[HIGH COURT OF AUSTRALIA.]

THE KING v. THE GOVERNOR OF THE STATE OF SOUTH AUSTRALIA.

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SYDNEY, *Aug.* 2, 5, 6, 7, 8.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Election of Senators—Election of one declared void—Vacancy in place of Senator—Successor chosen by State Parliament—Refusal of Governor to issue writ for new election—Mandamus—Question for determination by Parliament—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 13, 15, 47—*Judiciary Act* 1903 (*No.* 6 *of* 1903), *sec.* 33.

The Governor of a State in issuing a writ for the election of senators under sec. 12 of the Constitution is acting in the capacity of the constitutional head of the State, and not as an officer of the Commonwealth within the meaning of sec. 75, sub-sec. v. of the Constitution.

Upon a petition presented to the Court of Disputed Returns under the provisions of the *Commonwealth Electoral Act* 1902 it was declared that the election of one of the three senators returned as duly elected for South Australia, in place of those whose places had become vacant by effluxion of time, was void. The Parliament of South Australia, assuming to act under sec. 15 of the Constitution, chose a person as senator to fill the vacancy, that choice was duly certified, and the person chosen sat and voted as a senator. The candidate whose election had been declared void applied to the High Court for a writ of mandamus to compel the Governor to issue a writ for a popular election.

Held, that a mandamus will not lie to the Governor of a State to compel him to do an act in his capacity of Governor.

The jurisdiction in respect of mandamus conferred upon the High Court by the Constitution, sec. 75, sub-sec. v., has not been enlarged by sec. 33 of the *Judiciary Act* 1903.

Held, also, that the question whether, under the circumstances, there was or was not a vacancy in the representation of South Australia in the Senate was a question to be decided by the Senate under sec. 47 of the Constitution.

Rule *nisi* for a writ of mandamus discharged.

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MANDAMUS.

This was an application by Mr. Joseph Vardon for a writ of mandamus directed to the Governor of South Australia commanding him to cause a writ to be issued for the election of a senator for the State of South Australia to complete the representation of that State in the Senate of the Commonwealth. On 8th November 1906 the Governor of South Australia, Sir George R. Le Hunte, K.C.M.G., caused a writ to be issued for the election of three senators in place of Sir Josiah Symon, Sir Richard Baker and The Hon. Thomas Playford whose term of service would expire on 31st December of that year, and appointed the days for nomination, taking the poll, and return of the writ to be 17th November 1906, 12th December 1906, and 7th January 1907 respectively. Seven gentlemen, including Sir Josiah Symon, Mr. William Russell and Mr. Joseph Vardon were duly nominated, and the polling resulted in those three gentlemen being declared elected in that order, and the writ was returned endorsed with a certificate to that effect by the Commonwealth Electoral Officer. On 15th February 1907 one of the defeated candidates, Mr. R. P. Blundell, filed a petition in the High Court as the Court of Disputed Returns praying for a recount of the ballot-papers, a declaration that Mr. Vardon was not duly elected, and a declaration that Mr. Crosby, another candidate, or the petitioner was duly elected, or in the alternative a declaration that the election was absolutely void.

The petition was heard before His Honor Mr. Justice *Barton*, who on 1st June 1907 declared that the election was absolutely void in respect of the return of Mr. Vardon (1). Accordingly on 2nd July the Governor forwarded a message to the Legislative Council and Legislative Assembly of the State informing them that he had been notified of the result of the petition, and that a vacancy had thereby arisen in the representation of the State in the Senate. The message went on to state that the Governor was advised that by reason of the vacancy the place of a senator had become vacant before the expiration of his term of office within the meaning of sec. 15 of the Constitution, and that the vacancy must be filled by the Houses of Parliament sitting together choosing a person to hold the office in accordance with the section.

(1) 4 C.L.R., 1463.

In pursuance of this message and the standing orders of the two Houses of Parliament, the President of the Council summoned the members of the two Houses to a joint sitting for the purpose of electing a senator. On the same day, 3rd July 1907, the Legislative Council passed resolutions that it disagreed with the advice given to the Governor and referred to in his message to them, and that an address be presented to him conveying that resolution.

