A CONSTITUTIONAL EXTRAVAGANZA.

Tonkin & Others v. Brand & Others[1] was the legal culmination of two years of acrimonious political dispute between the government of Western Australia (a Liberal-Country Party coalition) and its Labour opponents. The plaintiffs were all members of the Opposition; the defendants, all members of the Government of the day. Not even the latter denied that, in the events which had happened, they were under a *political* obligation (to put it at its highest) to take the action necessary to effect a redistribution of the fifty electorates each returning one member to the Legislative Assembly; but they most strenuously denied that they were under any *legal* obligation to do so.

The background of the dispute will become more intelligible if a brief history of the Western Australian methods of determining the distribution of the electorates is first given. When responsible government was conceded by the United Kingdom in 1890[2] and a bicameral legislature established, the thirty electorates into which Western Australia was then divided for Legislative Assembly elections were defined in Schedule A of the Constitution Act itself.[3] That definition gave practical effect to the view then generally prevalent in Western Australia that (i) what was then and still is known as the "North-West"[4] should have special treatment in the matter of representation and (ii) in the remainder of the colony the electoral distribution in the agricultural, pastoral, and mining districts (*i.e.*, everything outside the Perth-Fremantle metropolitan area) should be "weighted" in their favour because of their significance in the economy of the community. When the Constitution Act was amended in 1893[5] and the number of Assembly seats was increased to 33, the electoral divisions were defined either by that Act or by the 1890 Act. Similarly in 1896, when the number of seats was raised to 44,[6] and again in 1899 when the electoral

1 [1962] West. Aust. R. 2. A brief description of the relevant facts appears in this volume in Western Australian Case Notes, at 99-100.

2 By 53 & 54 Vict. c. 26.

3 This did not mean that the Parliament of the United Kingdom (or the Queen's advisers in that country) arbitrarily defined the electorates. Its part was limited to formally approving the adoption of a new constitution for Western Australia which had been passed by the then (unicameral) Legislative Council and which appears as the first Schedule of the United Kingdom Act.

4 *I.e.*, the northern and larger part of Western Australia lying in the subtropical or tropical zone.

5 By Western Australian Act No. 14 of that year.

6 By Act No. 18 of that year.

divisions were once more increased to the present number of 50,[7] the same technique of weighting was used and the new electoral boundaries were described in the Acts. The outcome of these practices was that a number of electorates (usually four) were assigned to the North-West regardless of the paucity of its population; and that every metropolitan electorate contained a substantially larger number of potential voters than each of the non-metropolitan divisions. The degree of disparity between the metropolitan and the other electorates depended upon (a) the extent to which the government of the day *genuinely* believed that the non-metropolitan area should have greater representation than its population justified or merely paid lip service to that belief and (b) what it could persuade the two houses of the legislature to approve.

In 1904 the electoral distribution was again altered by this empirical method, but this time by a separate Redistribution of Seats Act[8] instead of by an amendment of the Constitution; section 6 of the new Act provided that a Bill for its amendment must be passed by absolute majorities in both Houses. The 1904 Act was itself repealed by an Act of the same title in 1911;[9] the latter was replaced by a third Act in 1929[10] which was amended eight months later[11] to alter the boundaries of five of the metropolitan electorates. In the meantime, however, a different principle of distribution had been adopted which gave statutory authority to the practice of discrimination that had always been observed in the earlier Acts. The Electoral Districts Act of 1922[12] has as its long title, "An Act to make provision for the Better Representation of the People of Western Australia in Parliament"; it assumes that the "people" will be better represented if certain areas get more members than would be allotted to them merely on the basis of actual (electoral) population. The North-West (described as the area comprising the then existing electorates of Kimberley, Roebourne, Pilbara, and Gascoigne) received its sacrosanct quota of four electoral divisions; the remainder of the State was then divided into four Areas,[13] namely, Metropolitan, Agricultural, Goldfields Central, and Mining. At this stage in the State's history all

7 By Act No. 19 of that year.

8 Act No. 21 of 1904.

9 Act No. 6 of 1911.

10 Act No. 1 of 1929.

11 Act No. 26 of 1929.

12 Act No. 10.

13 Defined in the Schedule by reference to electoral districts existing when the Act was passed.

persons eligible to vote were required to register as electors and to vote—and were subject to penalties if they failed in either duty.

