

was all that occurred, my present view is that it is not a **MACFARLAN** matter which should disentitle the sheriff to leave to interplead. The evidence does not make it clear that there was anything more than that.

J.
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GRANT.

Leave to interplead will be granted.

Order accordingly.

Solicitor for the sheriff: *Frank G. Menzies*, Crown Solicitor.

Solicitors for the judgment creditor: *Davis, Cooke & Cussen* for *J. R. Hanlon*.

Solicitors for the claimant: *Morrison & Sawers*.

P. E. J.

McLEOD v. MURPHY.

MANN A.C.J.

Local Government—Municipal council—Ouster of councillor—Unduly elected—Conduct of election—Fictitious ballot papers—Local Government Act 1928 (No. 3720), sec. 157 (1).

1934
Feb. 26, 27;
April 23.

At a municipal council election, at which there were two candidates, the number of ballot papers counted was greater than the number of votes that could lawfully have been recorded by the persons who voted. The successful candidate obtained seventy-four votes more than the other candidate. The number of ballot papers in excess was more than seventy-four. The fictitious ballot papers had been placed in the ballot boxes by fraud, but there was no proof of how or by whom that fraud had been committed, or any evidence that any fictitious ballot papers had been introduced with the knowledge of the successful candidate. The whole of the ballot papers had been officially burnt. On an order *nisi* for ouster from office of the candidate declared to have been elected,

Held, the election had been made unduly and contrary to the *Local Government Act 1928*, and the order for ouster should be made absolute.

Bridge v. Brown, [1916] 21 C.L.R. 582, distinguished.

ORDER NISI under sec. 157 of the *Local Government Act 1928*.

At an election of a councillor for the West Ward of the City of Richmond, held on the 25th August 1933, the respondent, David Murphy, received 644 votes, and the applicant, Frank McLeod, 570 votes. There were only the two candidates, and Murphy was declared elected. On the 22nd December 1933,

MANN A.C.J. McLeod obtained an order *nisi* calling upon Murphy to show cause why he should not be ousted from the office of councillor, on the ground that he was declared elected and held office unduly, contrary to the *Local Government Act* 1928, in that a number of fictitious votes were included, and the number of such fictitious votes was sufficient to affect the final result of the election.

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On the return of the order *nisi*, Mann A.C.J. directed an inquiry under sec. 157 (2) of the *Local Government Act* 1928 before His Honour Judge Macindoe, for his report upon certain matters of fact. Evidence was given at such inquiry that on the 26th February 1934, the returning officer, Councillor J. A. Loughnan, requested the Town Clerk, in whose custody the sealed parcels of ballot papers had been since the declaration of the poll, to destroy the papers in accordance with the provisions of sec. 145 (2) of the *Local Government Act* 1928, pointing out that the period of six months prescribed by that section had expired and stating that he wanted the papers destroyed to prevent his opponents making political capital out of them when he stood for re-election as a councillor. After some demur, the Town Clerk, in the presence of the returning officer and two other councillors, burnt the ballot papers, together with the ballot papers for the election of councillors for other wards of the city.

Judge Macindoe reported answers to the questions submitted to him as follows:—

1. Whether the number of ballot papers counted was greater than the number of votes that could lawfully have been recorded by the persons who voted at the election? Yes.

2. What was the number of such excess ballot papers? I am unable to ascertain the exact numbers but am satisfied there were substantially more than seventy-four votes.

3. Whether such excess ballot papers were introduced into the ballot boxes or otherwise included in the number counted by the fraud or connivance of any and what person or persons taking part in the conduct of the election? I am satisfied the excess ballot papers were introduced into the ballot boxes by fraud. The action of J. A. Loughnan (who was the returning officer and also the secretary of a committee which supported the candidature of the respondent) in having the election papers destroyed

raises a strong presumption that the irregularities occurred by his fraud or with his connivance, but I am unable to say that it has been conclusively proved that he was guilty of fraud or connivance on the day of the election.

4. Whether any of such fictitious votes were introduced with the knowledge and consent of the respondent? There is no evidence that any fictitious votes were introduced with the knowledge and consent of the respondent.

5. Generally as to the means by which and the persons by whom they were introduced? I am unable to answer this question.

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Ashkanasy, for the applicant, to move the order absolute.

Gorman K.C. (with him, *Dunlop*), for the respondent, to show cause—The Act does not prescribe the attitude to be adopted by the Court to the report of the referee. The Court should now look at the evidence. That evidence is not sufficient to sustain the ground set out in the order *nisi* and, that being so, the Court cannot act. Further, vital statements in the affidavit, but for which the order *nisi* would not have been granted, are shown to be untrue. The burden is upon the applicant to show that the fictitious votes had a determining effect on the election. Since the ballot papers are not available, the influence of the fictitious votes on the election cannot be proved and the election cannot be disturbed—*Bridge v. Bowen (a)*.

