[HIGH COURT OF AUSTRALIA.]

JUDD . . . . . APPELLANT;
DEFENDANT,

AND

McKEON . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF QUARTER SESSIONS OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 24.

MELBOURNE, *Oct.* 11.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Electoral Law (Commonwealth)—Compulsory voting—Election for Senate—Method of choosing members—Powers of Commonwealth Parliament—Ultra vires—Failure to vote—"Valid and sufficient reason"—Disapproval of candidates—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 9—*Commonwealth Electoral Act* 1918-1925 (*No.* 27 *of* 1918—*No.* 20 *of* 1925), *secs.* 123, 128A.

Held, by the whole Court, that sec. 128A (12) of the *Commonwealth Electoral Act* 1918-1925, which provides that "every elector who (*a*) fails to vote at an election without a valid and sufficient reason for such failure . . . shall be guilty of an offence," is a valid exercise of the power conferred by sec. 9 of the Constitution upon the Commonwealth Parliament to make laws "prescribing the method of choosing Senators."

An elector who had failed to vote at an election for Senators stated, in effect, as his reason for not voting, that all the candidates at the election supported capitalism, that the socialist labour party, of which he was a member, worked for the ending of capitalism and the inauguration of socialism and consequently its members were prohibited from voting for any of the candidates, and that his party did not put forward candidates because it had lost much money through the deposits of its candidates in the past being forfeited.

Held, by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the reason was not "valid and sufficient" within the meaning of sec. 128A.

APPEAL from a Court of Quarter Sessions of New South Wales.

At the Central Police Court at Sydney an information was heard whereby Bernard George McKeon, a divisional returning officer

under the *Commonwealth Electoral Act* 1918-1925, charged that on 14th November 1925 Ernest Edward Judd, being an elector within the meaning of that Act, failed to vote at an election of members of the Senate for the State of New South Wales without a valid and sufficient reason. It appeared that the defendant, on being required in accordance with sec. 128A of the Act to state the reason why he had not voted at the election, made a declaration that the reason was as follows :—" Without prejudice to my legal rights, if any :— All the political parties and their candidates participating in the election support and do all in their power to perpetuate capitalism with its exploitation of the working class, war, unemployment, prostitution, &c. The Socialist Labour Party, of which I am a member, stands for the ending of capitalism and the inauguration of socialism —and, consequently, its members are prohibited from voting for the aforementioned supporters of capitalism. The Socialist Labour Party has paid and lost hundreds of pounds in Federal election deposits for its candidates. The unjust penalty of £25 on each candidate penalizes us if we participate in a Federal election, and your letter suggests that we will be penalized if we don't. Is this fair ? " The defendant, having been convicted and fined 10s., appealed to the Court of Quarter Sessions at Sydney, which dismissed the appeal and affirmed the conviction.

In giving his reasons the Chairman of Quarter Sessions held that sec. 128A of the *Commonwealth Electoral Act* 1918-1925 was within the power of the Parliament of the Commonwealth ; and, as to the meaning of the words " valid and sufficient reason " in that section, that they had the same meaning as was given by the High Court, in *Krygger* v. *Williams* (1), to the words " lawful excuse " in sec. 135 of the *Defence Act* 1903-1910, and did not include such a reason as that given by the defendant. He thought that the reason must be some physical inability to record a vote, such as being prevented from voting by flood or ill-health or lack of means of conveyance to the nearest polling booth, or some similar reason.

From that decision the defendant now, by special leave, appealed to the High Court.

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Brissenden K.C. (with him *Collins*), for the appellant. Sec. 128A of the *Commonwealth Electoral Act* 1918-1925 is not a valid exercise of the power conferred by sec. 9 of the Constitution to make laws prescribing the method of choosing Senators. The word "choosing" has there the meaning which it had in reference to elections when the Constitution was enacted. The right to vote was then something in the nature of a franchise which the elector might at his free will exercise or not. The right to vote implies a right not to vote, and excludes the notion of compulsion. (See *Halsbury's Laws of England*, vol. XII., p. 278, par. 555; *Smith* v. *Oldham* (1).) The reason given by the appellant for not voting was "valid and sufficient" within sec. 128A (12). The Legislature did not intend to compel an elector to vote for a person to whom he had a well-grounded objection. A conscientious objection may be a valid and sufficient reason.

