

H. C. OF A.
1929.
BURNS,
PHILP
& Co.
LTD.
v.
FEDERAL
COMMISS-
SIONER OF
LAND TAX.

The question stated should be answered in the negative.

Case remitted to Rich J., with the opinion of this Court that the question submitted should be answered in the negative. Costs of the case to be costs in the appeal.

Solicitors for the appellant, *Minter, Simpson & Co.*
Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

Foll
Berill's
Petition, *In re*
(1976) 134
CLR 470

[HIGH COURT OF AUSTRALIA.]

PERKINS PETITIONER ;

AND

CUSACK RESPONDENT.

IN THE COURT OF DISPUTED RETURNS.

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1930.
MELBOURNE,
Feb. 11-13 ;
Mar. 4.
Starke J.

Parliamentary Election—Election for House of Representatives—Ballot-papers alleged to have been tampered with by persons unknown—Allegation unproved—Provision that “ Court shall not inquire into the correctness of any Roll ”—Effect—Persons on Divisional Roll showing residence outside Division—Evidence to prove—Admissibility—Evidence rejected as challenging correctness of Roll—Commonwealth Electoral Act 1918-1928 (No. 27 of 1918—No. 17 of 1928), secs. 39 (3), 112 (2), (3), 113, 115 (1) (a), (2), (6), 116, 138, 189A, 190—Electoral and Referendum Regulations (Statutory Rules 1928, No. 80), regs. 46-67.

The petitioner sought a declaration that the respondent was not, and that the petitioner was, duly elected as a member of the House of Representatives at an election held in October 1929 for the Eden Monaro Electorate in New South Wales. One of the grounds of the petition was that a parcel containing fifty ballot-papers the first preferences on which had been given for the

petitioner had been tampered with by some person or persons unknown, and forty-nine of such ballot-papers had been abstracted and forty-nine other ballot-papers substituted in the said parcel the first preferences on which were recorded for the respondent.

Held, that the allegation had not been proved.

Sec. 190 of the *Commonwealth Electoral Act* 1918-1928 provides: "The Court shall inquire whether or not the petition is duly signed, and so far as Rolls and voting are concerned may inquire into the identity of persons, and whether their votes were improperly admitted or rejected, assuming the Roll to be correct, but the Court shall not inquire into the correctness of any Roll." Sec. 112 (2) prescribes that in the case of a House of Representatives election "an elector shall only be admitted to vote for the election of a member for the Division for which he is enrolled"; and, for the purposes of this section, sub-sec. 3 provides that "the electoral Rolls in force at the time of the election shall be conclusive evidence of the right of each person enrolled thereon to vote as an elector" &c. Evidence was tendered by the petitioner to prove that, though the names and addresses of certain persons who had voted at the election were correctly stated in the Roll, the addresses so shown were outside the Electoral Division, and consequently that such persons were not entitled to vote as electors of that Division.

Held, (1) that the Court was, under the provisions of sec. 190, bound to assume that these persons were rightly on the roll; (2) that their right to vote at the election was conclusively established under sec. 112 (3), and (3) that such evidence would challenge the correctness of the Roll and was, therefore, not admissible.

PETITION.

This was a petition by John Arthur Perkins seeking, in substance, a declaration that John Joseph Cusack was not, and that the petitioner was, duly elected as a member of the House of Representatives, at an election held in October 1929, for the Eden Monaro Division or Electorate of New South Wales.

The petition was heard by *Starke J.*, in whose judgment (hereunder) the grounds, the material facts and the arguments of counsel are fully set out.

Maughan K.C., for the petitioner.

McTiernan, for the respondent.

O'Bryan, for the Chief Electoral Officer.

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STARKE J. delivered the following written judgment :—

This petition of John Arthur Perkins seeks, in substance, a declaration that John Joseph Cusack was not, and that the petitioner was, duly elected as a member of the House of Representatives, at an election held in October 1929, for the Eden Monaro Division or Electorate in New South Wales.