A few days afterwards Mr. Vardon presented to the Governor a letter signed by himself in which he suggested that the proper means of filling the vacancy was by the issue of a writ by the Governor for the election of a senator for the State, and that sec. 15 of the Constitution was only intended to apply to senators duly elected, and had no relation to a void election. To this the Governor replied that, until otherwise advised, he must decline to issue a writ for a fresh election. On 10th July 1907 Mr. Vardon wrote to Mr. Butler, a member of the House of Assembly of the State, a lettter in which he stated his position in regard to the Senate election in the following words:—"I am willing to act as a senator if duly and properly elected as one. I am advised that the proper course is a new popular election. I must leave the responsibility of acting or not acting on your wish to nominate me in Parliament entirely to yourself. If you do so and the result is that I am lawfully made a senator I will act accordingly." On 11th July the two Houses of Parliament were summoned, and at a joint sitting elected Mr. J. V. O'Loughlin to fill the vacancy.

On 12th July on the motion of *Sir John Downer* K.C. and *Mr. Piper* an order *nisi* for a mandamus to the Governor was granted by *Barton* J. on the ground that, the election of senators having been declared absolutely void in respect of the return of Mr. Vardon, a new election must be held, and it was the duty of the Governor to cause a writ to be issued for such new election. Notice of the order *nisi* was directed to be given to any person who might be chosen by the Houses of Parliament to fill the vacancy.

On the motion of Dr. *Cullen* K.C. leave was given to the Commonwealth to intervene on the hearing of the motion to make the order absolute.

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Sir John Downer K.C. (*Piper* with him), for the prosecutor, moved to make the order absolute. The Commonwealth should not have been allowed to intervene. Its only interest in the case is its pecuniary interest in the cost of another election. The question as to the representation of South Australia in the Senate affects that State alone. The leave to intervene should therefore be rescinded.

[*Per Curiam.*—It was a matter for the discretion of the Court, and we think that granting the leave was a proper exercise of that discretion.]

The main question is whether there is a vacancy within the meaning of sec. 15 of the Constitution. If there is not, then the rule should be made absolute. [They referred to secs. 1, 7, 11, 15 and 47 of the Constitution, and secs. 197, sub-secs. (IV.), (V.), (VI.), and 205, sub-sec. (III.) of the *Commonwealth Electoral Act* 1902.] This is a matter arising out of the Constitution. The High Court has jurisdiction to issue mandamus in such a matter under sec. 76 of the Constitution, and sec. 30 of the *Judiciary Act* 1903, either by prerogative writ, or by special writ under the *Judiciary Act* 1903.

Sir Julian Salomons K.C. and *Rolin*, for the Governor of South Australia. The Court cannot issue mandamus to the Governor on the application of the prosecutor. The thing to be commanded here is not a duty which the Governor owes to the prosecutor. It is a public duty, and the prosecutor as a mere elector has no interest in the matter. Secs. 11 and 12 of the Constitution do not create any duty to the individual electors of a State. [They referred to *The Queen* v. *Commissioners of Inland Revenue*; *In re Nathan* (1); *The King* v. *Arndel* (2).

[GRIFFITH C.J.—Undoubtedly that is the common law rule, but motions for a mandamus to compel an election are always moved by electors. [He referred also to High Court Procedure Rules, Order XLI., rr. 14 *et seq.*]

Here the only party aggrieved is the State of South Australia, and the Attorney-General for the State is the only person who may bring a suit on behalf of the State: sec. 62 of the Con-

(1) 12 Q.B.D., 461, at p. 470. (2) 3 C.L.R., 557, at p. 580.

stitution. "Suit" includes any action or original proceeding. The prosecutor is precluded now from applying for a writ of mandamus. By his letter of 10th July he agreed to take his chance of being chosen by the Houses of Parliament. He thereby made his election. [They referred to *The Queen* v. *Lofthouse* (1); *Shortt on Mandamus and Prohibition*, 1st ed., p. 151.]

