[HIGH COURT OF AUSTRALIA.]

THOMPSON . . . . . APPELLANT;
PLAINTIFF,

AND

THE COUNCIL OF THE MUNICIPALITY OF RANDWICK } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 11, 12, 18.

Dixon C.J., Webb, Kitto and Taylor JJ.

Local Government (N.S.W.)—Municipality—Division into wards—Aldermen—Alteration in boundaries of wards and number of aldermen—Request for poll—Non-compliance with request—Proclamation—Validity—Injunction—Right of individual elector—Voting rights—Impairment—Local Government Act 1919-1952 (*N.S.W.*) (*No.* 41 *of* 1919—*No.* 53 *of* 1952), *ss.* 58*, 648*.

The Minister for Local Government issued a notice announcing that a proposal had been received that the division of the Municipality of Randwick into wards should be altered, so that the boundaries of the wards should be

* Section 58 of the *Local Government Act* 1919-1952 provides :—

(1) The Governor may by proclamation divide municipalities into wards, and may name or alter the name of any ward.

(2) The Governor may by proclamation alter or abolish any division of a municipality into wards, and after abolishing any such division may again divide a municipality into wards : Provided that such alteration, abolition, or subsequent division shall not affect the representation of the municipality on its council until the next following ordinary election of the council or such earlier time as may be proclaimed.

(3) Before such division, alteration, abolition, or subsequent division is carried out the prescribed notice shall be given, and the council or any elector of the municipality may make written representations with regard thereto.

(4) Before so dividing a municipality or altering or abolishing any such division, or redividing a municipality, the Governor shall, on the request of one hundred or more of the electors of the municipality, remit to a poll of electors of the whole municipality the question whether such division, alteration, abolition, or redivision shall be carried out. The council shall thereupon fix and notify as prescribed a day on which such poll shall be held, and the same shall be held accordingly. If the decision of the poll is in the negative the proposal shall not be given effect to ; and a proposal having substantially the same effect shall not be brought forward within twelve months thereafter.

* By s. 648 it is provided :—

(1) A proclamation or notification of the Governor purporting to be made under this Act and being within the powers conferred on the Governor shall not be deemed invalid by reason of any non-compliance with any matter required by this Act as a preliminary to the making of the proclamation or notification.

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as described in the schedule thereto. More than one hundred electors, of whom the plaintiff was one, requested the Governor to remit to a poll of the electors of the municipality the question whether the alterations should be carried out. No poll was held. A proclamation by the Governor subsequently purported to alter the division into wards of the municipality, and to alter the number of aldermen constituting the council. The plaintiff sought to restrain the council from compiling lists of electors and holding elections in accordance with the alterations.

Held, that the plaintiff had no *locus standi* to ask for such relief, no right of the plaintiff being impaired.

Held, further, that, by virtue of the provisions of s. 648 of the *Local Government Act* 1919-1952 (N.S.W.), the proclamation was valid, notwithstanding that the provisions of s. 58 (4) had not been complied with.

Decision of the Supreme Court of New South Wales (*Myers* A.J.) (1953) 19 L.G.R. 121, affirmed.

APPEAL from the Supreme Court of New South Wales.

Dr. G. S. Thompson, an elector of the Municipality of Randwick, brought a suit by way of statement of claim in the equitable jurisdiction of the Supreme Court of New South Wales claiming certain injunctions and other relief against the Council of the Municipality of Randwick. The statement of claim was substantially as follows :—

1. The plaintiff is and has at all material times been an elector of the Municipality of Randwick.

2. In New South Wales Government *Gazette* No. 75 of 17th April 1953 there appeared a notice which omitting the schedule therein reads as follows :—

"Local Government Act 1919

Municipality of Randwick—Proposed Alteration of Division into Wards.

A proposal has been received that the division of the Municipality of Randwick into wards be altered so that the boundaries of the said wards shall be as described in the schedule hereto. A period of one month from the date of this notice is allowed during which the Council or any elector of the Municipality may make written representations to the Minister with regard to the proposal or one hundred or more electors of the Municipality may petition the Governor to remit the question to a poll of electors of the whole Municipality . . .

J. B. Renshaw.
Minister for Local Government.
Department of Local Government,
Sydney, 17th April 1953."

3. On 14th May 1953 more than one hundred electors of the said Municipality (including the plaintiff) requested the Governor to remit to a poll of electors of the whole of the said Municipality the question whether the said alteration should be carried out.

4. The defendant did not thereupon or at any time fix or notify as prescribed or in any manner a day upon which such poll as aforesaid should be held, and such poll as aforesaid was not at any time held.