Under this Act an Electoral Commission was to be set up, comprising a judge of the Supreme Court as chairman, the Surveyor-General, and the Chief Electoral Officer of the State. The Commission was required first of all to halve the number of electors in the Metropolitan Area and add to the figure so ascertained the actual number of electors in the Agricultural and Goldfields Central Areas and one and a half times the number of electors in the Mining Area. It would then divide the aggregate total by forty-six, *i.e.*, by the number of seats available after the allocation of the North-West's four, to give a "quota." Next it would divide the "adjusted" number[14] of electors in each Area by this quota in order to determine the number of electoral districts to which each Area would be entitled; if, as might well happen, this did not result in the allocation of the full number of 46 divisions, the Commission in effect could assign the unallotted seat (or seats) to any Area (or Areas). The next step was to divide the actual electoral population in each Area by the number of seats allotted to it so as to obtain a quota for each electoral district in the Area, and then to define boundaries; but in doing so the Commission need not adhere rigidly to an equality of voters, it could (for the reasons stated in section 6[15] of the Act) deviate not more than one-fifth above or below the quota. Observing these statutory instructions the Commission would divide the State into fifty electoral districts and send its recommendations to the Minister, who was required to submit them to both Houses and to introduce a Bill to give effect to them. But though the section is mandatory—"A Bill *shall*[16] be introduced for the redistribution of seats etc."—neither House is under any compulsion to pass the Bill unamended or indeed to pass it at all. Provision is also made—again in mandatory form—for redistribution if (a) the Assembly so directs or (b) if the report of the Chief Electoral Officer as to the state of the electoral rolls at any triennial election shows that five or more electorates deviate by more than the permissible margin above or below quota.[17] This second contingency pre-

[14] *I.e.*, half the number of actual electors in the Metropolitan Area, and one and a half times the actual electors in the Mining Area.

[15] *I.e.*, after taking into consideration such factors as
(a) community of interest,
(b) means of communication and distance from the capital (Perth),
(c) physical features, and
(d) the existing boundaries of districts.

[16] Emphasis added by author.

[17] It is curious that section 6, which authorizes variations in the number of electors in each district, uses the vulgar fraction "one-fifth" above or below

supposes that a duty rests on the Chief Electoral Officer to report to the Minister; but nowhere in the Electoral Districts Act or in the Electoral Act[18] itself is there any provision requiring the Chief Electoral Officer to make such a report. In providing for the appointment of a Chief Electoral Officer the Electoral Act merely says that he "shall, under the Minister, be charged with the administration of this Act."

In 1929 the principle of unequal electorates was maintained by a new Electoral Districts Act[19] which amended the 1922 Act in some important particulars. The number of Areas (outside the North-West) was reduced from four to three by merging the Goldfields Central Area and the Mining Area under a new title, the Mining and Pastoral Area. In the Metropolitan Area every three electors now counted as two; in the Mining and Pastoral Area each elector counted as two; when the "adjusted" totals for these Areas had been calculated and added to the actual number of electors in the Agricultural Area the procedure was the same as under the earlier Act. Electoral Commissioners (the Act provided that the Commonwealth Electoral Officer for Western Australia[20] could be appointed a Commissioner in place of the (State) Chief Electoral Officer) having been duly appointed, their recommendations were embodied in the Redistribution of Seats Act 1929.[21] It was found necessary, later in the year, to pass an amending Act[22] to make minor changes in the defined boundaries of three metropolitan districts. In parenthesis it may be of interest to note that under these two Acts of 1929 the electoral quotas and districts were (1) in the Metropolitan Area, 6531 and 17 seats, (2) in the Agricul-

quota to define the extent of the permissible variations; but section 10, which provides for redistribution when the deviations are excessive, speaks of the electoral enrolment falling short of or exceeding the quota by more than "twenty per centum"—a distinction without a difference.