[GRIFFITH C.J.—That rule applies to prohibition, and to a certain extent to quo warranto, but it is very doubtful whether it applies to mandamus.]

This application is quo warranto in effect. The office is full, and a mandamus ordering to fill the office again would be futile. This is not a case of a mere colourable election: *Frost* v. *Mayor of Chester* (2); *Rex* v. *Mayor of Cambridge* (3); *Rex* v. *Bankes* (4); *The Queen* v. *Secretary of State for War* (5). There was a *bonâ fide* election under sec. 15 of the Constitution.

[HIGGINS J. referred to *The King* v. *Trevenen* (6).]

This Court cannot issue a mandamus to the Governor of a State to issue a writ for an election. That is a function which he exercises as a representative of the Crown. [They referred to New South Wales Parliamentary Handbook.] The Crown will not command itself.

The Governor is bound by the terms of his commission to administer the law, and if he continuously refuses to do so he may be indicted as an individual, or removed from his position: *Kentucky* v. *Dennison* (7); *Sutherland* v. *The Governor* (8); *The People* v. *Morton* (9); *Anson, Law and Custom of the Constitution*, 2nd ed., vol. II., p. 356. Moreover, the issue of the writ for an election is discretionary. The section says that he "may," not that he "shall," do so.

[ISAACS J. referred to *Railroad Company* v. *Hecht* (10).

HIGGINS J. referred to *Governor of Georgia* v. *Madrazo* (11); *Amer. and Eng. Encyc. of Law*, vol. VI., p. 379.]

There cannot be a popular election for one senator. There is no provision for it in the Constitution or the *Commonwealth*

(1) L.R. 1 Q.B., 433, at p. 440.
(2) 5 El. & Bl., 531, at p. 539.
(3) 4 Burr., 2008.
(4) 3 Burr., 1452.
(5) (1891) 2 Q.B., 326.
(6) 2 B. & A., 339.
(7) 24 How., 66.
(8) 29 Mich., 320.
(9) 156 N.Y. Rep., 136.
(10) 95 U.S., 168, at p. 170.
(11) 1 Peters, 110, at p. 124.

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Electoral Act 1902. The Court of Disputed Returns had no power to declare the election partly void. It could either declare the whole election void, or that one or more senators was or were not duly elected. It must, therefore, be taken here that the declaration was that Mr. Vardon was not duly elected. The result of that declaration was that he ceased to be a senator: secs. 197 (IV.) (V.) (VI.), 205 (I.) of the *Commonwealth Electoral Act* 1902. The legislature treats such a case as one in which the term of office had *de facto* begun, see *May's Parliamentary Practice*, 10th ed., p. 631. If the effect of the judgment of the Court of Disputed Returns was to make the election void *ab initio*, as if the seat had never been filled, then all Parliamentary proceedings that were dependent upon the vote of that senator are avoided.

[GRIFFITH C.J.—There is no way of investigating the validity of the proceedings of Parliament.]

At any rate, a vacancy arose after the senators' term of office had begun and before its expiration, and sec. 15 of the Constitution applied. The election of the prosecutor was not merely colourable: *The King* v. *Mayor of Colchester* (1). If the petition had not been filed he would have continued in his seat: See secs. 13, 20, 38 and 45 of the Constitution. The time for a popular election has passed. [They referred to *Rochester, Mayor of*, v. *The Queen* (2); *In re Stafford, Coroner for* (3); *Maxwell, Interpretation of Statutes*, 3rd ed., p 531.] According to the law and practice of Parliament in England, the office of a member of the House of Commons is treated as becoming vacant if his election is avoided by the Court of Disputed Returns: *Stevens* v. *Tillett* (4); *May, Law and Practice of Parliament*, 10th ed., p. 620; *Anson, Law and Custom of the Constitution*, 3rd ed., vol. I., p. 162.

[GRIFFITH C.J. referred to *Rogers on Elections*, 7th ed., pp. 2, 354.

