

O N A P P E A L
FROM THE FULL COURT OF THE SUPREME COURT OF
SOUTH AUSTRALIA

B E T W E E N :

JAMES BARTON GILBERTSON Appellant

- and -

THE STATE OF SOUTH AUSTRALIA and THE
ATTORNEY GENERAL FOR THE STATE OF SOUTH AUSTRALIA
Respondents

C A S E F O R T H E A P P E L L A N T

Record

A. INTRODUCTORY

1. This appeal is from a final judgment dated pp.158-159
the 3rd November 1976 of the Full Court of the Supreme Court of South Australia (Bray C.J., Walters, Zelling, Wells and Jacobs JJ) in an action in which the present appellant (hereinafter called "Gilbertson") was plaintiff and the present respondents were defendants. The hearing of the said action on questions of law arising upon the pleadings was refer- pp.8-9

red to the said Full Court which, in accordance with the decision of the majority of the Court gave the said decision which is the subject of this appeal.

2. The appeal is brought pursuant to leave in this behalf granted by the said Full Court on 10th December 1976.

See foot-
note to
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II

B. THE CIRCUMSTANCES OF THE ACTION

10 3. In this action (commenced by Writ on the 14th day of September 1976) Gilbertson a person who is entitled and qualified to vote at House of Assembly elections in South Australia challenges the validity of at least portion of the legislative scheme contained in the South Australian Act No. 122 of 1975 (Constitution Act Amendment Act (No. 5) 1975) and in the circumstances challenges the efficacy of matters purporting to have been done pursuant to that Act.

pp.1-3

p.4 1.8

20 4. The said Act No. 122 of 1975 (amending the Constitution Act 1934-1975) purports to establish (Section 78) an Electoral Districts Boundaries Commission which is directed (Section 82) to make periodic State electoral boundary redistributions for the purposes of House of Assembly elections; the said Act purports to empower the

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Commission to implement its decision (from time to time) by its own order (Section 82) published in the Government Gazette (Section 86(1)) but subject to a right of appeal on the part of any elector to the Full Supreme Court against any such order (Section 86(2)). In the event of any appeal, the Act provides that the relevant order of the Boundaries Commission shall not take effect until three months after the appeal has been disposed of (Section 86(4)). The said Act specifies the matters to be taken into account by the Commission in making its orders (Section 83) and specifies the powers of the Supreme Court on appeal therefrom which include the power (Section 86(7)) for the Supreme Court to vary an order of the Boundaries Commission. The Act provides for the establishment of 47 electoral districts (Section 27) and provides an arithmetical formula (Section 77) for calculating (from the electoral rolls) a numerical quota of electors for each district but subject to a tolerance in each district of 10% (to which extent the number of electors in a district may vary from the quota). The above references in this paragraph to section numbers are to sections of the principal Act (Constitution Act 1934-1975) as inserted by the

amending Act No. 122 of 1975.

5. The Boundaries Commission purported to make its first order in terms of a report gazetted on 5th August 1976 and appeals against this order (by persons other than Gilbertson) have been in-

pp.175-341 and especially p.175 and p. 202
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stituted under the Act and are still pending in the Supreme Court.

pp.346-355

6. By consent of the parties the Full Supreme Court had before it a memorandum issued by the Electoral Districts Boundaries Commission

pp.345-346

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dated 23rd August 1976 noting errors in the Commission's report upon which its order of 5th August 1976 is based. The effect of this memorandum is that in the adjoining proposed new electorates of Hartley and Coles an adjustment in the respective numbers of electors should be made for the purposes of the Commission's report. A description of these two proposed electoral dis-

p. 175

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tricts will be found in the Commission's report (Districts numbered 23 and 24) and the relative juxtaposition of these districts appears from the diagram of Metropolitan Districts contained in the report.

pp.264-265

pp.266-267

p. 176

The substance of the Commission's memorandum is

that the District of Hartley will move from 17247 electors (2.75% over the quota) as shown in the Commission's report to 18233 electors (8.62% over the quota); the District of Coles will move from 17433 electors (3.86% over the quota) as shown in the Commission's report to 16447 electors (2.01% under the quota).

p. 265
11. 6-7

p. 267
11. 5-6

C. GILBERTSON'S FORMAL CLAIM AND SUBSTANTIVE ARGUMENTS

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7. In this action Gilbertson has claimed a declaration :-

(a) that the said order of the Electoral Districts Boundaries Commission is of no effect and does not take effect

p. 3
11. 8-11

(b) that sub-sections 2 and 7 of Section 86 of the Constitution Act 1934-1975 as contained in the said Act No. 122 of 1975 are void and inoperative by virtue of repugnancy to Imperial Law in that they purport to confer upon the Supreme Court of South Australia a function which is inconsistent with the established judicial character of the Court.

p. 3
11. 12-26

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8. Gilbertson has argued two general questions before the said Full Court as follows :-

Firstly, Gilbertson contended that the

p. 63
11. 23-42

appellate function which the Act No. 122 of 1975 purports to confer upon the Full Court is either legislative or administrative in character but in any event is repugnant to the function of a Court of judicature as the Supreme Court was so established by or under Imperial legislation and that by virtue of the operation of the Colonial Laws Validity Act (Imp.) 1865 the appellate provisions of the Act No. 122 of 1975 are void.

p. 64
11. 1-2

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Secondly, Gilbertson contended that upon the proper construction of the said Act No. 122 of 1975 and after applying such principles of severance or reading down as may properly be available, the appellate provisions of the Act must nevertheless be regarded as wholly invalid and incapable of taking effect in any restricted fashion with the consequences that the order of the Electoral Boundaries Commission never takes effect.

p. 89
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D. THE FULL COURT'S DECISION

9. The majority of the Supreme Court (namely p.39)
 1.5-20)
 Bray CJ, Walters and Jacobs JJ) decided against p.59)
 1. 20)
 Gilbertson upon his first contention (see para- p. 157)
 1.20-46)
 graph 8 above), but Zelling and Wells JJ accepted
 Gilbertson's contention in this behalf and decided p. 85 1.20
 p.86 1. 28
 that it was beyond the legislative competence of p.141-142
 1.34
 South Australia to confer upon its Supreme Court
 functions otherwise than of a judicial character.

