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IN THE HIGH COURT OF AUSTRALIA

CRITTENDEN

v.

ANDERSON.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on WEDNESDAY, 23rd AUGUST, 1950.

H. H. Dav, Gov. Print., Melb.

C.12280/46

CRITTENDEN v. ANDERSON

JUDGMENT. FULLAGAR J.

CRITTENDEN v. ANDERSON

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The subject matter of this application is a petition addressed to this Court as the Court of Disputed Returns under Part XVIII of the Commonwealth Electoral Act 1918-1949. The application is made by the respondent to the petition, who asks that proceedings on the petition be stayed on the ground that it is vexatious and an abuse of the process of the Court. I consider that I have power to deal with such an application and to deal with it in chambers. Order LI.B of the Rules of this Court contains rules dealing with election petitions and made under sec. 202 of the Act. Rule 1 provides that the Rules of Court contained in Part I of the Rules shall, so far as the same are applicable, and are not inconsistent with Order LI.B, extend and apply to proceedings in the High Court in the exercise of its jurisdiction as the Court of Disputed Returns. It further provides that a petition disputing an election or return shall be deemed to be an originating proceeding within the meaning of Part I of the Rules. Order XLIV, Rule 1, which occurs in Part I, provides that the Court or a Justice may, at any time after the institution of a cause or matter, direct a stay of proceedings either as to the whole cause or matter or as to any proceedings therein. Order I, Rule 1, states that the document by which a cause or matter is commenced is called an "originating proceeding". The proceeding commenced by the petition seems, therefore, to be a cause or matter within the meaning of Order XLIV, Rule 1. And Order XLVI, Rule 1, provides that an application which by Rules of Court is authorised to be made to a Justice and is not specifically required to be made to a Justice in Court (words which include an application for an order under Order XLIV, Rule 1) may be heard and determined by a Justice in Chambers. With regard to the grounds

of an application for a stay of proceedings, it is, I think, well settled that every Court has an inherent jurisdiction to stay proceedings which are an abuse of its process. In Barrett v. Day (1890) 43 Ch.D. at p. 449, North J., after referring to Order XXV, Rule 4, said: "Independently of this Order, the Court has undoubted jurisdiction to stay all proceedings, or dismiss an action, when on the facts proved to the satisfaction of the Court it appears that the action is frivolous and vexatious." He added:- "In my opinion, the prosecution of an action is vexatious when it is clear that no relief can be granted at the trial." The same jurisdiction was exercised in Lawrance v. Lord Norreys (1888) 39 Ch.D. 213. In that case Bowen L.J., at p. 236, referring to the plaintiff, said: "I do not say a word against his honour or good faith, but I am satisfied that no reasonable man could on the materials before us consider this action anything but groundless. I think it would be wrong to allow an action of this sort to hang over the heads of the defendants, an action which seems to me to contain all the elements of vexation and oppression."

Before considering the present application on its merits I should refer to one other matter. Sec. 197 of the Act provides that "no party to the petition shall, except by consent of all parties or by leave of the Court, be represented by counsel or solicitor." The petitioner appeared before me in person, the respondent by counsel. The petitioner did not consent to the representation of respondent by counsel, and opposed an application by counsel for leave to appear. He said that he could not afford himself to engage counsel. I did not think that this was a sufficient reason for refusing leave to the other party, and I thought that this was a case in which it was desirable that counsel should appear. I therefore gave the leave sought.

The petition relates to the election which took place on the 10th December 1949 in the Electoral Division of Kingsford Smith in New South Wales. The respondent, Gordon Anderson, was returned as elected. The petitioner was a candidate at the election. The petition is based on three grounds which are as follows:-

"1. The said Gordon Anderson is not capable of being chosen or of sitting as a Member of the House of Representatives he being under acknowledgement of adherence, obedience and/or allegiance to a foreign power within the meaning of Section 44 of the Commonwealth Constitution.

2. More than £250 was expended by or on behalf of the said Gordon Anderson as and by way of election expenses in contravention of Part XVI Sections 145 and 146 of the Commonwealth Electoral Acts of 1918-49.

