COMMENT

EX PARTE DANIELL[1] AND THE OPERATION OF INOPERATIVE LAWS

BY LESLIE KATZ*

A number of the discussions of the question of inconsistency between federal and State laws[2] refer to *Ex parte Daniell.* It seems to me, though, that none of these discussions has explored the case with sufficient thoroughness and so what follows is yet another treatment of it, over half a century after the event.

Daniell applied to the Supreme Court of Queensland for prohibition or, in the alternative, *certiorari* in respect of a determination of the Brisbane Licensing Court that the liquor licence of the hotel of which she was the owner should cease. The power of the Licensing Court so to determine was expressed in the State Liquor Act to depend on a resolution's having been passed by the voters in the relevant Local Option Area that the number of licences in the Area be reduced.[3] Such a resolution had seemingly been carried. The date of the vote had been, as the Liquor Act had required,[4] the date on which federal Senate elections were held in Queensland in 1917. There was in existence, however, at the time the vote was taken, a federal statute[5] which prohibited[6] the taking of State votes on the same day that federal elections were being held.[7]

In view of sections 38A and 40A of the Judiciary Act 1903-1915 (Cth), the Supreme Court of Queensland refrained from adjudicating on the matter and it was removed into the High Court. Before the High Court Daniell argued that the State and federal statutes were inconsistent, so that the State statute requiring the vote to be taken was

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[1] *R.* v. *Brisbane Licensing Court; ex parte Daniell* (1920) 28 C.L.R. 23.

[2] Howard, *Australian Federal Constitutional Law* (2nd ed. 1972) 27-45; Fajgenbaum and Hanks, *Australian Constitutional Law* (1972) 491-503; Sawer, *Australian Federalism in the Courts* (1967) 138-142; Tammelo, "The Tests of Inconsistency Between Commonwealth and State Laws" (1957) 30 A.L.J. 496; Zelling, "Inconsistency Between Commonwealth and State Laws" (1948) 22 A.L.J. 45.

[3] The Liquor Acts 1912-1914, ss. 183, 186 (Qld).

[4] S. 172.

[5] Commonwealth Electoral (War-time) Act 1917 (Cth). According to Sawer this was the only piece of legislation for which the Hughes Nationalist government was responsible, aside from routine financial measures: Sawer, *Australian Federal Politics and Law 1901-1929* (1956) 134.

[6] S. 14.

[7] It is implicit in Howard, *op. cit.* 31-33, 35, that after the federal statute had been passed the Queensland government chose to hold the local option vote on the same date as the Senate election. However, this was not so, because by virtue of s. 172 of The Liquor Acts 1912-1914 (Qld) the local option vote had been required to be held on the same date as the Senate election before the federal statute was passed.

inoperative. This meant, the argument continued, that the resolution seemingly carried at the vote was void, which in turn meant that the Licensing Court had had no power to determine that her hotel's licence should cease.

Isaacs J. (as he then was) delivered the judgment of six of the seven members of the High Court.[8] He approached the matter on the basis that the federal statute merely prohibited under penalty the taking of State votes on federal election days and did not expressly provide that State votes, if taken in contravention of the prohibition, were void.[9] He therefore considered whether the federal legislature had implied this consequence and concluded that it had, relying, in so doing, on authorities derived from the field of implied statutory illegality in contract law.[10] This meant that there was an inconsistency between the federal and State statutes. Having reached this conclusion, Isaacs J. held without further ado that Daniell was entitled to a remedy.[11]

At the outset I must say that I do not find Isaacs J.'s reliance on authorities on implied statutory illegality of contracts to support his conclusion as to the federal legislature's intention very persuasive. In the contracts situation, a court asks itself whether the avoiding of a contract of a lawbreaker is an appropriate supplement to the penalty expressly imposed on him by the statute enacting the command or prohibition.[12] In the voting situation, however, the avoiding of the vote, rather than being a supplementary penalty for the offending electoral officials,[13] seems to be more in the nature of a penalty for entirely different people—the voters. Although it could well have been the federal legislature's intention that any State poll taken in contravention of its statute should be void, this intention cannot be inferred for the same reason that a legislative intention to avoid the contracts of lawbreakers is often inferred.