One of the grounds of the petition is thus stated: "That a parcel containing fifty ballot-papers forwarded from the Moss Vale Subdivision of the said Division to the Divisional Returning Officer the first preferences on which had been given for" the "petitioner was, between the time the same was transmitted by the Assistant Returning Officer for the said Moss Vale Subdivision to the District Returning Officer at Queanbeyan, and the time the same was first recounted by the Divisional Returning Officer, tampered with by some person or persons unknown, and forty-nine of such ballot-papers were abstracted and forty-nine other ballot-papers substituted in the said parcel the first preferences on which were recorded for the said John Joseph Cusack." This allegation has not been proved. It was proved that the Assistant Returning Officer at Moss Vale made a return, setting forth that 1,303 votes were cast for Cusack in that Subdivision and 1,420 for Perkins, but upon a recount made by the Divisional Returning Officer, pursuant to the provisions of sec. 138 of the *Commonwealth Electoral Act* 1918-1928, it was found that in a parcel of fifty ballot-papers from the Moss Vale Subdivision, one had been cast for Perkins and the remaining forty-nine for Cusack. All had been included in the Moss Vale return as cast for Perkins. The officers and scrutineers who acted at Moss Vale are convinced that they made no mistake, and they all, I am sure, did their duty honestly and carefully. But mistakes will occur, no matter how careful one may be, and I am convinced that a mistake did occur at Moss Vale. The ballot-papers there were counted into several parcels of fifty for each candidate, and they were checked more than once. Finally, they were sealed up in packages, and forwarded to the Divisional Returning Officer at Queanbeyan. The recount took place at Queanbeyan on Sunday 20th October 1929 in the presence of the Divisional Returning Officer, his assistants, and scrutineers for each candidate. The parcels of votes (including

those from Moss Vale) were all in exactly the same condition as when received from the Assistant Returning Officers, and with the seals intact. The seals were broken under the supervision of the Divisional Returning Officer, and the ballot-papers were then distributed to the counting officers, who worked in pairs, and the scrutineers for both candidates watched and checked the count. The fifty ballot-papers in dispute were produced before me, and all appeared to be genuine and to bear on their backs the initials of the presiding officer of the Polling Booth. The Divisional Officer, and those present at the recount, have denied any substitution or dishonest action on their part, and it is desirable, though perhaps needless, to say that I have no doubt of their truthfulness or of their honesty. It is the petitioner's duty to satisfy me beyond all reasonable doubt of the grave charge that he has made, and he has wholly failed to sustain that burden. The extreme care of the Returning Officer and his assistants at Moss Vale was pressed upon me, and, on this fact and this fact only, I was asked to conclude that a fraudulent substitution of votes must have taken place. It is unnecessary for me to find how the mistake at Moss Vale occurred, for the petitioner must establish a fraudulent substitution in order to succeed. But, to hazard a guess, I suspect that in counting the votes into parcels of fifty at Moss Vale, one vote cast for Perkins was, by some slip, placed on top of forty-nine votes cast for Cusack, and then the parcel was counted as fifty votes cast for Perkins.

Another ground of the petition was that a large number of persons were enrolled as electors of the Division of Eden Monaro and voted at the election who were not entitled to be on the Electors' Roll or to vote in that Division. The suggestion was that the real place of living of these persons was not within the Eden Monaro Division, and certainly was not so within three months immediately preceding polling day in that Division. Now, sec. 190 of the *Commonwealth Electoral Act* 1918-1928 provides: "The Court shall inquire whether or not the petition is duly signed, and so far as Rolls and voting are concerned may inquire into the identity of persons, and whether their votes were improperly admitted or rejected, assuming the Roll to be correct, but the Court shall not inquire into the correctness of any Roll." Consequently, I rejected evidence tendered