BARTON J. referred to *Chanter* v. *Blackwood* (5).]

If the present difficulty has not been provided for by the Constitution or by Parliament under its constitutional powers, the English common law as to elections should apply, and the

(1) 2 T.R., 259.
(2) El. B. & E., 1,024; 27 L.J.Q.B., 45, 434.
(3) 2 Russ., 475, at p. 483.
(4) L.R. 6 C.P., 147.
(5) 1 C.L.R., 39, 121.

word vacancy should be construed accordingly. [They referred to sec. 49 of the Constitution.] The vacancy having now been filled under sec. 15, the only way in which the validity of the election of the new member can be tested is that provided by sec. 47.

At this stage the High Court has no power to grant mandamus, though it might possibly have power to do so after the decision of the Senate had been made known, if there was a duty on the part of some person amenable to mandamus. The power to inquire into election matters is not part of the judicial power of the High Court as such, but is given to it as a special tribunal, and can only be exercised in respect of the matters committed to it as such tribunal by the Statute: *Holmes* v. *Angwin* (1). No provision has been made for trying such questions as the present in the *Commonwealth Electoral Act* 1902; sec. 192 of that Act is quite inapplicable.

Cullen K.C., and *Bavin*, for the Attorney-General for the Commonwealth. This is purely a question of the construction of the Constitution, which cannot be affected by the *Commonwealth Electoral Act* 1902. The Constitution deals with vacancies and makes no reference to voidness of elections. The term "vacancy" must therefore be construed by reference to the Constitution alone. The certificate of the Governor General under sec. 7 is *primâ facie* valid, and the senator whose name is certified holds the office until his term expires, or his election is declared void, or he is declared not to have been duly elected. Upon the happening of any of those events a vacancy arises. [They referred to *In re Carter and Kenderdine's Contract* (2); *Frost* v. *Mayor of Chester* (3); *The King* v. *Mayor of Winchester* (4); *Bowman* v. *Blyth* (5); *Linnett* v. *Connah* (6); secs. 32, 33, 45 and 47 of the Constitution.]

[ISAACS J. referred to *In re Delgado* (7).]

The Court should lean against construing the word "may" in sec. 12 as mandatory.

(1) 4 C.L.R., 297.
(2) (1897) 1 Ch., 776.
(3) 5 El. & Bl., 531; 25 L.J.Q.B., 61.
(4) 7 A. & E., 215.
(5) 7 El. & Bl., 26; 26 L.J.M.C., 57.
(6) (1902) St. R. Qd., 104.
(7) 140 U.S., 586.

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[GRIFFITH C.J.—It is questionable whether it is necessary to decide that in this case.]

Sir John Downer K.C. and *Piper* in support of the rule. If sec. 15 applies to this case the consequence is that, on the retirement of senators at the expiration of their term of office, the places of those elected to fill the vacancy may be avoided owing to the default of officers over whom neither the State nor the candidates have control, and the election of senators taken away from the people and given to the State Parliament, where the result will depend upon the state of parties. The language must be very strong and clear before the Court will so construe the section. The context shows that the vacancies there referred to are casual or interim vacancies arising in the places of senators who had been duly elected. But there never had been an election as to this particular place, and it must be deemed to have never been filled. [They referred to *Rogers on Elections*, 13th ed., p. 241; *May, Parliamentary Practice*, 11th ed., pp. 631, 644; *Ex parte Siebold* (1).]

It was the duty of the Governor under the Constitution to issue a new writ for the election of a senator by the people. This Court has jurisdiction to issue a mandamus to compel him to do so. The Governor is not the Crown except to the extent of his instructions, and when acting under them. He has no absolute immunity from being sued. If he is sued he may plead that the act or omission complained of was done or omitted in the exercise of his office, that it was an act of State, and it is then for the Court to inquire whether as a matter of fact and law that defence has been made out. If it is not made out he is liable in the same way and to the same extent as any other individual would be if the duty in question had been imposed on him: *Musgrave* v. *Pulido* (2). The Governor is no part of the Commonwealth Government. He is a public officer having certain duties imposed upon him by the Constitution to perform in the Commonwealth. If the duty is improperly performed the Governor is clearly amenable to the jurisdiction of the High Court, and there is no reason on

(1) 100 U.S., 371.