5. In New South Wales Government *Gazette* No. 123 of 3rd July 1953 there appeared a proclamation which omitting the schedule thereto reads as follows :—

"Local Government Act 1919—Proclamation

(L.S.) J. Northcott, Governor.

24th June 1953.

I, Lieutenant-General Sir John Northcott, Governor of the State of New South Wales, with the advice of the Executive Council, and in pursuance of the Local Government Act 1919, do hereby (1) alter the division into wards of the Municipality of Randwick as proclaimed in Government Gazette No. 2 of 6th January 1909 and altered by notification published in Government Gazette No. 3 of 4th January 1911, and by proclamations published in Government Gazettes No. 95 of 20th July 1928, and No. 98 of 6th October 1944, so that the wards of the said Municipality shall be as described in the Schedule hereto ; and (2) alter from twelve to fifteen the number of aldermen constituting the Randwick Municipal Council.

By His Excellency's Command,

J. B. Renshaw.

God Save the Queen."

The plaintiff craves leave to refer to the said proclamation as appearing in the said *Gazette* when produced as if the same were fully set out herein.

6. The alteration referred to in the said proclamation is the same alteration as is referred to in the notice set out in par. 2 hereof.

7. The plaintiff charges and the fact is that the said proclamation is void and of no effect.

8. The defendant inserted in the issue dated 13th August 1953 of "The Randwick-Coogee Weekly" a newspaper circulating in the said Municipality a notice stating, *inter alia*, that the triennial lists of electors for the various wards of the said Municipality were then being compiled and that every claim for and every objection to enrolment must be lodged with the town clerk of the said Municipality on or before 4th September 1953.

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9. The plaintiff charges and the fact is that the said lists are being compiled in accordance with the alteration which the said proclamation purports to effect.

The plaintiff claimed, *inter alia* :—

1. That the defendant be restrained from compiling lists of electors of the Municipality of Randwick in accordance with the alteration to the division into wards of the said Municipality which the proclamation dated 24th June 1953 published in New South Wales Government *Gazette* No. 123 of 3rd July 1953 purports to effect.

2. That the defendant be restrained from holding elections for an alderman or aldermen of the said Municipality in accordance with the said alteration.

3. That the said proclamation be declared void and of no effect.

The defendant appeared, and, at the hearing, demurred *ore tenus* to the statement of claim. *Myers* A.J. upheld the demurrer and granted leave to the plaintiff to amend the statement of claim ; in default of amendment within fourteen days the suit was ordered to stand dismissed with costs.

From this decision the plaintiff, by special leave, appealed to the High Court.

A. F. Rath, for the appellant. Sufficient facts are alleged in the statement of claim to lead to the result that the proclamation is void, and the alteration and increase of aldermen are void. If before the proclamation the appellant could vote in one ward, he would now be forced to vote in another ward for different aldermen. The right to vote is a right to vote for an alderman for a particular ward. The reference to the proclamation in par. 5 makes the document part of the statement of claim.

[Kitto J. referred to *Metropolitan Theatres Ltd.* v. *Harris* (1).]

The combined result of the invalid proclamation and the action of the council in proceeding on that proclamation is :—(1) to deprive the appellant of his statutory right to be enrolled for the ward for which he has the requisite qualification (i.e. as it existed prior to the proclamation) ; (2) to deprive the appellant of his statutory right to vote at the forthcoming election for that ward ; (3) wrongfully to place his name on a roll in respect of a ward which has no legal existence ; (4) he will then be compulsorily required to vote in this non-existent ward, and be subjected to a penalty if he does not. There are two propositions which uphold the appellant's case :—(1) The redivision and increase are invalid ; (2) the appellant

(1) (1935) 35 S.R. (N.S.W.) 228 ; 52 W.N. 68.