Flannery K.C. (with him *Nield*), for the respondent. The power to prescribe the method of electing members prima facie includes power to make voting compulsory. The nature of elections is such that it does not imply absolute freedom of choice. The freedom of choice was always subject to restrictions. Electors and candidates had to have certain qualifications and candidates had to be nominated in a particular way. A duty having been cast by sec. 128A upon electors to vote, the reason given by an elector for not voting is not valid and sufficient unless it admits the duty and puts forward some countervailing matter which would ordinarily release him from the duty. Physical prevention would be such a reason, but disagreement with the political views of all the candidates is not.

Cur. adv. vult.

Oct. 11.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The appellant was convicted on a charge of failing to vote at an election of Senators for New South Wales without a valid and sufficient reason for such failure, contrary to the provisions of sec. 128A of the *Commonwealth*

(1) (1912) 15 C.L.R. 355, at p. 358.

Electoral Act 1918-1925. That section provides, by sub-sec. 1, that it shall be the duty of every elector to record his vote at each election, and, by sub-sec. 12, that every elector who fails to vote at an election without a valid and sufficient reason for such failure shall be guilty of an offence. On appeal to Quarter Sessions the conviction was affirmed; and this appeal is brought by special leave from that decision.

The appellant contends (1) that the provisions of sec. 128A above quoted are beyond the powers of the Commonwealth Parliament, and (2) that the reason he gave for his failure to vote was a valid and sufficient reason.

In our opinion the first contention cannot be supported. By sec. 9 of the Constitution Parliament is empowered to make laws prescribing the method of choosing Senators, subject to one condition or qualification only, namely, that the method shall be uniform for all the States. This power, subject only to the condition mentioned, is plenary and unrestricted; and the only reason advanced for denying to Parliament the right to prescribe that every qualified elector shall record his vote was founded on the use of the word "choosing." It was said that the choosing of a candidate implied a desire on the part of the elector that that candidate should be elected, and that consequently the power of Parliament was limited to prescribing the method by which electors desiring that a candidate should be elected should signify that desire. We do not think the meaning of the expression "choosing Senators" in sec. 9 of the Constitution can be so restricted. In common parlance "to choose" means no more than to make a selection between different things or alternatives submitted, to take by preference out of all that are available. As an illustration of the meaning of the corresponding noun "choice" the *Oxford Dictionary* quotes the phrase "I have given thee thy choice of the manner in which thou wilt die," and this use of the word seems to exclude the idea that a right of choice can only be said to be given when one or other of the alternatives submitted is desired by the person who is to exercise the right, or, in other words, to choose between them.

It remains to consider whether any of the reasons given by the appellant was a valid and sufficient reason. The reasons given

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were as follows:—[The reasons as above stated were here set out.] These reasons do not purport to express the views of the appellant but those of the party to which he belongs; and in that view his only excuse, which is clearly insufficient, is that his party prohibits him from voting. But if the reasons be taken as representing the individual views of the appellant they amount to no more than the expression of an objection to the social order of the community in which he lives.

In our opinion such an objection is not a valid and sufficient reason for refusing to exercise his franchise.

For these reasons we are of opinion that the appeal should be dismissed.

ISAACS J. The appellant, Ernest Edward Judd, was prosecuted by Bernard George McKeon, the Commonwealth divisional returning officer for West Sydney, for failing to vote at the last Senate election for New South Wales, without a valid and sufficient reason for such failure. The offence charged was alleged to be in contravention of sec. 128A of the *Commonwealth Electoral Act* 1918-1925. That section declares, by sub-sec. 1, that "it shall be the duty of every elector to record his vote at each election." By sub-sec. 12 it is enacted that "every elector who (*a*) fails to vote at an election without a valid and sufficient reason for such failure . . . shall be guilty of an offence." The penalty, that is, the maximum penalty, is £2. The appellant was fined by the Stipendiary Magistrate 10s. and was ordered to pay £1 5s. costs. He appealed to Quarter Sessions, and his appeal was dismissed with £3 3s. costs. An appeal was, by leave, brought to this Court and supported in argument on two grounds: (1) that a statute enacting compulsory voting at parliamentary elections is *ultra vires* of the Commonwealth Parliament, and (2) that a valid and sufficient reason was given for not voting, namely, that the only candidates were opponents of the appellant's political views.