Of the members of the Court, only Higgins J. did not agree with the approach to the case taken by Isaacs J., although he did not formally dissent. In contrast to Isaacs J., Higgins J. felt obliged to define the scope of the federal enactment solely by reference to its terms. In his view it was inappropriate to widen the effect of the federal statute by drawing inferences as to the legislature's intention when the result of

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[8] Knox C.J., Isaacs, Gavan Duffy, Powers, Rich and Starke JJ.

[9] (1920) 28 C.L.R. 23, 29.

[10] *Id.* 29-30.

[11] *Id.* 32. In the course of his judgment Isaacs J. had disposed of the contentions that s. 14 of the federal Act was *ultra vires* and that Daniell was estopped by her conduct from obtaining a remedy; *id.* 30-32. Incidentally, 28 C.L.R. contained two other Isaacs J. judgments which may be noted here—those in the *Engineers' Case*, at 129, and in *McArthur's* case, at 530. While his judgment in *Daniell's* case is not as famous as his judgments in the other two cases, nevertheless it is similar to them in its benevolent attitude toward the federal government.

[12] See Atiyah, *An Introduction to the Law of Contract* (2nd ed. 1971) 215-219.

[13] Howard, *op. cit.* 35, assumes that the federal statute (s. 14) was directed to the voters rather than the State electoral officials and accordingly he views it as imposing a penalty for voting. I do not believe this to be the correct interpretation of the words "no . . . vote of the electors . . . shall be taken . . .".

doing so would be to bring section 109 of the Constitution into play.[14] Since the federal statute had merely prescribed a penalty for those who took the poll, Higgins J.'s view was that it could not be read as impliedly invalidating the poll, which was therefore valid.[15]

While this approach, which was consistent with Higgins J.'s approach to section 109 generally,[16] may have much to commend it, it was obviously a minority view even by 1920 and cannot, in view of the subsequent total victory by the proponents of the "covering the field" test[17] (led, incidentally, by Isaacs J.[18]) be accepted as a means of solving the problem thrown up by the case. Whether for better or worse, clearly the High Court is prepared to declare State laws inoperative because of inferences it draws about the federal legislature's intentions from the express terms of its laws.

Higgins J. did not, however, rest his judgment solely on the express terms of the federal legislation. He also referred to authorities concerned with the difference between mandatory and directory provisions in statutes[19] in an attempt to show that, if intention were relevant, the federal legislature's intention had been that the State poll should not be void.

It seems to me, though, that these authorities provide an unsound basis on which to infer the federal legislature's intention. When a legislature imposes a duty on an official and also specifies a time for the performance of the duty, there may well be a presumption that the legislature would rather see the duty performed out of time than not at all. When, however, the duty is imposed by one legislature and the specification of time is made, as here, by another, it seems wrong to assume that the second legislature would necessarily have preferred the duty to be performed at the wrong time than not at all. The second legislature simply does not have as great an interest in seeing the duty performed as if it had itself imposed the duty.

Thus, to sum up the analysis of *Daniell's* case to this point: the federal legislature had enacted a penalty for those taking a State vote at a certain time. It might have intended that such a vote, if taken, would be void, but it had not expressly said so. There was nothing to prevent the Court from inferring that this had been its intention, but Isaacs J.'s attempt to do so, based on authorities on implied statutory illegality of contracts, seems unconvincing. On the other hand, Higgins J.'s attempt to infer that the legislature's intention had been that the vote not be void, based on authorities on directory provisions in statutes, seems equally unconvincing.

What then had been the federal legislature's intention in enacting the

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[14] (1920) 28 C.L.R. 23, 33.
[15] *Ibid.*
[16] Sawer, *Australian Federalism in the Courts* (1967) 139.
[17] See Howard, *op. cit.* 36-44.
[18] In *Clyde Engineering Co. Ltd* v. *Cowburn* (1926) 37 C.L.R. 466.
[19] (1920) 28 C.L.R. 23, 33-34.

legislation? I believe that the answer to this question was irrelevant, because, whatever its intention, Daniell's application ought to have failed.