18 No. 27 of 1907; reprinted, with amendments up to and including No. 47 of 1940, in Vol. 2 of the Reprinted Acts of Western Australia; subsequently thereto amended in 1948, 1949, 1951, 1952, 1953, 1957, and 1959.

19 No. 25 of 1928.

20 The distribution of the federal electorates allotted to each State is determined exclusively by the Commonwealth legislature, which does not adopt any weighting method but treats all electors as equal wherever they may live. It does not, however, require all its electorates in a given State to contain as nearly as possible the same number of electors. The number of registered electors in a State is divided by the number of seats allotted to the State to give a quota; a variation up to one-fifth above or below the quota is permissible for reasons similar to those applying in the State scheme: See note 15 *supra,* and Commonwealth Electoral Act 1918-1961, sec. 19.

21 No. 1 of that year.

22 Redistribution of Seats Act Amendment Act, No. 26 of 1929.

tural Area, 4074 and 21 seats, and (3) in the Mining and Pastoral Area, 2005 and eight seats.[23]

The two Redistribution of Seats Acts, and the measure on which they were based, had been passed under a Labour government which lost office to its Nationalist-Country Party opponents in 1930. The new government saw no reason to amend the weighting system and the actual allocation of seats which had given it a majority in the Legislative Assembly; but in 1933 it was defeated by Labour, which then began a long term of office that continued until 1947. In 1937 a Redistribution Bill was introduced by the government which would have had the effect of leaving the number of Metropolitan members at 17 and of increasing the number of Mining and Pastoral seats from eight to eleven at the expense of the Agricultural Area. Though the Bill received a small majority at the second-reading vote in the Legislative Assembly it lacked by one vote the statutory absolute majority required for its passing; it thereupon lapsed. Thereafter the Labour administration confined its attempts at electoral change to Bills to liberalise the property franchise for the upper House; none were successful, the Opposition (which had a majority in the Legislative Council) constantly taunting the government with its failure to set its own house in order with a redistribution of seats. It conveniently forgot that the opposition of its political allies in the other House had frustrated the government's only attempt to do so in 1937; but what it really wanted was not a re-allocation of seats under the existing legislation but the adoption of a new method of distribution which would deprive Labour of some safe seats in the Mining and Pastoral Area and give its opponents a good chance to win a few new seats in the Agricultural Area.

The Opposition's chance did not occur until 1947 when it had become the government after the election held early in that year. Late in the first session it introduced a new Electoral Districts Bill which, after passing both Houses by absolute majorities,[24] became law as Act

[23] See (1929) 81 PARLIAMENTARY DEBATES (Western Australia) 25 *et seq.*

[24] This requirement might have led to the defeat of the Bill, as government supporters in the Legislative Assembly numbered only 25 after one of them had been elected Speaker. If the (Labour) Opposition had stood pat, the Bill would have been lost because of failure to be passed by an absolute majority (*i.e.*, by 26 voting in its favour). But in the vital divisions at the end of the second-reading and third-reading stages, the Opposition quietly allowed one of its members to cross the floor and vote for the Bill. Why did it do so? It appears to have been influenced by the then recent misfortunes of the Labour Party in Victoria; sitting there on the government benches, it had had the mortifying experience of seeing three Supply Bills

No. 51 of 1947. This Bill, which made a number of significant changes in the existing law, was bitterly opposed by Labour, particularly when after the committee stage (which began at approximately 6 p.m. on 4th December and ended at 2 a.m. on the next day) the Minister in charge of the Bill immediately moved the third reading which, despite very vocal protests and several dilatory motions by the Opposition, was finally carried at 10.25 a.m.[25]