(2) 5 App. Cas., 102.

principle why he should not be amenable to its jurisdiction if he omits to perform the duty. The King can compel the performance of any statutory duty by mandamus. [They referred to *The Queen* v. *Lords Commissioners of the Treasury* (1).]

[ISAACS J. referred to *Nireaha Tamaki* v. *Baker* (2).]

The Governor is the *persona designata* to perform the duty, and he is described as the Governor merely in order to indicate the person. [They referred to *Holmes* v. *Angwin* (3); *The King* v. *Arndel* (4).] He does not perform the duty as Governor under his Commission, and his acts or omissions in regard to it can never be acts of State. They can only be justified under the Constitution. The position is not affected by the fact that the general words of the Governor's instructions may cover this particular duty. In this case he is not described as the Governor in Council, though the Constitution expressly recognizes the distinction between a Governor simply and a Governor acting with the advice of the Executive Council. The context requires that the word "may" should be read as "shall." It is imperatively enacted that the Senate shall be constituted in the manner prescribed, and all things necessary for its constitution must be done by those upon whom the duty is imposed, whatever may be the form in which the duty is stated. If the duty cannot be enforced by the High Court the Constitution will become ineffective. [They referred to *Judiciary Act* 1903, secs. 30, 33, and the Constitution, secs. 76, 77; *Marbury* v. *Madison* (5); *Martin* v. *Hunter's Lessee* (6).] The argument that the King, as represented by the Commonwealth, cannot proceed against the King as represented by the State was rejected in *Municipal Council of Sydney* v. *Commonwealth* (7). The Governor is not spoken of here as the agent of the Crown as represented by the State, nor are the States dealt with as clothed with sovereignty. They are, for the purpose of elections, mere geographical divisions, and for convenience the Governor of each State is selected as the officer to do certain acts in that State.

As to the question of vacancy, the seat may have been full in a

(1) 16 Q.B., 357; 20 L.J.Q.B., 305.
(2) (1901) A.C., 561, at pp. 575, 576.
(3) 4 C.L.R., 297.
(4) 3 C.L.R., 557.
(5) 1 Cranch, 137.
(6) 1 Wheat., 304.
(7) 1 C.L.R., 208.

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certain sense for some purposes, but it does not follow that when the election has been avoided the place is to be deemed to have been filled for the purpose of sec. 15. The reference in that section to the seat becoming vacant should be construed in the same sense as in secs. 19, 20 and 45. Secs. 13 and 15 provide the code for dealing with vacancies arising after a proper election, the former at the expiration of the term of service, and the latter before such expiration. It is straining the language to apply sec. 15 to the case of a vacancy which has never been properly filled. Quo warranto is not the appropriate remedy because such a writ will not go to a member of Parliament, and the place is not now full, O'Loughlin having no colour of title: *Reg.* v. *Mayor of Bangor* (1); *Rex* v. *Mayor of Cambridge* (2); *Re Borough of Bossing* (*Tintagel*) (3). This Court cannot inquire into or notice the fact that O'Loughlin is taking part in the proceedings of the Senate, the status conferred upon him by the Senate, or the reasons or intentions of the Senate in admitting him. It must be assumed that the Senate will admit a man who has a lawful title to sit. The ministerial duties of officers in regard to elections must be performed without speculation as to consequences. The Senate has no power to compel the Governor, though this Court has. To compel him would not be any interference with Parliament, but rather aiding it in securing its due constitution. [They referred to *Stockdale* v. *Hansard* (4); *Bradlaugh* v. *Gossett* (5); *Harford* v. *Linskey* (6).]

Cur. adv. vult.