has the right to be enrolled and to vote, and that is a private right. [He referred to the *Local Government Act* 1919-1952, ss. 58, 64 (1), 65 (4), 68, 69, 70 (1), 71 (3), 73 (2), and ordinances 14, cl. 22; 7, cl. 2; 8, cl. 2; 9, cll. 2, 15.] Section 56 makes it clear that the right to vote is dependent upon being enrolled. The rolls are the council's responsibility; therefore relief is properly claimed against it in respect of that matter. The right to be enrolled is a personal right. Section 50 clearly confers a right, and shows that the right is conferred on a person as such—not as a member of the public, or as a member of a group or section of the public. The requisite qualifications are dealt with in ss. 51-54. In *Ashby* v. *White* (1) the question was the right to vote itself. Here we are more concerned with the right to be enrolled. The question whether it was a public right or not was raised. The test cannot be whether large numbers of the public have the right: *Constantine* v. *Imperial Hotels Ltd.* (2). The plaintiff can ask the Court to undo an act depriving me of a private right, without going any further. There is a threat to reject my vote. It is the same as if in *Ashby* v. *White* (1) there had been a rejection of votes of all who were entitled, and an acceptance of the votes of those not entitled. Its being void would not prevent individual rights arising. Mere multiplication does not alter the right involved. The feature avoiding the election is that my vote, in common with all others, is being, in law, rejected. The machinery for elections is automatic; the machinery for the preparation of the rolls is not, but is the result of the proper performance of a duty cast upon the council by ss. 64 and 65. The automatic nature of an election is shown by ss. 23, 30, 32, 33 (1) (b), 38, 39, 40. *Ashby* v. *White* (1) and *Reg.* v. *Cousins* (3) do not decide that there is any right to demand an election. They decide that, assuming one is being held, one has a right to demand that one's vote be recorded. Section 50 (b) confers a personal right to vote.

[DIXON C.J. referred to s. 56 (1) (a).]

It is necessary to analyze the right to determine whether its infringement is a matter of personal action or not.

B. P. Macfarlan Q.C. (with him *M. H. Byers*), for the respondent. No request for a poll was made to the council; it merely received the proclamation from the Governor. Rules 101, 102 and 103 of the *Consolidated Equity Rules* 1902, relate to formal demurrers. There is no express provision in the rules relating to demurrers

(1) (1703) 2 Ld. Raym. 938 [92 E.R. 126].
(2) (1944) K.B. 693.
(3) (1865) 4 S.C.R. (N.S.W.) 1.

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ore tenus: they depend on the English practice as altered here. [He referred to *Shannon* v. *Smith* (1) and *Metropolitan Theatres Ltd.* v. *Harris* (2).] There has been no alteration to the boundaries of the ward in which the appellant is resident; this would have appeared if the whole of the proclamation had been set out. There were changes to two of the wards, out of which three were made. This is not a case within the equitable jurisdiction to grant injunctions, and because of that the appellant is not entitled to a declaration. What he seeks is the prevention of his being put upon a wrong roll; that does not enforce his personal right, if any, to be put upon a right roll. If the proclamation is invalid the roll made in pursuance of it is not a roll under the Act. Even if an injunction were granted to restrain the respondent from placing the appellant on a wrong roll, it would give him nothing of profit. He has no personal right in the other four wards, except that his ward will be represented by one fifth, instead of one fourth of the aldermen. The appellant's real submission is that he is entitled to have an original roll prepared for the election. At that stage, the right is public. If the roll is prepared, and an individual elector is left off it, he may have some special damage. If the appellant is put upon a wrong roll, his complaint does not come within any category protected by the equitable jurisdiction to grant injunctions. The only possible category to which the claim could be referred is the protection of proprietary rights. An injunction to restrain the act of putting him on a wrong roll is not a protection of a proprietary right. It does not affect his right to be put on a right roll. [He referred to *Attorney-General* (*Vict.*) v. *T. S. Gill & Son Pty. Ltd.* (3).] The plaintiff must show something peculiar to himself to invoke the jurisdiction of the equity court. The public right arises from the common interest in a situation. The appellant's argument has proceeded upon the assumption that the proclamation is invalid. Section 648 is wide enough to cover this case. The power to revoke and alter the boundaries is vested in the Governor, who may do so by proclamation: s. 58 (2), (3), (4). Section 648 applies to such a case.

A. F. Rath, in reply, referred to *Ashby* v. *White* (4); *Aslatt* v. *Corporation of Southampton* (5); *North London Railway Co.* v. *Great Northern Railway Co.* (6). Sections 16-19 are the matters

(1) (1914) 14 S.R. (N.S.W.) 253, at p. 259; 31 W.N. 82.
(2) (1935) 35 S.R. (N.S.W.) 228, at pp. 232-233; 52 W.N. 68, at pp. 69-70.
(3) (1927) V.L.R. 22.
(4) (1703) 2 Ld. Raym. 938 [92 E.R. 126].
(5) (1880) 16 Ch. D. 143, at pp. 146, 148-149.
(6) (1883) 11 Q.B.D. 30.

probably referred to in s. 648. Few sections in the Act deal with proclamations by the Governor. [He referred to *Trethowan* v. *Peden* (1).]

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This is an appeal by special leave from an order of the Supreme Court of New South Wales in Equity upholding a demurrer *ore tenus* to the statement of claim in a suit brought by the appellant against the respondent council. The purpose of the suit was to restrain the defendant council from acting upon an alteration of the division into wards of the municipality when the council's officers compiled the list of electors for the municipality and also from holding the elections for aldermen in accordance with such alteration.