Let us first assume that, although Higgins J.'s authorities were inappropriate, his conclusion as to the federal legislature's intention was nevertheless correct. In that case the State vote had obviously been unaffected by the federal statute and Daniell must have been unsuccessful.

Let us next assume that, although Isaacs J.'s authorities were inappropriate, his conclusion as to the federal legislature's intention was nevertheless correct. In that case, the State statute authorising the vote was certainly properly held inoperative, but I contend that this holding ought not to have rendered void the vote taken under the statute prior to its being held inoperative, so that Daniell must still have been unsuccessful.

To justify this contention I must travel to an area on the very fringes of constitutional law. It is often said that an unconstitutional statute is a nullity and those who hold this view would undoubtedly also say that a State statute which is inconsistent with a federal statute becomes inoperative at the point in time at which the inconsistency arises. An example of this attitude is Latham C.J.'s statement in the *First Uniform Tax Case*[20] that "A pretended law made in excess of power . . . never has been a law . . . . it is invalid *ab initio*."[21]

In America, however, this approach to unconstitutional (and, by implication, inoperative) statutes has long been rejected. A famous example of the American Supreme Court's attitude is Hughes C.J.'s statement in *Chicot County Drainage District* v. *Baxter State Bank*,[22] made two years prior to Latham C.J.'s statement quoted above, that

> such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations . . . and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the

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[20] *South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373.

[21] *Id.* 408. Latham C.J. has, incidentally, been described as "a veritable champion" of this viewpoint by Pannam, "Tortious Liability for Acts Performed under an Unconstitutional Statute" (1966) 5 Melbourne University Law Review 113, 128. His championship, however, pales to insignificance when compared to that of the Connecticut Supreme Court of Errors. That Court rendered some 1500 Connecticut statutes void *ab initio* at one stroke by ruling in *State* v. *McCook* (1929) 147 Atlantic Reporter 126 that Bills passed by the State's General Assembly did not become laws unless signed by the Governor within three days of the final adjournment of the Assembly: see (1936) 45 Yale Law Journal 1533, 1534.

[22] (1940) 308 U.S. 371.

> light of the nature both of the statute and of its previous application, demand examination . . . . an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[23]

At least one Australian judge has shown himself sensitive to the problems created by the crude approach championed by Latham C.J. Sir Owen Dixon, in an extra-judicial writing in 1938,[24] began by pointing out that formerly lawyers

> even in the presence of expedience, did not shrink from pressing to a conclusion all the consequences of an established legal concept.[25]

He continued:

> In the operation given to the legal conception of a void act, or a nullity, we have an example of this resolute logic which, in our own time when many governmental . . . powers are rigidly defined by . . . law, has produced effects well nigh prodigious. The purpose of conferring even the humblest power or authority is that rights and duties of some kind may be called into existence. To treat what purports to be done in the exercise of a power as if it had never taken place, as the theory of invalidity demands, is to affix to acts done and things brought into being upon the assumption that the power has been well exercised, legal qualities and legal consequences which are sometimes as oppressive as they are unexpected. No doubt these difficulties are seen at their worst when an elaborate enactment of a legislature of limited powers is found to be *ultra vires* after a substantial period of time during which its provisions have been administered and enforced by the Executive.[26]

After referring in a footnote to a leading American work, *The Effect of an Unconstitutional Statute*,[27] His Honour then devoted the rest of the article to "one clear qualification to the application of the general rule"[28]

> that when for want of . . . legal power or authority . . . any purported act in the law is invalid, then rights and liabilities are to be ascertained upon the same footing as if the act had not been attempted.[29]

This qualification, which he said "should be conspicuous", was the "*de facto* officer" doctrine.[30] Clearly, if it had fallen to His Honour to decide the validity of actions taken by a person purportedly appointed

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[23] *Id.* 374.
[24] Dixon, "*De Facto* Officers" (1938) 1 Res Judicatae 285.
[25] *Id.* 285.
[26] *Ibid.*
[27] Field, *The Effect of an Unconstitutional Statute* (1935).
[28] (1938) 1 Res Judicatae 285, 285.
[29] *Ibid.*
[30] *Ibid.* On this topic see now Pannam, "Unconstitutional Statutes and *De Facto* Officers" (1966) 2 F.L.Rev. 37. For a recent case referring to the doctrine, see *Adams* v. *Adams* [1971] P. 188. The case involved an unsuccessful petition for a declaration of validity of a divorce granted by a Rhodesian judge appointed after the Unilateral Declaration of Independence.

to a public office under an appointing statute later found unconstitutional, he would not have felt compelled, as Latham C.J.'s comments suggest that he would have, to hold the actions void.