The new Act reconstituted the Electoral Commission so that it now consists of the Chief Justice of the Supreme Court as chairman, the Under-Secretary for Lands (in place of the Surveyor-General), and the Chief Electoral Officer of the State; substitutes may be temporarily appointed for any nominated person who is unable to sit. The North-West lost one of its members, the previously existing four electorates to be re-divided into three. The remainder of the State was consolidated into two Areas, *viz.*, (1) the Metropolitan, in which

rejected by the Legislative Council. As this high-handed and almost unprecedented action left the government very short of ready money, it had no option but to recommend a dissolution as no other party could form a government. At the forthcoming election it expected to be able to fight on the issue of the propriety of the Council's action in rejecting the necessary Supply Bills. But its opponents had other ideas; they planned to fight the election on a platform of hostility to the Banking Bill (to provide for the nationalisation of banking) recently introduced into the federal parliament by the (federal) Labour Party. Though this issue was quite irrelevant to State politics, it undoubtedly influenced the Victorian electors, who voted heavily against the State Labour Party. It seems that the Labour Party in Western Australia was afraid that, if the Electoral Districts Bill failed to obtain an absolute majority, the government would ask for a dissolution on the ground that "electoral reform" had been the major item in its policy statements at the time of the 1947 election. Labour apparently feared that if a new election were held the government would take a leaf from the Victorian book and campaign, not about electoral reform, but about the iniquities of the federal banking legislation. The Victorian catastrophe (catastrophe, that is, from the Labour point of view) might have been repeated in Western Australia; Labour might well have lost a number of seats and have been rendered impotent when the Electoral Districts Bill was re-introduced. Instead of running this risk it preferred to encourage (or direct?) one of its members to vote for a Bill which it heartily disliked.

25 It is of passing interest to note that after the Attorney-General had at the opening of the second-reading debate made the usual speech explaining the policy of the Bill, he was followed by a succession of Opposition speakers. There were occasional interjections from the government benches, but no member from that side of the House sought to attract the Speaker's eye until the debate was obviously nearing its end. Then the Minister for Education (speaking, one suspects, not so much in his capacity as a minister as in his role as leader of the Country Party segment of the coalition government) had a brief say; he was immediately followed by the Attorney-General who briefly dealt with some of the objections and then moved that "this Bill be read a second time."

for quota purposes every two electors were to count as one, and (2) a composite Area to be known as the Agricultural, Mining, and Pastoral Area, in which each elector counted as one. The electoral population of the second Area, to which is added half the electoral population of the Metropolitan Area, is then divided by 47 to give a quota. The division of the number of actual electors in the former Area, and of the adjusted number of electors in the latter Area, by the quota gives the number of seats to which each Area is entitled—with the proviso that if one seat remains unallotted by this method it must go to the Metropolitan Area.

The Electoral Commission now proceeds to determine the actual boundaries of the electorates. The Commission should, as far as is practicable, give each electorate the same number of electors;[26] but, as under the earlier Acts,[27] they can authorize a deviation of ten per cent. (not of twenty per cent. as before) above or below. The Commissioners then publish their findings in the *Government Gazette* and in a newspaper circulating in an electoral district whose boundaries they propose to alter. Any person[28] who objects to any of the Commissioners' proposals may do so in writing but must send his objections to them within two months of the publication of their findings. The Commissioners need not pay any attention to objections and need not say, if they decide to override them, why they have done so; they must send their final report and recommendations to the Minister in charge of the Electoral Act—on or before a date to be fixed by the Governor, which however must be within eight months of the date on which the Act was brought into force. The final recommendations come into operation three months after publication in the *Government Gazette* without reference to Parliament; hence there is now no necessity for the introduction of a Bill to give effect to the new distribution as was essential under the earlier and now repealed Acts. Parliament has no say; its role is now limited to the opportunity given to the Legislative Assembly to pass a resolution calling for a redistribution; if it does pass such a resolution, a Proclamation must be issued by the Governor appointing Commissioners, whose functions are exactly the same as before and whose findings go through the same routine—with this important modification, under an Act passed in

[26] Owing to the weighting system the average in the Metropolitan Area electorates will of course be twice as large as the average in the Agricultural, Mining, and Pastoral Area.

