

H. C. OF A. receipt or bill of lading, or that the shipowner had changed its
 1929. responsibility from that of carrier to that of warehouseman or
 KEANE storeman. But the evidence, in my opinion, establishes neither
 v. contention.
 AUSTRALIAN The appeal ought to be dismissed.
 STEAMSHIPS
 PTY. LTD.

Appeal dismissed with costs.

Solicitor for the appellant, *D. Bruce Tunnock.*

Solicitors for the respondent, *Hedderwick, Fookes & Alston.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

BLAKEY PETITIONER ;

AND

ELLIOTT AND ANOTHER. RESPONDENTS.

FINDLEY PETITIONER ;

AND

ELLIOTT AND ANOTHER. RESPONDENTS.

IN THE COURT OF DISPUTED RETURNS.

H. C. OF A. *Parliamentary Election—Senate Election—Nomination of six candidates for Victoria*
 1929. *—Death of one candidate before poll—Name withdrawn from ballot-papers—*
 MELBOURNE, *Preferential voting—Method of marking ballot-papers—Numerical succession of*
Mar. 4, 13. preferences—Whether prescribed—Commonwealth Electoral Act 1918-1928 (No.
 27 of 1918—No. 17 of 1928), secs. 123 (1), 133, 135, 193, 217 (1), *Sched., Form E.*
 Starke J.

Six candidates nominated for election for the State of Victoria to the Senate of the Federal Parliament. Three of the candidates had to be elected ; but one of them died before the polling day, and his name was as far as

possible withdrawn from the ballot-papers. A number of ballot-papers were rejected as informal where the electors had marked their ballot-papers with the numbers 1, 2, 3, 4, 6, opposite the names of the candidates standing for election at the date of the poll.

Held, that by the terms of the *Commonwealth Electoral Act* 1918-1928 it was imperative that voters should indicate their preferences by numbers in numerical succession, and that the ballot-papers marked as above stated were rightly rejected as informal.

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PETITIONS.

Two petitions were presented to the High Court sitting as the Court of Disputed Returns. One of the petitions was by Albert Edward Howarth Blakey and the other was by Edward Findley seeking declarations (*inter alia*) that Robert Charles Dunlop Elliott and Harry Sutherland Wightman Lawson were not duly elected, as senators for the State of Victoria, to the Senate of the Commonwealth Parliament at an election held in December 1928.

The petitions were tried by *Starke J.*, in whose judgment the material facts are fully set out.

Walker, for the petitioner, referred to the *Commonwealth Electoral Act* 1918-1928, secs. 133, (1) (b) and (2), 193, 217; *Blundell v. Vardon* (1), and *Chanter v. Blackwood* (2); *Chanter v. Blackwood* [No. 2] (3).

Ham K.C., for the respondent Elliott, referred to the *Commonwealth Electoral Act* 1918-1928, secs. 123, 133, 135 (1) (b), (8) and (9), 193, and to *Chanter v. Blackwood* (4) and *Kean v. Kerby* (5).

Robert Menzies K.C., for the respondent Lawson.

Walker, in reply, referred to *In re Cambooya Petition (Daniels v. Mackintosh)* (6).

Cur. adv. vult.

(1) (1907) 4 C.L.R. 1463, at p. 1473.

(2) (1904) 1 C.L.R. 39, at pp. 54, 55.

(3) (1904) 1 C.L.R. 121.

(4) (1904) 1 C.L.R. 39.

(5) (1920) 27 C.L.R. 449.

(6) (1900) 9 Q.L.J. 341.

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STARKE J. delivered the following written judgment :—

These are two petitions, one by Albert Edward Howarth Blakey, and the other by Edward Findley, seeking declarations (*inter alia*) that Robert Charles Dunlop Elliott and Harry Sutherland Wightman Lawson were not duly elected as senators for the State of Victoria in the Parliament of the Commonwealth at an election held in December 1928. Three senators had to be elected, and six candidates nominated—Barnes, Blakey and Findley, Elliott, Forsyth and Lawson. Forsyth died, however, before the polling day, and the electoral officers withdrew his name from the ballot-papers, so far as possible : the cases in which it was not possible to withdraw his name from the ballot-papers are not material for the proper determination of the present petitions.

The evidence disclosed that 11,289 ballot-papers had been rejected as informal, which electors had marked as follows :—

A

1

 Barnes

A

2

 Blakey

A

3

 Findley

B

4

 Elliott

B

6

 Lawson

If these ballot-papers were improperly rejected the result of the election might be altered ; otherwise the result could not be affected. Whether they were formal or informal depends upon the proper construction and application of the provisions of the *Commonwealth Electoral Act* 1918-1928. It is desirable to extract the material parts of these provisions, for upon them the decision of this Court must be based.