The judgment of the Court was read by

BARTON J. This is an application on behalf of an elector of the State of South Australia for a prerogative writ of mandamus addressed to the Governor of that State, commanding him to cause a writ to be issued for the election of a senator to fill a vacancy, which undoubtedly occurred, and which it is alleged has not been filled. The material facts are as follows:—At the end of the year 1906 the places of three of the senators for

(1) 18 Q.B.D., 349; s.c. on appeal 13 App. Cas., 241.
(2) 4 Burr., 2008.
(3) 2 Stra., 1003.
(4) 9 A. & E., 1, at p. 118.
(5) 12 Q.B.D., 271.
(6) (1899) 1 Q.B., 852.

South Australia became vacant by effluxion of time under the provisions of sec. 13 of the Constitution. An election was held in due course, and three persons were returned as duly elected. Upon a petition presented to the Court of Disputed Returns under the provisions of the *Commonwealth Electoral Act* 1902 it was declared that the election was void so far as regarded one of them. Thereupon both Houses of the Parliament of South Australia, assuming to act under the provisions of sec. 15 of the Constitution, sat together and chose a person to hold the place of the senator whose place had become vacant, this choice was certified by the Governor, and the person so chosen has since sat and voted as a senator. The applicant contends that the case was not within sec. 15, and that the attempted choice of the Houses of Parliament was a mere nullity. He maintains that when the election of a senator elected at a popular election becomes ineffective for any reason, a new popular election must be held, for which purpose the Governor of the State is bound to cause a writ to be issued, and that the performance of this duty may be enforced by mandamus.

The respondent contends that sec. 15 applies to all cases in which there has been an election *de facto*, and that in such a case every person returned has a term of service, which may expire with the declaration of the Court of Disputed Returns that he was not duly elected. He says that, since challengeable elections become unchallengeable at the expiration of the time allowed for petitioning, an irregular election is voidable and not void, and that the words "the place of a Senator" in sec. 15 consequently mean the place *de facto* occupied, whether *de jure*, or not.

It is necessary to refer to some of the provisions of the Constitution in detail. Sec. 7 of the Constitution provides that "the Senate shall be composed of senators for each State directly chosen by the people of the State, voting . . . as one electorate." They are to be chosen for a term of six years, and the names of the senators chosen for each State are to be certified by the Governor of the State to the Governor General. Sec. 9 authorizes the State Parliament to make laws for determining the time and place of elections for the Senate. Sec. 11 provides that "the

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Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate." This phrase seems to suggest *primâ facie* that the doing of all things necessary for giving the State its representation in the Senate is entrusted to the State itself, an idea which is emphasized by the provisions of sec. 9 just quoted. Sec. 12 provides that "the Governor of any State may cause writs to be issued for elections of senators for the State." This, of course, means in any case in which the choice of a senator is under the Constitution to be made by popular election.

Sec. 13 provides that "the term of service of a senator chosen in ordinary rotation shall be taken to begin on the first day of January following his election" (except in certain cases not now material). It was suggested that this provision is inconsistent with an election being held after the first of January to fill vacancies which ought to have been filled at an election held before that day, but we do not think that there is anything in this point. If the election ought now to be held, it should, we think, be taken to be held *nunc pro tunc* for all purposes. Otherwise the main purpose of securing a regular rotation of senators would be frustrated.

Sec. 15 provides that "if the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor" as prescribed. If the State Parliament is not in Session the Governor of the State in Council may appoint a person to hold the place of senator temporarily. In either case the name of the person chosen or appointed is to be certified by the Governor of the State to the Governor General.

Sec. 19 provides for the vacation of a seat in the Senate by resignation, and sec. 20 for the vacation of a seat by continued absence without permission.

Sec. 45 provides for the vacation of the seat of senator upon the arising of certain disqualifications.

Sec. 47 prescribes that "until the Parliament otherwise provides, any question respecting the qualification of a senator or of

a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises."

Sec. 21 provides that whenever a vacancy happens in the Senate it shall be notified by the President or by the Governor General to the Governor of the State in the representation of which the vacancy has happened. It was not disputed in argument that a vacancy, occurring in consequence of a declaration under sec. 47 that a senator was not duly elected, would be a vacancy within the meaning of sec. 21.