According to the statement of claim a proclamation by the Governor in Council appeared in the New South Wales Government *Gazette* of 3rd July 1953 purporting to alter the division into wards of the municipality in a manner described in the schedule to the proclamation and altering the number of aldermen constituting the council from twelve to fifteen. The plaintiff's contention is that the proclamation was invalid because the conditions prescribed by s. 58 (4) of the *Local Government Act* 1919-1952 were not fulfilled. Sub-section (1) of s. 58 empowers the Governor by proclamation to divide a municipality into wards and to name or alter the name of a ward. Sub-section (2) enables him by proclamation to alter or abolish any division of a municipality into wards and again to divide a municipality into wards. Sub-section (3) provides that before such division, alteration, abolition or subsequent division is carried out a notice prescribed shall be given and the council or any elector may make written representations with regard thereto. Then sub-s. (4) provides that before so dividing a municipality or altering or abolishing any such division or redividing the municipality the Governor shall, on the request of one hundred or more of the electors, remit to a poll of electors of the whole of the municipality the question whether such division, alteration, abolition or redivision shall be carried out. Thereupon the council is to fix a day for the poll. If the decision of the poll is in the negative the proposal shall not be given effect to.

The statement of claim alleges that more than one hundred electors of the municipality, including the plaintiff, requested the Governor to remit to a poll of electors the question whether the alteration should be carried out. The pleading proceeds to allege

(1) (1930) 31 S.R. (N.S.W.) 183, at p. 232; 48 W.N. 36.

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that the respondent council did not thereupon or at any time fix or notify as prescribed or in any manner a day upon which such poll as aforesaid should be held and that at no time was such a poll held. There is no allegation that the Governor did not remit the question to a poll of electors but we were informed by counsel for the respondent council that in fact no such remission was made, the view having been taken that what the statement of claim alleges to have been a request did not amount to a request within the meaning of s. 58 (4).

The chief ground of the demurrer *ore tenus* was that the plaintiff appellant had no title to sue for the relief claimed. Even if the proclamation were void, the consequences were of a public nature, so the respondent council maintained, and the plaintiff is not entitled to complain. No particular right of his had been invaded. There was no threat to invade such a right and, moreover, so it was said, if there were any such right it was not one of the character which courts of equity would protect by injunction or other relief. The respondent council further contended that the result of the non-fulfilment of the requirements prescribed by s. 58 (4) was not to invalidate a proclamation once gazetted. Reliance was placed upon s. 648 of the *Local Government Act*.

The suit came before *Myers* A.J., who upheld the demurrer *ore tenus* on the ground that even if the complaint of the plaintiff appellant were made out, it would amount only to an interference with a public right. It was not alleged that any particular loss was suffered by the plaintiff appellant nor any special damage and there was no allegation of facts showing any private right of his with which the council's action would interfere. It is this last conclusion that the plaintiff appellant contests.

In support of his appeal it is contended that a particular or private right is given to him which would be interfered with if the council proceeded to act upon the proclamation. The contention depends upon s. 50, which provides that every person shall, if he has the requisite qualification, be qualified to be an elector and shall be entitled (a) to be enrolled for the ward or riding in respect of which he has the requisite qualification, and (b) to vote at any election of aldermen or councillors for the ward or riding.

The argument of the plaintiff appellant depends upon a number of steps. First, the right to be enrolled, so he contends, becomes effective when the roll is in course of preparation in pursuance of ss. 64, 65 and 66, and entitles him to be enrolled in respect of a lawfully established ward. He adds that a similar right exists in him to vote at the election for a lawfully established ward, although

this right to vote may be subject to the prior necessity of having his name placed on the roll. The second step is that the right is one that is cognisable in a court of equity and one which would be protected by injunction. The third step in the argument is that, because a poll was not held, one hundred electors having requested the Governor to remit the question to a poll, the purported redivision of the municipality into wards is void. The fourth step is the contention that by causing his name to be placed upon a roll for a ward forming part of the void redivision, the respondent council impairs his alleged right to be enrolled for a lawful ward.

Every one of these steps is contested by the respondent municipality. It is convenient to deal at once with the last of them. It necessarily involves matters of fact as well as of law. The basis in fact of the contention is that if the roll is made up in accordance with the proclamation the plaintiff will be enrolled in respect of a ward that does not exist in law and will thereby be refused enrolment in respect of a ward which does exist in law. Now, although by s. 64 (1) the council before each triennial ordinary election must cause an original roll of electors to be prepared, yet by s. 65 (4) rolls must be prepared separately for wards and the rolls for all the wards taken together constitute the roll for the area. The foundation of the complaint must therefore be that the plaintiff will be enrolled for a ward which does not correspond to what he alleges to be the lawful ward.