“ 123. (1) In a Senate election a voter shall mark his vote on his ballot-paper as follows :—(a) Where his ballot-paper is a ballot-

paper in accordance with Form E in the Schedule—he shall vote for not less than the prescribed number of candidates by placing the number 1 in the square opposite the name of the candidate for whom he votes as his first preference, and by placing the numbers 2, 3, 4 (and so on, as the case requires) in the squares respectively opposite the names of so many other candidates as will, with the candidate for whom he votes as his first preference, complete the prescribed number. The voter may, in addition, where there are more candidates than the prescribed number, indicate the order of his preference for as many more candidates as he pleases by placing in the squares respectively opposite their names other numbers next in numerical order after the numbers already placed by him on the ballot-paper. In this paragraph ‘the prescribed number of candidates’ means twice the number of the candidates to be elected, plus one, or, if there are fewer candidates than that number, the total number of candidates.” The ballot-paper was admittedly in accordance with the form E in the Schedule, and each paper therefore contained the following directions: “In marking his vote on this ballot-paper the voter must place in the squares respectively opposite the names of at least five candidates the numbers 1, 2, 3, 4 and so on up to and inclusive of the number 5 so as to indicate the order of his preference for such candidates, and if there are any more candidates may in addition indicate the order of his preference for as many of them as he pleases by placing in the squares respectively opposite their names other numbers next in numerical order after those already used by him.” “133. (1) A ballot-paper shall . . . be informal if . . . (b) in a Senate election . . . it does not indicate the voter’s first preference for one candidate and his consecutive preferences for so many other candidates as will, with the candidate for whom he votes as his first preference, be equal in number to the prescribed number of candidates . . . (2) A ballot-paper shall not be informal for any reason other than the reasons specified in this section, but shall be given effect to according to the voter’s intention so far as his intention is clear.” “135. In a Senate election the scrutiny shall . . . be conducted in the manner following:—(1) Each Assistant Returning Officer shall, in the presence of an Assistant Presiding Officer or a Poll Clerk, and

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of such authorized scrutineers as may attend . . . (b) reject all informal ballot-papers . . . (9) (a) When a candidate is elected or excluded, each ballot-paper counted to him shall be deemed to be exhausted if there is not indicated upon it a next preference for one continuing candidate. (b) 'Next preference' . . . includes the first of the subsequent preferences marked on the ballot-paper which is not given to an elected or excluded candidate: Provided that where there is a break in the consecutive numbering of preferences marked on a ballot-paper (other than a break necessitating the rejection of the ballot-paper as informal in pursuance of paragraph (b) of sub-section 1 of section one hundred and thirty-three"—above set out—"of this Act), only those preferences preceding the break shall be taken into account." "193. The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not." "217. (1) Strict compliance with the forms in the Schedule shall not be required, and substantial compliance therewith shall suffice for the purposes of this Act."

If the Act absolutely and imperatively requires that a voter indicate his consecutive preferences in numerical order, then the 11,289 ballot-papers are undoubtedly informal. The general rule is that an absolute enactment must be obeyed or fulfilled exactly whilst a directory enactment may be obeyed substantially (*Borough of Exeter Case* (1)). It is imperative, in my opinion, for voters to indicate their preferences by number, for that is the only method provided by which an elector is to show his preference (cf. *Chanter v. Blackwood* (2); *Kean v. Kerby* (3)). Still, it is possible that a numerical succession is not required if an uninterrupted succession of preferences can be otherwise established. But, in my opinion, the Act clearly prescribes a numerical succession. Thus, sec. 123 (1) (a) uses the words "next in numerical order": so do the directions in Form E in the Schedule; and the proviso following sec. 135 (9) (b) prescribes for cases in which there is "a break in the consecutive numbering of preferences." Once the conclusion is

(1) (1911) 6 O.M. & H. 228.

(2) (1904) 1 C.L.R., at p. 52.

(3) (1920) 27 C.L.R., at p. 464.

reached that the statute lays down a definite and imperative rule for marking preferences in Senate elections, and has declared (sec. 133 (1) (b)) that a ballot-paper otherwise marked is informal, then provisions such as secs. 133 (2), 193 and 217 are all immaterial. Indeed, sec. 133 (2) recognizes this, for it allows effect to be given to a ballot-paper according to the voter's intention unless the ballot-paper is declared informal for any reason specified in sec. 133. And sec. 193 does not authorize the Court to ignore the imperative provisions of the statute, even if the construction of that section sanctioned in *Chanter v. Blackwood* (1) be adopted. The same observation applies to sec. 217.

Other objections were taken by the petitioners and by the respondents to various votes. It was admitted, however, that if the 11,289 ballot-papers were rightly rejected, then these other votes could not affect the result of the election, and it becomes unnecessary for the Court to consider them.

The result, in my opinion, is that the petitions must be dismissed, and they are each dismissed accordingly, but without costs.

Deposits to be repaid.

The Principal Registrar will forthwith forward a copy of these orders to the Clerk of the House of Parliament affected by the petitions.

Petitions dismissed without costs.

Solicitors for the petitioners, *Maurice Blackburn & Tredinnick*, and *W. Slater*.

Solicitors for the respondents, *Arthur Robinson & Co.*

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(1) (1904) 1 C.L.R. 39.

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