[27] See note 15, *supra*.

[28] The Act says "any person", *i.e.*, objections can be made by persons who are neither registered electors nor entitled to become electors.

1955,[29] that the final recommendations come into operation on the date of publication in the *Government Gazette.*

The 1947 Act is in mandatory terms—"Such a Proclamation *shall*[30] issue" (a) on resolution of the Legislative Assembly, or (b) "if in the report by the Chief Electoral Officer to the Minister to whom the administration of the Electoral Act, 1907-1940, is for the time being committed, as to the state of the *rolls made up for any triennial election*[31] it appears that the enrolment in not less than five Electoral Districts falls short of or exceeds by twenty per centum the quota as ascertained for such districts under this Act."[32] The deliberate purpose of the Act is to put it out of Parliament's power to prevent a redistribution once more than five districts are "out of balance", and to debar Parliament from interfering in any way with the Electoral Commission's recommendations; it may be noted incidentally that the first re-distribution under the Act altered the boundaries of every electoral district in the State.

When the rolls closed for the triennial election held in March 1959 it was obvious that more than the statutory maximum of five districts contained a number of electors greater or less than the quota by more than the permissible twenty per cent.; as the returns came in it became equally obvious that the retiring (Labour) government was certain to be defeated. Thereafter significant events occurred with surprising speed. Before all the returns were in, it seems, the Chief Electoral Officer had reported to the Minister that nine electoral districts had an enrolment more than twenty per cent. in excess of the quota, and that in a tenth district the enrolment was more than twenty per cent. below quota. The Labour government, now facing certain defeat and loss of office, decided not to leave it to its successor to start the machinery which would produce a redistribution; in Executive Council it advised the Governor to issue a proclamation in accordance with section 12 of the Act, and such a proclamation was in fact issued on 1st April 1959.[33] The Labour government then resigned, and was succeeded by the usual Liberal-Country Party coalition.

It did not suit the purposes of the new government to see the electoral districts redefined in 1959 at the very beginning of what would normally be three years of office. It declared that it proposed

[29] Electoral Districts Act Amendment Act, No. 4 of 1955.

[30] Emphasis added.

[31] Emphasis added.

[32] Electoral Districts Act 1947, sec. 12 (2).

[33] It is not thought that there was any significance in the date (April Fools' Day)!

to ask the Legislature to amend the 1947 Act; if the Legislature did so, all the work put into a redistribution might well prove to have been wasted. The immediate problem, however, was that once put into motion the machinery of redistribution could not be interrupted and must produce a result which would have the force of law. As the government had apparently not then made up its collective mind as to what amendments to the 1947 Act it would sponsor, it decided to introduce a Bill to cancel the Proclamation already issued. The Bill, which became law on 7th July 1959 as the Electoral Districts (Cancellation of Proclamation) Act, is curiously circuitous in its wording. Though the short title embodies the words "Cancellation of Proclamation" and the long title begins with the words, "An Act to cancel a Proclamation promulgated pursuant to the power conferred by the Electoral Districts Act, 1947, etc.", the operative words of the Act take a different form. Section 2 declares that "The provisions of the proclamation made on the first day of April, one thousand nine hundred and fifty-nine, . . . are hereby cancelled and shall be deemed not to have been in operation." In similar vein section 3 declares that the several appointments of the Electoral Commissioners "are hereby cancelled, and shall be deemed not to have been made."