We can also find in the cases at least one well known instance when Dixon J. (as he then was), true to the sentiments expressed in his "*de facto* officers" article, did not shrink from the prospect of giving effect to an unconstitutional statute. This took place in the last *James Case*,[31] the action for damages against the Commonwealth decided the year after the "*de facto* officers" article appeared. Public officers had seized James' property under the purported authority of a federal statute which was later found to be unconstitutional. This meant that the officers were liable in tort for the seizures. The question which arose in the case was whether the Commonwealth was vicariously liable for these torts. The Commonwealth had argued it was not, because an unconstitutional statute conferred no authority on the officers to act on the Commonwealth's behalf. Dixon J. rejected this argument, saying:

> once there is found a *de-facto* authority from the Crown in right of the Commonwealth within the scope of which an alleged tort is committed, the doctrine of *ultra vires* is not used to produce the same immunity as formerly arose from the incompetence of an officer at common law to bind the Crown by his tortious acts.[32]

This judgment of Dixon J. was delivered while he was sitting alone as a trial judge. There is, however, one area in which the full High Court has for some time now contradicted the Latham approach to unconstitutional statutes, although not admitting it. This area is that of suits to recover money paid under taxing statutes later held unconstitutional. If the Latham approach were followed here, plaintiffs must invariably be successful and yet we know that they are not. The High Court does not allow recovery unless the plaintiff can show not only that the statute was unconstitutional, but also that he paid the money under compulsion.[33] This attitude can be seen in *Mason* v. *N.S.W.*,[34] in which the plaintiff succeeded. It is worth pointing out, however, that, although Dixon C.J. decided that case in the same fashion as the rest of the Court, namely, on the question of the existence of compulsion, he did say:

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[31] *James* v. *The Commonwealth* (1939) 62 C.L.R. 339.

[32] *Id.* 359-360. See generally Hogg, *Liability of the Crown* (1971) 76-77.

[33] Pannam, "The Recovery of Unconstitutional Taxes in Australia and the United States" (1964) 42 Texas Law Review 777. Latham C.J. did not participate in any cases involving attempts to recover money paid under unconstitutional taxing statutes, but his judgment in *Werrin* v. *The Commonwealth* (1938) 59 C.L.R. 150, especially at 159, suggests that he would have taken the same approach in them as is stated in the text, *viz.*, to give effect to the statute unless the plaintiff could show compulsion. The suggestion implicit in Pannam's article (at 791) that *Werrin's* case did involve an unconstitutional taxing statute is incorrect. Also, the statement he there attributes to Latham C.J. (at 59 C.L.R. 157) was actually made by Starke J. (at 59 C.L.R. 163).

[34] (1959) 102 C.L.R. 108.

> I have not been able completely to reconcile myself to the view that if the weight of a *de facto* governmental authority manifested in a money demand is not resisted although it is incompatible with s. 92 [of the Constitution] the money belongs to the Crown unless the payment was the outcome of the actual threatened or apprehended withholding of something to which the payer was entitled or the actual threatened or apprehended impeding of him in the exercise of some right or liberty.[35]

Thus in the first area in which the full High Court held by necessary implication that an unconstitutional statute could be effective, Dixon C.J. seems to have preferred the view that such statutes should be treated as void *ab initio*! When the statute in question is a taxing statute, I believe this to be the proper view.[36] Just as the Latham view that all unconstitutional statutes are void *ab initio* is unsatisfactory, so would be a rule that all holdings of unconstitutionality only operated from the time of judgment. As the statement of Hughes C.J. quoted above suggests,[37] different sorts of statutes should be treated differently, a view to which the above references to Dixon C.J.'s writings, both judicial and extra-judicial, show he subscribed.

Recently we have had added to the area of taxing statutes another area in which the full High Court has given effect to unconstitutional legislation, although here it has done so with more justification than in the taxing area.