(1) *Ultra Vires.*—The foundation of the first ground was sec. 9 of the Constitution. The words are: "The Parliament of the Commonwealth may make laws prescribing the method of choosing Senators," &c. The argument was that the word "choosing"

imported voluntary action, and excluded all notion of compulsion upon any elector. That the franchise may be properly regarded as a right, I do not for a moment question. It is a political right of the highest nature. The Constitution in sec. 41 speaks of the "right to vote."

But I am equally free from doubt that Parliament, in prescribing a "method of choosing" representatives, may prescribe a compulsory method. It may demand of a citizen his services as soldier or juror or voter. The community organized, being seised of the subject matter of parliamentary elections and finding no express restrictions in the Constitution, may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be. The word "choose" in this connection is the time-honoured expression for the election of a parliamentary representative. Mr. Burke, in his famous speech, said to his constituents: "You choose a member indeed, but when you have chosen him he is not a member of Bristol, but he is a member of Parliament." A method of choosing which involves compulsory voting, so long as it preserves freedom of choice of possible candidates, does not offend against the freedom of elections, as established and recognized by the *Statute of Westminster* I. (3 Edw. I. c. 5).

The compulsory performance of a public duty is entirely consistent with freedom of action in the course of performing it. A tribunal may, for instance, be required, by mandamus, to determine a controversy, but its determination is to be freely arrived at. It is the failure to observe this distinction that lies at the root of the first objection, which must fail.

(2) *Valid and Sufficient Reason.*—The reason advanced has only a faint colour of even plausibility. It was urged that, assuming compulsion *intra vires*, still the duty to vote had not been made absolute, but subject to abstention for a "valid and sufficient reason." It is a reason, so the argument ran, both valid and sufficient that a man should abstain from voting if the only selection possible was one between what he considered political evils—all candidates being avowed advocates of doctrines to which the voter was opposed. But when the matter is examined the argument is at once seen to be unreal. It omits to observe the fact that every phase of opinion

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has an opportunity of candidature. True, there is a pecuniary consequence if the candidature proves to be an unnecessary waste of public and private time and money. But the opportunity exists. And when all opportunities are reduced to the actual candidatures and the time comes for each constituency to return its quota to the national Parliament, there is no force whatever in the contention that a valid and sufficient reason exists for non-compliance with the primary duty of voting, merely because no one of the ultimate candidates meets with the approval of the given elector. If that were admitted as a valid and sufficient reason, compulsory voting would be practically impossible. Each elector may—if that be the will of the community expressed by its Parliament—be placed under a public duty to record his opinion as to which of the available candidates shall in relative preference become the representative or representatives of the constituency in Parliament.

It is strictly not necessary to offer any opinion as to what is imported by the words "valid and sufficient reason," because the only reason here advanced is so directly opposed to all compulsion that it is in open contradiction to sec. 128A, whatever limitation be given to the words referred to. At the same time, it would be very unsatisfactory to leave so important a matter untouched, more particularly as the learned Chairman has essayed a limitation which I cannot agree to. In my opinion, a "valid and sufficient reason" means some reason which is not excluded by law and is, in the circumstances, a reasonable excuse for not voting. If it be, as in this case, an open challenge to the very essence of the enactment, it is, of course, excluded by law and not valid. So also, if there be any express provision of any law with which the alleged reason is in conflict. Again, if a mandatory or prohibitive regulation be contravened the same result follows. But the reason may be compulsive obedience to law which makes voting practically impossible. Physical obstruction, whether of sickness or outside prevention, or of natural events, or accident of any kind, would certainly be recognized by law in such a case. One might also imagine cases where an intending voter on his way to the poll was diverted to save life, or to prevent crime, or to assist at some great disaster, as a fire : in all of which cases, in my opinion, the law would

recognize the competitive claims of public duty. These observations are not, of course, suggested as exhaustive, but as illustrative, in order to dispel the idea that personal physical inability to record a vote is the only class of reasons to be regarded as "valid." The sufficiency of the reason in any given instance, is a pure question of fact dependent on the circumstances of the occasion.