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to show that the real living place of these persons was not within the Division, for that evidence would challenge the correctness of the Roll, and such an inquiry is forbidden to this Court by the statute. It was argued that the petitioner did not challenge the correctness of the Roll, because the addresses given in the Roll were not within the Eden Monaro Division. Apart from the provisions of sec. 116 of the statute, the challenge is, nevertheless, to the right of these persons to be on the Roll, and is, therefore, forbidden to the Court. It was contended, however, that notwithstanding the inhibition against inquiry into the correctness of any Roll, yet these persons, although on the Roll, were not entitled to vote as electors of the Division in respect of which they were enrolled, because their real place of living was not, at some time within three months immediately preceding polling day, within the Division (see sec. 39, sub-sec. 3, proviso). Under sec. 115, sub-sec. 1 (a), the presiding officer at the polling place shall put to every person claiming to vote the following, amongst other, questions: “(ii.) Is your real place of living within the Division . . . ? (iii.) (if the last preceding question is answered in the negative)—Was your real place of living at any time within the last three months within the Division . . . ?” “The voter’s answer to any question put to him by the presiding officer under the authority of this section shall be conclusive, and the matter shall not, subject to this section, be further inquired into during the polling” (sub-sec. 6). If any person claiming to vote to whom the questions are put refuses to answer fully any question so put to him, or does not answer question (ii.) absolutely in the affirmative when put to him, or, if he answers that question in the negative, does not answer question (iii.) absolutely in the affirmative when put to him, his claim to vote shall be rejected (sec. 115, sub-sec. 2). Then sec. 112, sub-sec. 2, prescribes that in the case of a House of Representatives election “an elector shall only be admitted to vote for the election of a member for the Division for which he is enrolled,” and, for the purposes of this section (see sub-sec. 3), “the electoral Rolls in force at the time of the election shall be conclusive evidence of the right of each person enrolled thereon to vote as an elector, unless he shows by his answers to the questions prescribed by section one hundred and fifteen that he is not entitled

to vote.” Assuming these persons to be rightly on the Roll—as I am bound to assume under sec. 190—then their right to vote at the election is conclusively established, unless their answers to the questions prescribed by sec. 115 show that they are not entitled to vote. It was not suggested that anything in the answers of these persons showed that they were not entitled to vote. Consequently, in my opinion, the Roll is conclusive, and, as sec. 190 prohibits the Court from inquiring into its correctness, again I rejected the evidence.

Lastly, it was suggested that many of these persons were absent voters, that is, persons to whom the provisions of sec. 113 applied. And it was contended that this class of persons stood, by force of sec. 189A, in a somewhat different position. This section prescribes (sub-sec. 1 (a)) : “ When it is proved that a ballot-paper issued under the regulations relating to absent voting . . . has, in any election, been marked by a person who was not entitled to vote at the election, the Court may require the production of . . . the declaration made by that person under the regulations relating to absent voting . . . and . . . may reject the ballot-paper.” A good deal may be said for the view that this provision concerns only the identity of the persons voting. But, be that as it may, the Roll in force at the time of the election is conclusive evidence of the right of any person to vote as an elector unless his answers to the prescribed questions show that he was not entitled to vote ; for, in my opinion, regs. 112 (3), coupled with the Statutory Rules of 1928, No. 80, regs. 46-67, apply as well to absent voters as to voters exercising their franchise at the polling places. Consequently, as to this contention, the petitioner fails on the threshold, because he cannot prove that any ballot-paper issued under the regulations relating to absent voting was marked by a person not entitled to vote. Under sec. 190 the Court must, for this purpose too, assume the Roll to be correct, and cannot inquire into its correctness ; I therefore rejected evidence tendered to show that the real place of living of persons who voted in the Eden Monaro Division as absent voters was not in that Division.

Other grounds of the petition were concerned to show that the electoral officers committed various irregularities in connection with

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the election, but, as no evidence was tendered on these charges, and they were abandoned at the hearing, I need say no more about them.

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The petition must be dismissed, and I see no reason why the petitioner should not pay the costs of the respondent Cusack and also of the Chief Electoral Officer.

Petition dismissed. The petitioner to pay to John Joseph Cusack and to the Chief Electoral Officer their costs respectively of this petition. The Principal Registrar of this Court shall forthwith forward to the Clerk of the House of Representatives a copy of the order of the Court on this petition.

Solicitors for the petitioner, *Gillott, Moir & Ahern.*

Solicitors for the respondent, *Frank Brennan & Co.*

Solicitor for the Chief Electoral Officer, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.