This addition occurred in *Attorney-General for Australia (ex rel. McKinlay)* v. *The Commonwealth*[38] in which, among other legislation, certain sections of the Representation Act 1905-1973 (Cth) were challenged. The effect of these sections was that a re-allocation of the number of members of the House of Representatives among the States, based on their respective populations, was to take place only after each quinquennial census. A majority of the Court held that these sections were invalid, because the Constitution required such a re-allocation to take place after every general election in anticipation of the succeeding triennial general election. For this re-allocation the latest population statistics were to be used, whether or not they came from a census.

This holding might have led to doubts about the validity of the actions of those past Parliaments in which the House of Representatives had been elected at or near the end of the maximum term of the former House and in which the number of members in the House of Representatives had been allocated among the States according to the most recent

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[35] *Id.* 117.

[36] Subject to the caveat in Pannam, *op. cit.* 800-803, that if the statute is found unconstitutional only by overruling a previous decision that it was constitutional, then it should not be considered void *ab initio*. Adherence to this rule, incidentally, would have led to a conclusion contrary to the one actually reached in *Mason's* case, since the relevant legislation there had previously been upheld: (1959) 102 C.L.R. 108, 113.

[37] *Supra* pp. 69-70.

[38] (1975) 7 A.L.R. 593 (hereinafter cited as *McKinlay's* case). The case is reviewed elsewhere in this Review: *infra* p. 242.

census figures, when the use of more recent population statistics than those of the census would have led to a different allocation.

In order to end such doubts, Barwick C.J. said:

> The use of the then existing . . . determination of the number of members of the House of Representatives chosen by the several States did not invalidate any election of members of the House of Representatives which has already taken place; nor bring into doubt the validity of the membership of the Parliament.[39]

The Chief Justice did not, however, offer any explanation for this conclusion. Gibbs J., with whom Stephen and Mason JJ. concurred on this point, was marginally more illuminating. He said:

> Even if it were established that the numbers were not . . . in their correct proportion . . . that would not mean that elections conducted in the past have been invalidly conducted . . . . there is an overriding constitutional duty to hold elections. . . . There is also a constitutional duty to ensure that each State is proportionately represented in the House of Representatives, but a failure to perform that duty does not invalidate an election held otherwise in compliance with the Constitution.[40]

Gibbs J.'s reference to "the overriding constitutional duty to hold elections" inevitably brings to mind the overriding necessity of having a Parliament, because the point of having elections is to create a Parliament. If some past elections held pursuant to the unconstitutional sections of the Representation Act were held to have been invalid, the country would now be discovered to have been without a Parliament at various times in the past. Chaos would have resulted from such a discovery and so it was appropriate—even necessary—for the Court to treat the unconstitutional sections of the Representation Act 1905-1973 (Cth) as valid prior to the time of the decision in *McKinlay's* case.[41]

This result is, incidentally, one of which it can safely be assumed that Dixon C.J. would have approved, because its effect was that the actions of some *de facto* officers were treated as valid. The only difference between these *de facto* officers and those Dixon C.J. discussed in his article,[42] is that the former were unconstitutionally elected, while those he discussed were unconstitutionally appointed.

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[39] *Id.* 614.

[40] *Id.* 629.

[41] A similar sort of problem arose in America after its Civil War. The Supreme Court then upheld the validity of a number of statutes of Confederate legislatures *e.g. U.S.* v. *Insurance Companies* (1875) 89 U.S. 99. In that case Strong J., for the Court, said of the Georgian Confederate legislature at 101 "If not a Legislature of the State *de jure*, it was at least a Legislature *de facto*. It was the only law-making body which had any existence." When during the 1960's the American Supreme Court began to declare unconstitutional statutes creating federal, state and local government electoral boundaries because they did not give effect to the "one vote, one value" principle, the notion that an unconstitutional statute was necessarily void *ab initio* was so thoroughly discredited that no reference was even made in the cases to the effect of the decision on past legislative bodies.

[42] (1938) 1 Res Judicatae 285.