The appeal should, therefore, be dismissed.

HIGGINS J. I concur in the view that on this appeal no reason of any substance has been suggested for the contention that the section in question—sec. 128A of the *Commonwealth Electoral Act* 1918-1925—exceeds the powers conferred on the Federal Parliament by the Constitution; and until such a reason has been presented it is our duty to assume that the section is valid.

But, in my opinion, the form as filled up by the elector states a valid and sufficient reason for his failure to vote.

I cannot at all concur in the view taken by the learned Chairman of Quarter Sessions, that the only "valid and sufficient reason" contemplated by Parliament for failure to vote is inability to do the physical act of recording a vote—e.g., through being prevented by flood, ill-health, lack of means of conveyance or some such like reason. There is not in the Act anything that I can find to justify such a limitation of the words "valid and sufficient reason"; and further, in the same sec. 128A itself, sub-sec. 7, when Parliament wants to limit a failure of the elector to some physical reason it says so expressly: "If any elector is unable, by reason of *absence from his place of living* or *physical incapacity*, to fill up, sign, and post the form," &c.

I might add that, in my opinion, if abstention from voting were part of the elector's religious duty, as it appeared to the mind of the elector, this would be a valid and sufficient reason for his failure to vote (sec. 116 of the Constitution). But no ground based on religious duty has been taken by this elector.

The words of the reason for not voting—as stated by the elector in this form—have been set out; and it is not an unfair paraphrase of the words to say that this is the meaning:—"The only candidates between whom I am asked to elect are candidates who, with their

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parties, work for capitalism, whereas my party and myself work for socialism and the ending of capitalism. I am prohibited by my party and its principles from voting for such candidates. If you ask me why, then, we don't put forward candidates of our own, my answer is, it is too expensive—we should lose the £25 deposit in each case." This objection to vote is obviously misrepresented when it is said to be mere non-agreement with the views of any of the candidates for election. Mere non-agreement does not exclude differences of degree of dislike of views or of persons; whereas the elector, being evidently concerned only with the struggle between capitalism and socialism, says that he cannot, as a fighter against capitalism, consistently vote in aid of any faction or person who fights for capitalism. No one, so far as I have heard, contends that the command of his party would be a valid reason justifying an elector in disobeying the command of the law.

Now, it must be remembered that voting is preferential (Act 1918-1922, sec. 123); and if the elector has in truth no preference, that fact would, in my opinion, constitute a valid and sufficient reason. It is to be presumed in favour of Parliament, unless it clearly say the contrary, that the Act of Parliament does not compel a man to say that he has a preference when he has none—does not compel him to tell a lie. If in what is obviously a labour constituency there were two labour candidates and an anti-labour elector regarded one labour candidate as being as bad as the other, this would, in my opinion, be a valid reason for declining to vote. If Colonel Newcome, after the well-known visit to the club with Clive, were asked to say which of two equally foul-mouthed members he preferred to have on the committee, would he not be justified, in the eyes of reasonable men, in saying "I prefer neither"? What if John the Baptist were asked which he preferred—Herod or Herodias? In the position which I suggest, he could not say that one was blacker than the other, for to him they appear to be both as black as pitch.

It is true that this elector has not expressly said that he had no preference, has not even used the word "preference." Yet obviously Parliament cannot have meant that these forms should be filled in with the nicety of pleadings, so long as the substance of the objection satisfactorily appears.

Parliament has given no guidance as to what it means by "valid and sufficient reason"; as often happens of late years, it has left it to the Courts to decide such things as what reason is valid and sufficient, or what remuneration is "fair and reasonable." I suppose we must try to find a separate force for each word used. "Valid" does not mean truthful; for a separate penalty is provided when the elector states a false reason (sec. 128A (12) (c)). Probably "valid" may fairly be taken as referring to the *character* of the reason, and "sufficient" as referring to the *strength* of the reason under all the circumstances. If an elector say that he did not go to vote because his wife was ill, the character of the reason would commend itself to most people; but, if the illness is merely an ordinary catarrh, the reason would hardly be called sufficient. The Courts, in the successive steps of their hierarchy, are given a very wide area of discretion; and if the elector give a reason which would commend itself to the "man in the street" as valid and sufficient, however stupidly expressed, and however stupid the underlying principles of action may appear to us, I do not think that Parliament intends that such an elector should be treated as a criminal, and punished by a fine, and possibly by imprisonment with hard labour. The object of elections being to ascertain the predominance of opinion in some given area, it must be presumed (in the absence of clear words to the contrary) that Parliament did not want to compel men to vote whose votes do not reflect any real opinion as between platforms or candidates, votes which would tend rather to defeat than to aid that object.