Ashkanasy, in reply, was stopped.

MANN A.C.J. In this case, in accordance with the provisions of the *Local Government Act 1928*, questions of fact were sent to a referee for determination and report, and his findings on those questions are now before me. He has found that the number of ballot papers counted at this election was greater than the number of votes that could lawfully have been recorded by the persons who voted at the election. He has found that the excess of ballot papers was more than seventy-four, seventy-four being the difference between the total numbers of the votes cast for the respective candidates; and he has found that these excess ballot papers were introduced into the ballot boxes by fraud.

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Now, giving, as I am bound to do, the fullest weight and authority to the decision in *Bridge v. Bowen* (b), which is relied upon by counsel for the respondent in this case now before me, it seems to me that the defect in the election is of a fundamentally different order from the defect arising from impersonation which the Court had in view in that case. The ballot papers at an election are under the sole control of the returning officer, and the strictest supervision is required in the issue as well as in the counting of the ballot papers. The ballot boxes are also in the care and under the supervision of the returning officer, and in the expression "the returning officer" I of course include those subordinate officers and assistants whom he is authorised to employ. It would be a clear breach of the requirements of the Act if the returning officer or his assistants issued to a voter more ballot papers than that voter was entitled to use, having regard to his qualifications for that particular election.

It is the conclusion which I draw, and the only conclusion I can draw, from the findings, that in some way and by some means ballot papers either found their way improperly into the hands of voters to be by them introduced into the ballot boxes, or the excess ballot papers were themselves introduced into the boxes by those whose duties were concerned with the conduct of the election. In the first case, it is consistent with the excess papers being obtained from the returning officer by some fraud of the voters, that is to say, of one or more of the individual voters, although I find some difficulty in imagining any fraudulent device that could lead to that result.

But it seems to me that, whether the result can be attributed to fraud on the part of those connected with the conduct of the election or not, it is quite inconsistent with anything that can be described as a due or proper conduct of the election. It seems to me to constitute clearly an irregularity of the gravest description, whether that irregularity occurred through mere negligence on the part of those who had the custody of the papers or not. Papers which should never have passed from the returning officer's hands into the hands of voters or into the ballot boxes did find their way into the ballot boxes. It seems to me that those are the conclusions I am bound to draw from the findings of the learned Judge, and it seems to me that in either case there was such an irregularity in the whole conduct of the election as to

take the case outside the authority relied upon by counsel for the respondent. MANN A.C.J.

It follows, I think, to use the words of the Act, that the election has been made unduly and contrary to the Act, and the result is that the order *nisi* must be made absolute, with costs.

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Order absolute.

Solicitor for the applicant: *G. Gordon Hill.*

Solicitor for the respondent: *W. Slater.*

H. J. A. C.

[NOTE.—On the 28th May 1934 the High Court of Australia refused special leave to appeal from the above decision.]

In re LANSELL.

SANDHURST AND NORTHERN DISTRICT TRUSTEES,
ETC., CO. LTD. *v.* LANSELL.

MANN A.C.J.

1934

May 1, 7.

*Administration and Probate—Duty on deceased persons' estates—Settlement by joint owners—Administration and Probate Act 1928 (No. 3632), sec. 177.**

A husband and his wife were joint owners of policies of assurance upon the life of the husband. They joined in executing a deed of settlement by which, after reciting that they had mutually agreed to assign the policies, they assigned the policies to a trustee upon trust upon the death of the husband to invest the moneys payable under the policies and to pay the income to the wife during her life should she survive the husband, and from and after the death of the survivor of the husband and wife upon trust for the children of the marriage. The husband died.

Held, the agreement recited in the deed effected in equity a severance of the joint ownership of the policies, and therefore each settlor as a tenant in common settled an undivided moiety. On the husband's death the settlement became liable to be registered under sec. 177 of the *Administration and Probate Act 1928*, duty being payable upon the value of one-half of the property settled by the deed.

Re Wilford's Estate, [1879] 11 Ch.D. 267, applied.

* *Administration and Probate Act 1928*, sec. 177—"Every settlement of any property made . . . by any person containing trusts or dispositions to take effect after his death, shall upon the death of the settlor be registered . . . and no such trusts or dispositions shall be valid unless such settlement is so registered." The section also provides that no settlement is to be registered unless a statement is filed setting forth the nature of the property comprised in the settlement and the value thereof, and that duty is to be paid calculated upon the total value appearing in the statement.