3. Certain Commonwealth Government Department Publications produced wholly at the public expense were used by the said Gordon Anderson and/or his Agents for the purpose of influencing Electors in his favor and the cost of which is part of the Election Expenses as limited by the relevant part and sections of the Commonwealth Electoral Acts 1918-49."

I will deal first with the ground first stated. It is particularised in the petition as follows:-

> "The said Gordon Anderson was, at the times of his nomination and election, a professed member of the Roman Catholic Church. As such he, as in the case of all members of that Church in all countries, is under 'acknowledgement of Adherence, Obedience or Allegiance to a Foreign Power' - the Papal State. He is therefore incapable of being chosen or of sitting as a Member of The House of Representatives."

There is perhaps a certain ambiguity about this passage, but the petitioner made it quite clear to me that he did not allege that the respondent had entered into any individual or particular acknowledgement of adherence obedience or allegiance to what he describes as the Papal State. His thesis is that, merely by virtue of being a professed member of the Roman Catholic Church, the respondent owes allegiance to a foreign power. What he is saying is no more and no less than that every member of that church is the subject of a foreign power and for that reason incapable of becoming or being a member of either House of the Parliament of the Commonwealth. He concedes that, if this vast major premiss cannot be sustained, the first ground of his petition must fail.

It is obvious, in my opinion, that no such major premiss can be supported. The matter contained in the petition invites a close analysis of the history of the relations of Church and State over the centuries, with particular attention to the

"Roman question", to the relations of the State of Italy with the Papal States, and to the Lateran Treaty of 1929, by which Italy recognised the sovereignty of the Vatican City State. In my opinion, no such investigation can possibly be relevant to the election of a member of the House of Representatives for Kingsford Smith.

One may observe, as a matter of law, that every person born in Australia, into whatever religion he may be born and whatever religion he may embrace, is according to the law of this country (which is the only relevant law) a British subject owing allegiance to His Majesty, and that of that allegiance he cannot rid himself except in certain prescribed ways. One may observe, as a matter of fact, that many thousands of Catholics have fought in the armed forces of this country in recent wars. But the root of the matter, to my mind, lies in the fact that the petitioner really seeks to revive a point of view which was abandoned in England in 1829, when sec. 2 of Act 10 Geo. IV, c. 7, enacted that any person professing the Roman Catholic religion might lawfully sit and vote as a member of either House of Parliament, if in other respects duly qualified. Sec. 116 of our own Constitution was, of course, not enacted by men ignorant or unmindful of history, and it is, in my opinion, sec. 116, and not sec. 44(i) of our Constitution which is relevant when the right of a member of any religious body to sit in Parliament is challenged on the ground of his religion. Effect could not be given to the petitioner's contention without the imposition of a "religious test". In my opinion, the view put forward by ground 1 of the petition in this case is quite untenable.

With regard to ground 2 of the petition, the relevant provisions of the Act are secs. 145 and 146 (as re-enacted by the Commonwealth Electoral Act 1946) and secs. 147, 161(c), 162 and 191. The ground, as stated, does not in terms allege that excessive expenditure was incurred or authorised by the respondent, but this is perhaps not more than a formal defect which could be cured by amendment. It appears, however, from the particulars given later in

the petition, that the substance of the petitioner's allegation is that the Australian Labour Party expended money in advertising in the interests of all its candidates at the general election held in Australia on the 10th December 1949, and that the aggregate sum so expended represents more than £250 per candidate for the House of Representatives. Assuming that this allegation can be established, I think it clear that it would not afford a ground for declaring the election void. I am aware that in England a very stringent view has been taken of the responsibility of candidates for the expenditure of money spent in their interests, but here the allegation made cannot support the conclusion that the amount allowed by the Act was exceeded in the case of the respondent.

With regard to ground 3 of the petition, it is sufficient to say that, whatever may be thought of the acts alleged, if true, they cannot afford a ground for declaring the election in Kingsford Smith to be void.

For these reasons I am of opinion that the petition shows on its face that it has no prospect of success, and that it is vexatious and oppressive in the relevant sense. I am clearly of opinion that it ought to be stayed.

I order that proceedings on the petition be for ever stayed, and I order that the petitioner pay the respondent's costs. ~~I fix the costs at _____ guineas.~~ I certify for counsel for the respondent.