With this excursion through the cases in which the High Court has, without much explication, given effect to unconstitutional statutes complete, let us now return to *Daniell's* case. It must be apparent that the pressure on the High Court in *Daniell's* case to treat the inconsistent statute as operative was not nearly as strong as the pressure in, say, *McKinlay's* case to treat the unconstitutional statute as operative. The consequence of not doing so in the latter case would have been that past Parliaments and all their actions would have been undermined. Placed alongside that, the consequence of the actual result in *Daniell's* case was trivial. Nevertheless, we can still ask whether that result was right. Should not the State statute in *Daniell's* case have been treated as authorising the holding of the State vote at a point in time prior to the High Court's decision on its inconsistency?

I believe that this treatment of it would have been the proper one. After all, the State legislature had purported to give the voters in the Local Option Area an opportunity to express their views on a matter on which the State legislature had every constitutional right to allow them to express their views. The voters had expressed their views, most probably in greater numbers because of the concurrent holding of the federal vote, than if the State vote had been held alone. Furthermore, the voters could not reasonably have been expected themselves to have answered the question whether the State statute was inconsistent with the federal statute at the time the vote was taken. For these reasons it seems wrong to ignore the voters' expression of their views. In fact, to ignore them by holding that the State statute became inoperative at the point in time at which the inconsistency arose, as the Court did, led, to quote Higgins J., to "the expectations of the . . . people of the district [being] frustrated", to say nothing of "the expectations of the better class of publicans"![43]

If, however, the High Court were not prepared in *Daniell's* case to acknowledge that action taken under a statute later declared inoperative should have legal effect at a point in time after the inconsistency arose, it could have achieved the same result by more devious means, just as in the case of unconstitutional taxing statutes the plaintiff is put off by the recital of the empty phrase, "Money paid voluntarily under a mistake of law". Daniell was seeking a prerogative remedy, the grant of which was discretionary. The Court could easily have given legal effect to the vote merely by invoking its discretion to refuse her a remedy.

There was no lack of precedents for such an approach. For instance, a case on which the Court could well have relied was *R.* v. *Ward*,[44] an 1873 case in which Blackburn J. delivered the judgment of the Court in a *quo warranto* proceeding. Having acknowledged the strength of the relator's argument that an election had been conducted contrary to statute, Blackburn J. continued:

> seeing that the mistake committed here has produced no result whatever; that the same persons have been elected who would have

[43] (1920) 28 C.L.R. 23, 35.
[44] (1873) L.R. 8 Q.B. 210.

> been elected if the election had been conducted with the most scrupulous regularity . . . we ought, in the exercise of our discretion, to refuse . . . to disturb the peace of this district. . . .[45]

Another relevant decision was *The State (ex rel. Mitchell)* v. *Tolan*,[46] an 1868 decision of the New Jersey Supreme Court. In that case the relator was seeking *quo warranto* against a number of aldermen of the city of New Brunswick. The State statute incorporating the city had required their election to take place on a particular date, but through an honest error by electoral officials it had been held on a different date. A large majority of the city's voters had voted at the election and the error was not discovered till afterwards. Depue J., for a unanimous Court, refused to exercise his discretion in the relator's favour. Basing himself on a great many English authorities, he said:

> The . . . question . . . as to the expediency of permitting the inquiry into the title of the defendants to proceed . . . is entirely independent of the question whether the title of the defendants is valid or not.[47]

Mitchell's case is the only case in the British Commonwealth and America whose facts approach those of *Daniell.* I believe that its reasoning, based as it was on a long line of English authorities, some of which led Blackburn J. to the same result in *Ward's* case, could easily have been adapted to use in *Daniell's* case, and should have been if the Court were not prepared instead to admit directly that a vote taken under an inoperative statute could still be valid. Regardless, however, of which approach were used, direct or indirect, I believe the result would have been more just than the one actually reached by the High Court.[48]

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[45] *Id.* 215. The same approach can be seen in *e.g.* the Commonwealth Electoral Act 1918-1975 (Cth) s. 194.

[46] (1868) 33 New Jersey Law Reports 195 (hereinafter cited as *Mitchell's* case).

[47] *Id.* 199.

[48] The failure of Daniell's application would obviously have satisfied Higgins J. Howard, *op. cit.* 32, is also critical of the result the Court reached.