For reasons given elsewhere[34] the government was unable—or unwilling—to introduce a Bill to amend the 1947 Act; but in the Legislative Assembly it consistently and persistently refused to give any undertaking that there would be a redistribution before the next triennial election early in 1962. As 1960 neared its end the time factor became more and more important; unless the redistribution machinery were started up before about the middle of 1961, there would be insufficient time for the Electoral Commission to complete its task before the 1962 election.[35] Just before Christmas Day 1960 five Labour members of the Legislative Assembly, each representing an electorate with an enrolment more than twenty per cent. above quota, issued a writ against all the members of the Executive Council (*i.e.,* all the members of the government of the day), claiming a declaration that

[34] See (1960-1962) Western Australian Case Notes 99-100.

[35] One serious defect in the 1947 Act is that if the Chief Electoral Officer reports on the state of the electorates soon after the triennial election, the procedure for redistribution should start and be completed *in the first* year of the new parliament. With a rapid increase in population, and the marked tendency to urban, and indeed metropolitan, agglomeration, it may well happen that before the next triennial election more than five seats under the new redistribution will already be out of balance. To ensure that few seats would vary disproportionately from the quota at each election the Act should have provided for a redistribution in the year immediately preceding that in which the usual triennial election is due to be held.

the defendants were under a legal duty to advise the Governor in Executive Council to issue a Proclamation under the 1947 Act; they did not ask for a mandamus to compel the defendants to give that advice. On the pleadings certain issues of law were, after hearing by a judge in chambers, settled for determination by a Full Court (which normally consists of three of the Supreme Court judges). They were:—[36]

1. Did the Court have jurisdiction to make the declaration claimed and, if so, should it exercise it?
2. Had the plaintiffs sufficient interest to sustain the action?
3. What was the effect of the Electoral Districts (Cancellation of Proclamation) Act 1959?
4. Is there a legal duty imposed on the defendants to advise the Governor to issue a Proclamation under the 1947 Act?

For the plaintiffs it was argued that they had sufficient interest to sustain the action both as members (because the electorates which they represented and which they proposed to contest at the next election were much larger than they should have been) and as electors[37] (because as electors in a swollen constituency their individual votes had a reduced value). Further, they contended that the effect of the 1959 Act had been to nullify completely the Proclamation of 1st April 1959, so that there was thenceforth no compliance with the mandatory terms of section 12 of the 1947 Act that "a Proclamation shall issue" in the events which had happened. If the Court declared that the Executive Council was under a *legal* duty to give certain advice it was not in any way interfering with the executive branch of government; just as the Court could restrain a minister from giving illegal advice, so it could declare that in certain circumstances the minister was under a legal duty to act, even though the Court possessed no coercive power to compel the minister to perform that duty.

For the defendants none of these arguments were conceded; but counsel found himself in the impossible position of having to argue that the effect of the 1959 Act was to leave the Proclamation in existence (whence it was contended that there had been and still was full compliance with the requirements of the 1947 Act) though bereft of any operative effect. The claim of the plaintiffs for a declaration was merely a disguise for a claim for mandamus; and mandamus, with its possible consequence of committal for contempt if disobeyed,

[36] Paraphrased from the report in [1962] West. Aust. R. 2, at 5-6.

[37] Under the Electoral Act 1907-1957 a member can claim to be enrolled as an elector in the district which he represents, regardless of his place of residence.

would not lie against a minister to perform what was essentially a political obligation, not a legal duty.