Unfortunately the statement of claim contains no precise allegation as to the manner in which the subdivision took place. The allegation in the pleading dealing with the subdivision craves leave to refer to the proclamation as appearing in the *Gazette* as if the same were fully set out in the pleading. It was objected on the authority of *Metropolitan Theatres Ltd.* v. *Harris* (1) that, for the purpose of the demurrer, only what appeared actually in the pleading could be considered and that it was not legitimate to look at the remainder of the proclamation as it appeared in the *Gazette*. This objection if upheld, however, might result in no more than an amendment and so the *Gazette* was looked at for the purpose of seeing whether the case of the plaintiff appellant might be bettered. Another fact was stated which also does not appear in the pleading; that is to say we were told what was the ward in which the plaintiff appellant resided. It appears from the *Gazette* that the proclamation divides the municipality into five wards in substitution for four wards under the previous division. Nevertheless two of the wards, including that in which the plaintiff

(1) (1935) 35 S.R. (N.S.W.) 228, at p. 233; 52 W.N. 68, at p. 70.

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resides, are constituted as proclaimed in the Government *Gazette* which previously subdivided the municipality into wards. Apparently there is a revised description but these wards are substantially unchanged. The statement of claim does not therefore in itself show that the ward in respect of which the plaintiff appellant would be enrolled in pursuance of the proclamation is a different ward from that in respect of which he would be enrolled, had there been no such proclamation, and if the proclamation had been fully set out in the pleading that would not have appeared to be the fact. It therefore seems that the very foundation is wanting of the assertion of the plaintiff appellant that his enrolment on the basis of the proclamation would impair his alleged right to be enrolled for a lawfully constituted ward.

To meet this deficiency, however, it was argued that to be enrolled for the same ward after the municipality had been divided into five wards, that is to say after two other wards had been divided into three wards, was to obtain a different right, different because the proportion in relation to wards, voters and aldermen would be altered. But this contention rests on an indirect consequence of the redivision, upon the effect of a vote and not upon any impairment of the actual right to be enrolled or to vote in respect of a lawfully constituted ward. It could not afford the plaintiff appellant a cause of action, even were his other contentions to be sustained. For these reasons the plaintiff's appeal fails initially.

It appears proper to add that in point of substance his case would fail even if he made out a *locus standi* to sue and for equitable relief. It would fail because the grounds assigned would not result in the proclamation being null and void. It may be true that prima facie s. 58 (4) appears to impose a condition on the Governor's power by proclamation to divide municipalities into wards or to alter such a division, a condition the non-fulfilment of which would go to power. There is, however, no express language in s. 58 making failure to remit the question to a poll of electors after due request a ground of invalidating the proclamation. If it did result in invalidity the council of the municipality would be placed in an unenviable dilemma. The Governor having proclaimed a division in fact, without a poll, the council would be required at their peril to decide whether the Governor had or had not received a request properly signed by a sufficient number of citizens to remit to a poll. It would be a matter on which the council would have no knowledge, and yet if the council wrongly decided this question, then according to the plaintiff appellant, the rolls and the election thereon would be void. Section 648 appears to be directed to

remedy such a position. It provides that a proclamation or notification of the Governor purporting to be made under the Act and being within powers of the Governor shall not be deemed to be invalid by reason of any non-compliance with any matter required by the Act as a preliminary to the making of the proclamation or notification. The words " non-compliance with any matter required by this Act as a preliminary " are very general in their connotation and there seems to be no reason to regard the duty of the Governor to remit to a poll on due request as anything but a non-compliance with a matter required as a preliminary. It is true that if the Governor does remit to a poll and the decision of the poll is in the negative, s. 58 (4) provides that the proposal to divide shall not be given effect to. This is a positive command non-compliance with which may well not come within s. 648. Whether it is mandatory or directory is a matter which need not be discussed. But there is a distinction between the Governor in Council mistakenly treating a request as insufficient, or for some other reason erroneously failing to remit to a poll when he should do so, and the disregarding of an express prohibition against making a proclamation when a poll has been held and the vote has been in the negative. The basis of s. 648 seems to be that the validity of a proclamation or notification if made by the Governor in Council is to be tested only by a comparison with the power. If it falls within the ambit of the power it is to be valid, notwithstanding that preliminary conditions were not complied with. In the present case this principle appears to be fully applicable.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *McMaster, Holland & Co.*
Solicitors for the respondent, *Matthew McFadden & Co.*

G. D. N.