In execution of the power conferred by sec. 47, the *Commonwealth Electoral Act* 1902 provided that the Court of Disputed Returns may declare that a senator who has been returned as elected was not duly elected, or that an election was absolutely void (sec. 197). It also provided (sec. 205, sub-sec. III.), that if the Court declares that the election is absolutely void a fresh election shall be held.

It is clear, however, that when a vacancy occurs in the Senate it must be filled in the manner prescribed by the Constitution, whatever that may be, and that the Parliament cannot by any Statute make any valid provision to the contrary. It is equally clear that the Senate could not by any exercise of its powers under sec. 47 affect the question of the proper mode of filling a vacancy, and that the powers of the Court of Disputed Returns are not more extensive. In the present case, as already stated, the decision of the Court was that the election was void as regarded one of the senators returned. Its validity as regarded the other two was not impeached. The Court did not, therefore, in fact, declare the election, *i.e.*, the election held under the writ commanding the election of three senators, to be wholly void. We think the form of the order is quite immaterial. The only relevant fact is that the attempted choice of one of the three senators, who ought under sec. 7 to have been directly chosen by the people, was ineffectual. There is no doubt then that there was a vacancy within the meaning of sec. 21. Was it a vacancy within the meaning of sec. 15? And, if not, has this Court any

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and what jurisdiction to rectify the alleged mistake in the mode of choosing by the issue of a mandamus to the Governor?

The learned counsel for the Governor of South Australia contend that, whatever may be the proper mode of choosing a senator under the circumstances, a mandamus will not lie against the Governor. The counsel for the Commonwealth (the intervenants) further contend that no mistake has been made. We think that we are bound first to consider the objection to the jurisdiction of the Court.

The answer to the question thus raised for decision depends upon the nature of the functions and duties of the Governor of a State under the Constitution with respect to the election of senators. The formal functions and duties of the Governor are, as already pointed out, (1) to cause writs to be issued for the election of senators (sec. 12); (2) to certify to the Governor General the names of senators elected, chosen, or appointed (secs. 7, 15); and (3) to receive notification of vacancies in the office of senator (sec. 21). The object of the notification required by sec. 21 is obviously to inform the State, *qua* State, of the vacancy, so that the State may do what it thinks necessary in accordance with the Constitution to complete its representation in the Senate. The Governor, as the officiating Constitutional Head of the State, is accordingly named as the person to whom the notification is to be given, and the notification must be regarded as addressed to him in that capacity. So, in certifying to the Governor General the names of the senators elected, chosen, or appointed the Governor must be regarded as acting in the capacity of the Constitutional Head of the State, being in that capacity the proper channel of communication with the officiating Constitutional Head of the Commonwealth, the Governor General. We think that he must be regarded as acting in the same capacity when discharging the function of issuing a writ for the election of senators under sec. 12. For the purposes of the present inquiry the case may be considered as if the Governor had omitted to issue a writ for the election of three senators to fill vacancies occurring by effluxion of time. We will assume, without deciding, that sec. 12 imposes a duty upon the Governor to issue a writ in such a case. But the question remains: To whom does he owe

this duty? A somewhat analogous duty is cast upon the State Governors under the Constitutions of the States, all of which provide that upon a dissolution of the Houses of Assembly the writs for a general election are to be issued by the Governor. It has never been suggested that if the Governor failed to issue the writs a mandamus would lie from a State Court to compel him to do so. There is, of course, a remedy in such a case but it is to be sought from the direct intervention of the Sovereign and not by recourse to a Court of law. The case of an election to the Senate is not quite analogous. It is conceivable that the Executive Government of a State for the time being might desire that no senator should be chosen to fill a particular vacancy. If they advised the Governor to abstain from taking any action to fill it, and refused to afford him the necessary administrative facilities, and he accordingly did nothing, it may be that he would have failed in his duty. But, if so, it is clear that the duty would be one which he owed to the State collectively. It is not easy to see how, in such a case, he could perform this duty without dismissing his Ministers and finding others, and that power is manifestly one the exercise of which could not be reviewed by any authority but the Sovereign. The duty, therefore, is one of the duties which the Constitutional Head of a State owes to the State (and in the case of a Governor, but in a slightly different sense, to the Sovereign), and its performance must be enforced in the manner appropriate to the case of such duties. Instances of such duties—duties of imperfect obligation —are familiar to students of Constitutional Law.