The Court (Wolff C.J., Jackson S.P.J., and Hale J.) found for the plaintiffs on all four issues. On the question of the right of the plaintiffs to sue, Wolff C.J. and Hale J. based their opinions on *Ashby v. White*;[38] Jackson S.P.J., citing no authority, considered that they could sue both as electors and members. Wolff C.J. preferred to express no opinion on their capacity as members to sue, while Hale J. found it unnecessary to reach a definite decision on this point. With respect, however, *Ashby v. White* is a very flimsy foundation for this finding; it merely decided that a person who is entitled to vote has a right of action, sounding in damages, against a returning officer who refuses to allow him to vote at all. The House of Lords did not put a quantitative value on Ashby's vote; the fact that Ashby was not allowed to vote for the Whig candidate, and the exclusion of other electors who also wanted to vote Whig, may or may not have affected the result. The House did not concern itself with that aspect; Ashby's right to vote was a "real right",[39] a proprietary right (it will be remembered that in 1704 the right to vote was almost invariably linked with the ownership or occupation of land or appended to a particular office), and, given the social and economic background of the early 18th century, it was inevitable that the House of Lords would find that interference with a proprietary right gave rise to an action for damages. But in *Tonkin v. Brand* it was not claimed that the plaintiffs had been or would be denied the right to vote; the nature of the individual plaintiff's interest was merely that the quantitative value of each vote in the whole of his electorate was reduced by the fact that the electorate contained more voters than it should have done.[40] Wolff C.J. said that he rested his opinion on the matter of interest "on the provisions of section 17 (3)" of the Electoral Act 1907-1959, which enables a member to be enrolled as an elector in the district which he represents even though he does not live in it; yet the legislature itself, in the Electoral Districts Act 1947, seems to have thought it a matter

38 (1704) 2 Ld. Raym. 938, 92 E.R. 126.

39 The words used by Holt C.J., whose dissenting judgment was upheld by the House of Lords. Holt went on to say, "In Boroughs . . . they have a right of voting *Ratione Burgagii* and *Ratione Tenurae;* and this like the Case of a Freeholder before mentioned is a real Right, annexed to the Tenure in Burgage."

40 The value of a Labour vote in a "blue ribbon" Liberal electorate is precisely nil (likewise of a Liberal vote in a Labour stronghold); but no elector could claim that the boundaries should be altered so that he would be transferred to another electorate in which his vote might conceivably affect the result.

of extreme unimportance in which district any elector is enrolled, since it virtually authorizes the Electoral Commission to shift electors from this district to that like pieces on a chessboard; the elector is assigned willy nilly to such a district as includes his home. In these days the right to vote for the Legislative Assembly is completely dissociated from property; moreover, the contemporary citizen is compelled if eligible both to register as an elector and to vote at elections—and is liable to a fine if he fails in either obligation. It may even be said that the contemporary elector is regarded more as being under a duty to vote than possessing the right to vote.

At the time of *Ashby v. White* the voting, if a poll was actually held instead of the choice being made on the voices, was by show of hands so that it was a matter of common knowledge how Ashby wanted to vote. But since the introduction of the secret ballot any attempt to debar a contemporary Ashby from voting might exclude not an opponent but a supporter! Under section 119 of the Electoral Act the presiding officer at each polling place is required[41] to ask each person who asks for a ballot paper, "Do you live in the electoral district for which you claim to vote?" There are further questions which he may (and, at the request of any scrutineer, must) put, such as, "Are you the person whose name appears as *X.* on the roll?" "Are you of the full age of 21 years?" But the elector's answers to these questions, if satisfactory, cannot be challenged during the polling. Under section 122A a person whose name has been erroneously (*i.e.,* through no fault of his) omitted from or struck off the roll may nevertheless vote. The only person who can prevent an elector from voting is the presiding officer; and if he debars a person who gives the appropriate answers to questions put to him under section 119 or who comes within the terms of section 122A, he (the presiding officer) could be charged with "breach or neglect of official duty" as defined in section 180—for which a penalty of not more than £200 or of imprisonment for not more than one year is prescribed. It is submitted that the express provision of these heavy penalties is the sole sanction for an unlawful exclusion from voting; if that is so, *Ashby v. White* is no longer an authority even on its special facts.

On the question of interest *qua* member, there is persuasive authority in *McDonald v. Cain*[42] for holding that a member as such has an interest in the electoral scheme. In that case the plaintiff, a

[41] It is common knowledge that presiding officers do not always ask this question.