The sentence here is 10s., with costs £1 5s., and in default three days "hard labour."

The case of *Krygger* v. *Williams* (1) under the *Defence Act* may be accepted in its entirety without this case being affected. There a youth was charged under sec. 135 with failing to render the personal service required of him, military service as a senior cadet, "without lawful excuse." The Act did not allow conscientious objection to such military service as a "lawful excuse." Such an excuse was excluded by the law; but the law had made provision for allotment

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of conscientious objectors to non-combatant duties (sec. 143 (3)). This was the limit of the "lawful excuse," the only excuse allowed by law. There is no such limit here in the words "valid and sufficient reason." The distinction is obvious, whatever view one may take of the fact that the two Judges in that case treated the defendant's conscientious objection to perform military duties—to attend drill, to serve as a cadet—as if it were a mere objection to fight. A man may of course assist the operations of a combatant force as much by doing its fatigue duty as by standing in the firing line.

My view is that the words "valid and sufficient reason" are not to be construed in a niggardly spirit, but liberally, and on grounds which would commend themselves to honest men, whatever their political or social outlook, as being grounds which are reasonable. But the Courts are not given any right to say what political or social opinions are to be treated as reasonable. I disagree absolutely with the view that the Courts are to say what political or social views are to be treated as reasonable, or in accordance with common sense. The fact that the elector entertains scruples which we do not share, or which our imagination cannot grasp, is not a ground for saying that the scruples are either invalid or insufficient from the elector's standpoint.

For these reasons I think that the appeal should be allowed.

RICH J. In my opinion, compulsory voting is valid. The vote is not merely a right but a duty. Every elector must discharge that duty, and if he "fails to vote at an election without a valid and sufficient reason for such failure he shall be guilty of an offence" (sec. 128A (12) of the *Commonwealth Electoral Act* 1918-1925). The reason must be valid—sound in law and fact; and, if valid, must be sufficient—substantial and satisfactory in the absence of countervailing answer. The appellant's excuse does not fall within this category. In this workaday world no elector finds a candidate "*in se ipso totus teres atque rotundus.*" The "compleat" candidate is exhibited in the form and image of the individual elector, and the mould has been broken. Human affairs, however, are not so much concerned with the ideal and unattainable as with the practical and

possible, and the Federal law requires every citizen to vote unless he can furnish a valid and sufficient reason for his failure to do so.

I agree that the appeal fails.

Appeal dismissed with costs.

Solicitor for the appellant, *A. C. Roberts.*

Solicitor for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . PLAINTIFF;

AGAINST

THE AUSTRALIAN BOOT FACTORY LIMITED DEFENDANT.

Income Tax—Assessment—Company—Taxation where larger distribution to shareholders could reasonably have been made—Determination of Commissioner of Taxation—Right to challenge determination in action—Determination for years prior to 1922—"*Assessment*"—*Notice of assessment—Income Tax Assessment Act* 1922 (*No.* 37 *of* 1922), *secs.* 21, 32 (2), 54 (1)*—*Income Tax Assessment Act* 1924 (*No.* 51 *of* 1924), *sec.* 2.

SYDNEY, *Nov.* 15, 22.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Sec. 32 (2) of the *Income Tax Assessment Act* 1922 does not preclude the Commissioner of Taxation from enforcing against a company the provisions of sec. 21 in respect of a financial year prior to the financial year commencing on 1st July 1922.

* Sec. 21 of the *Income Tax Assessment Act* 1922 provides that (1) "Where in any year a company has not distributed to its members or shareholders at least two-thirds of its taxable income, the Commissioner shall determine whether a sum or a further sum (not exceeding the excess of two-thirds of the taxable income of the company over the amount distributed by it to its members or shareholders) could reasonably have been distributed by the company to them . . . . (2) The Commissioner shall calculate the