It follows from what we have said with regard to the election of senators that, although the Governor is the person designated to bring into operation certain provisions of the Constitution which ought to be brought into operation, and which cannot be brought into operation without his action, he cannot be regarded *quoad hoc* as an officer of the Commonwealth. The States are not subordinate to the Commonwealth, and the Commonwealth Judiciary cannot command the Constitutional Head of a State to do in that capacity an act which is primarily a State function. If, indeed, this Court could in any case undertake to command

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the necessary steps to be taken to secure the full representation of a State in the Senate, it is not easy to see why its authority should be limited to the case when the mode of choice alleged to be appropriate is a popular election. There are in fact three modes in which the place of a senator may be filled—popular election, choice by both Houses of Parliament, and appointment by the Governor with the advice of the Executive Council. In a case where the choice ought to be made by both Houses of Parliament it is quite clear that this Court could not command those Houses to meet and choose a senator, and it would be immaterial whether a writ had or had not been issued by the Governor for holding a popular election. It is equally clear that the Governer could not be commanded to do an act which he can only do with the advice of the Executive Council. As, therefore, this Court would have no authority to correct by mandamus a mistake of one kind as to the mode of choice, it seems clear that it was not intended to have authority to interfere by mandamus in such matters at all.

Apart from these considerations we think that a mandamus will not lie to the Governor of a State to compel him to do an act in his capacity of Governor. There is, of course, no British precedent for such a writ. Reference was made in argument to the cases in which it has been held that an action will lie against a colonial Governor for wrongful acts done by him. But it by no means follows that, because a Governor is liable to an action for a wrongful act done by him to the prejudice of an individual, he is liable to be commanded by mandamus to repair an omission to do a lawful act.

It is settled law that a mandamus will not lie against an officer of the Crown to compel him to do an act which he ought to do as agent for the Crown, unless he also owes a separate duty to the individual seeking the remedy. We do not think that the Governor of a State in the issuing of a writ for the election of senators is acting as agent for the Sovereign in this sense, since the duty imposed by the Constitution is imposed by Statute law and not by delegation from the Sovereign himself. But, as already pointed out, it is a duty cast upon him as Head of the State. And the same reasons which

prevent a Court of law from ordering the Sovereign to perform a constitutional duty are applicable to a case where it is alleged that the Constitutional Head of a State has by his omission failed in the performance of a duty imposed on him as such Head of the State.

This argument is independent of that arising upon the language of sec. 75 of the Constitution. But in our opinion the Governor of a State is not, so far as regards the matter now in question, an officer of the Commonwealth within the meaning of the section. Nor do we think that the *Judiciary Act* has enlarged the jurisdiction of the Court in this respect.

For these reasons we hold that the application fails.

We refrain from expressing any opinion upon the other important and difficult question which the applicant desires to have decided. It seems to be clear that the question whether there is or is not now a vacancy in the representation of South Australia in the Senate is one of the questions to be decided by the Senate under sec. 47 "unless the Parliament otherwise provides." Parliament can, no doubt, confer authority to decide such a question upon this Court, whether as a Court of Disputed Returns or otherwise. But until the question is regularly raised for decision we reserve our opinion upon it.

Rule nisi for a mandamus discharged with costs against the applicant. Intervenants to bear their own costs.

Solicitor, for the applicant, *P. R. Stow*, Adelaide, by *Minter, Simpson & Co.*, Sydney.

Solicitors, for the respondent, *The Crown Solicitor for South Australia*; *The Crown Solicitor for the Commonwealth.*

C. A. W.