10. Upon Gilbertson's second contention (see p.89 1.20
 p. 90
 paragraph 8 above) Zelling J accepted Gilbertson's
 contention and decided that the whole of the Act
 No. 122 of 1975 must be treated as invalid as in
 His Honour's view it was not possible to sever the
 invalid portions of the Act from the remainder there- p.142
 1.35 -
 of. On the other hand, Wells J considered that p.143
 1.35
 the Act could be given a restricted operation by p.140 1.11
 reading distributively the provisions which would
 otherwise have been invalid and he accordingly
 considered that the validity of the Act and its
 various portions should be up-held but with a
 restricted operation given to the review function p. 140
 11.37-40
 of the Supreme Court; Wells J considered that
 this function was at least as extensive as the
 prerogative processes (if they had been applic-
 able).

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E. LEGISLATION UNDER EXAMINATION

11. The legislation which is relevant to Gilbertson's argument is as follows :-

- (a) Constitution Act (S.A.) 1934-1975 and especially Amendment No. 122 of 1975.
- (b) Electoral Act (S.A.) 1929-1973.
- (c) Supreme Court Act 1935-1975; This Act (S.6) "continues" the Supreme Court "as by law established". It requires (S.48 (1)(F) the "Full Court" to hear and determine all matters required by "the express provision of any other Act to be heard and determined by the Full Court". Full Court is defined in Section 5 as the Supreme Court consisting of -
- "(a) not less than three Judges, or
- (b) if three Judges are not available to sit in the Full Court, any two Judges".
- (d) 4 & 5 Wm. IV Ch. 95 (1834) - authorising the establishment of South Australia and (inter alia) authorising the establishment of Courts .
- (e) 1836 Imperial Order in Council - establishing South Australia and empowering five nominated persons to constitute courts .
- (f) S.A. Ordinance (No. 5 of 1837) - Local Ordinance establishing Supreme Court.
- (g) 5 & 6 Vic. Ch. 61 (1842) - repealing all former South Australian laws but preserving things done thereunder.
- (h) 13 & 14 Vic. Ch. 59 (1850) - Authorising establishment of Responsible Government in South Australia with plenary powers.

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- (i) S.A. Statute (No. 2 of 1855-6) - establishing Constitution for South Australia.
- (j) S.A. Statute (No. 31 of 1855-6) - reciting the establishment of Supreme Court under (inter alia) Ordinance No. 5 of 1837 and providing "That the said Supreme Court so established as aforesaid shall continue".
- 10 (k) 1865 Colonial Laws Validity Act.

F. GILBERTSON'S SUBMISSIONS UPON THIS APPEAL

12. Gilbertson respectfully adopts as his argument the whole of the reasons for judgment of Zelling J and that portion of the judgment of Wells J in which he decides that the Supreme Court of South Australia is restricted to a judicial function. A convenient summary as to the restrictions upon the legislative competency of the Parliament of South Australia as regards the Supreme Court of South Australia is contained in the judgment of Wells J who paraphrases Gilbertson's argument. In essence Gilbertson contends that the function of the Supreme Court was established by and under Imperial legislation as a Court of Judicature and that any attempt by the South Australian Legislature to change the character of the Court by adding to its constitution a non judicial function involves repugnancy.

pp.61-90

pp.92-144

p.97 1.20-
p.102 1.34

13. Gilbertson respectfully joins issue with the reasons for judgment given by Wells J for giving a restricted operation to the appeal provisions contained in Section 86 of the Constitution Act 1934-1975. Gilbertson will contend that the Supreme Court's power to vary the order of the Boundaries Commission as contained in Section 86 (7) of that Act must inevitably involve the Supreme Court upon appeal in an exercise in expediency as opposed to the administration of justice in accordance with settled legal principle.

p.142 1.35-
p.143 1.35

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14. Gilbertson respectfully submits that the judgment of the Full Court of the Supreme Court of South Australia was wrong and ought to be reversed and this appeal ought to be allowed with costs for the following, amongst other

R E A S O N S

(i) that it is beyond the competence of the Parliament of South Australia to endow the South Australian Supreme Court (as a court of judicature established by or under Imperial law) with a function to exercise other than judicial power; the appeal provisions contained in the Act No. 122 of 1975 (and in particular Section 86 of the Constitution Act 1934-1975 therein contained) are to be

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characterised as necessarily involving legislative or administrative functions which are inconsistent with recognised judicial functions and are repugnant to Imperial law by which the Court was established.

10 (ii) that the appeal provisions contained in the Act No. 122 of 1975 are a necessary part of the legislative scheme insofar as that scheme involves an order of the Electoral Districts Boundaries Commission taking effect and this scheme would be significantly altered if the appeal provisions were removed so as to give any effect to the order of the Boundaries Commission without an over-riding right of appeal. Moreover any attempt to give the appeal provisions a restricted operation must also necessarily involve the legislative scheme in being significantly altered otherwise
20 intention. The purported order of the Boundaries Commission therefore cannot be permitted to take effect.

(iii) that the reasons for judgment of Zelling J were correct in law and that the statement of claim discloses a good cause of action.

HORTON WILLIAMS Q.C.

ASHLEY WATSON

No. 36 of 1976

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