[42] [1953] Victorian L.R. 411.

member of the Victorian Legislative Assembly, sought a declaration that it was unlawful to present the Electoral Districts Bill to the Governor for assent on the ground that the Bill, on reaching the Legislative Council, had been passed in that House by a simple majority of those present instead of by an absolute majority. The Court held that the Bill was not one of the class which, under the Victorian constitution, must pass by absolute majorities in both Houses; hence a declaration was refused. On the question of interest, O'Bryan J. held the plaintiff to have sufficient interest as an elector; Gavan Duffy and Martin JJ. found him to have an interest both as an elector and as a member, the former citing not merely *Ashby v. White* but *Harris v. Dönges*[43] and *Minister of the Interior v. Harris.*[44] In *Tonkin v. Brand* Wolff C.J. alone referred to *McDonald v. Cain,* but preferred to rest his judgment on the authority of *Ashby v. White.* The submission is repeated that *Ashby v. White* is a very dubious authority for a proceeding in which the plaintiff was not seeking redress for a wrong alleged to have been done to him personally as an elector, but was seeking a declaration of the existence of a legal duty imposed upon others. If the end justifies the means, Jackson S.P.J. in the Supreme Court of Western Australia and Martin J. in the Supreme Court of Victoria are to be preferred for asserting, without recourse to any previous authorities and with a judicial courage not always expected, that in either capacity the respective plaintiffs had an interest in the observance of the law relating to electoral redistribution—as indeed has every other citizen in his (or her) capacity as an elector.

The Court's view, that the effect of the Electoral Districts (Cancellation of Proclamation) Act 1959 was completely to nullify the proclamation issued on 1st April of that year and therefore to restore the situation created before its issue by the report of the Chief Electoral Officer was, it is submitted, unquestionably correct, as was its

43 [1952] 1 Times L.R. 1245; 1952 (2) S. African L.R. 428. This was an application for a declaration that Act No. 46 of 1951, not having been passed unicamerally by the South African parliament, was null and void; the applicant had a clear interest because, if the validity of the challenged Act were upheld, he would have been transferred from the common roll of electors in the Cape to one of the new electoral districts for "Cape coloured" only.

44 1952 (4) S. African L.R. 769. This arose out of the attempt of the South African Parliament to circumvent the decision of the Appellate Division in the previous case. Act No. 35 of 1952 purported to create a "High Court of Parliament" as an appellate tribunal to review decisions of the Appellate Division which had declared an Act of Parliament unconstitutional. Again the respondent (the applicant before the Cape Provincial Division and in the previous case) had an interest sufficient to give him status to sue for a declaration, since the High Court of Parliament had purported to overrule Harris v. Dönges.

opinion that section 12 of the Electoral Districts Act 1947 imposed not merely a political but a legal duty on the Minister in charge of the administration of the Electoral Act to take the necessary action to ensure the issue of a proclamation. The Court undoubtedly had the power to make a declaration to that effect even if no consequential relief could be granted in the event of the declaration being ignored.[45] Given the premiss that the plaintiffs had a sufficient interest to support their invoking the Court's aid, it is submitted that the Court made appropriate use of its powers in making the declaration sought. One may, however, hazard the guess that if the Court, after finding for the plaintiffs on the second, third, and fourth points of law, had decided in relation to the first that it would be inexpedient to make the declaration sought, the defendants would have found it virtually impossible, morally or politically, not to advise the issue of a new proclamation.

EPILOGUE.

Some three weeks after the Supreme Court had given judgment and after the government had announced its intention of appealing to the High Court of Australia, a new Proclamation was issued under section 12 of the Electoral Districts Act 1947. After hearing argument the High Court refused special leave to appeal largely on the ground that consequently upon the issue of the new proclamation there was no longer any justiciable issue between the parties.

A redistribution of seats was in due course made in time to apply to the triennial election held early in 1962. Though many electoral boundaries had been altered, the retiring government was returned with undiminished strength.

F. R. BEASLEY.

[45] Supreme Court Act 1935-1960, sec. 25 (6):—

No action shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief.