

1.

IN THE PRIVY COUNCIL

No. 36 of 1976

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
10 THE STATE OF SOUTH AUSTRALIA

Respondents

CASE FOR THE RESPONDENTS

Record

20	<p>1. This is an appeal from a judgment of the Full Court of the Supreme Court of South Australia (Bray C.J., Zelling, Walters, Wells and Jacobs JJ.) dismissing with costs the Appellant's action in which the Appellant sought declarations that an order of the Electoral Districts Boundaries Commission constituted by the Constitution Act Amendment Act (No. 5), 1975 of South Australia (No. 122 of 1975) ("the amending Act") is of no effect and does not take effect and that sub-sections 2 and 7 of S. 86 of the Constitution Act 1934-1975 as contained in the amending Act and other provisions of the amending Act 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>	<p>P.159 1.19-22</p> <p>P.7 1.34-38</p> <p>P.7 1.40-47 P.8 1.1-6</p>
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Record

2. The main issues arising in this appeal are, first, whether S. 86(2) of the Constitution Act purports to confer upon the Supreme Court of South Australia duties and powers that are not judicial in character and that are inconsistent with the function of a court of judicature and, secondly, if the duties and powers be of that kind, whether S. 86 and other provisions of the amending Act are repugnant to the Imperial Act 4 & 5 Wm. IV c. 95 (1834) or to anything done pursuant thereto or to the Imperial Act 5 & 6 Vict. c. 61 (1842).

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3. The amending Act was passed by the South Australian Parliament in 1975 and became law and came into force on the 22nd day of January 1976. The Constitution Act, thus amended, established an Electoral Districts Boundaries Commission (S.78) and charged it with the duty of making periodic electoral redistributions (S.82), the first to be commenced within three months after the commencement of the amending Act. The Commission is required by the Act to have regard as far as practicable to certain specified matters, and may have regard to any other matters that it thinks relevant (S.83). An electoral redistribution is to be promulgated by an order of the Commission (S.86), and becomes operative upon the expiration of a prescribed period (S.32). An appeal lies to the Full Court of the Supreme Court from an order of the Commission on the ground that the order has not been duly made in accordance with the Act (S.86). The Full Court is directed to hear and determine any appeal as a matter of urgency (S.86).

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P.15
1.15-24

P.15
1.35-44

P.16
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1.26-40

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1.1-40

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P.175

PP.345-
355

PP.1-8

PP.8-9

4. The Commission thus established caused an order making an electoral redistribution to be published on the 5th day of August 1976 in purported compliance with the scheme prescribed by the amending Act. Appeals by certain electors were then instituted in the Supreme Court under S.86, and on the 14th day of September 1976 the Appellant issued a writ in that Court seeking the declarations referred to in paragraph 1 of this Case. The questions of law arising on the pleadings were referred by Walters J. to the Full Court for determination before the hearing of the S. 86 appeals, and were argued before a Court comprised

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	<u>Record</u>
of five Judges on the 4th, 5th, 6th, 7th and 8th days of October, 1976. Judgment was reserved.	P.158 1.16-28 P.159 1.1-27
5. On the 3rd day of November 1976 the Court delivered judgment, and by a majority (Bray C.J., Walters, Wells and Jacobs JJ; Zelling J. dissenting) dismissed the plaintiff's action with costs.	P.159 1.18-22
10 The Chief Justice held that the amending Act is a valid Act for the peace, welfare and good government of South Australia within the plenary powers conferred on the South Australian Parliament by the Australian Colonies Act 1850 (13 & 14 Vict. c. 59). It is not repugnant to the Imperial Act of 1834, or to the South Australian Ordinance of 1837 which was made in virtue of that Act and which established the Supreme Court: so to argue is to confuse validity with perpetuity, and,	P.39 1.5-9
20 besides, a court of judicature would not cease to be such merely because it was given some additional attribute not appropriate to a court of judicature. Furthermore, the functions conferred on the court by S.86 of the Constitution Act are, in fact, judicial functions.	P.37 1.36-37
30 Walters J. held that there is no repugnancy. The Supreme Court was established in 1837 by a valid law of the colonial legislature, and the Imperial Parliament which authorized that law did not intend to clothe the Court with constitutional or jurisdictional immutability. The amending Act is within the legislative powers of the South Australian Parliament, whether the functions it confers be judicial or non-judicial.	P.38 1.18-23 P.44 1.29-45
40 Zelling J. in his dissenting judgment, held that Section 86 of the Constitution Act confers legislative power, and confers it on the Full Court of the Supreme Court as such and not as personae designatae. This is repugnant to the Imperial Act of 1834 and the Order in Council of 1836 in virtue of which the South Australian Ordinance of 1837, that established the Supreme Court as, and solely as, a court of judicature, was passed. The	P.56 1.24-36 P.53 1.33-48 P.54 1.1-3 P.58 1.31-36 P.85 1.20-27 P.86 1.32-35 P.85 1.20-33

Record

- P.90 .
1.15-40
- appeal provisions of S. 86 cannot be read down to bring them within power, and are not severable.
- P.142
1. 8-22
- Wells J. held that the character of the Supreme Court of South Australia as a court of judicature, conferred upon it by the Imperial Act of 1834 and Order in Council of 1836 and by the South Australian Ordinance of 1837 that perfected them, cannot be altered by State legislation. However, S. 86 of the Constitution Act, at least when read in conjunction with S. 22a of the Acts Interpretation Act 1935-1975, validly confers upon the Supreme Court an appeal jurisdiction which can be exercised in conformity with the amending Act without violating the essential character of the Supreme Court as a court of judicature. The appeal provisions are therefore valid. 10
- P.142
1.35-42
- P.143
1.1-15
- Jacobs J. held that the Supreme Court was constituted by the South Australian Ordinance of 1837 which cannot be regarded in any relevant sense as an Act of the Imperial Parliament. Thus no question of repugnancy arises. Besides, the amending Act does not give to the Supreme Court cognizance of a matter in a way which goes beyond the judicial function of a court of judicature. 20
- P.150
1.37-40
- P.152
1.25-28
- P.155
1.10-17
6. On the 5th day of November 1976 the Full Court of the Supreme Court granted the Appellant conditional leave to appeal to Her Majesty in Council against its judgment herein, and on the 10th day of December 1976 the Appellant was granted final leave to appeal. 30
- PP.161-
.162
7. The Respondents submit that this appeal should be dismissed with costs for the following amongst other

REASONS

- (1) (i) BECAUSE the functions or duties conferred by S. 86 of the Constitution Act are judicial in kind and call for the exercise of judicial power in the strict sense of that expression; 40

(ii) BECAUSE if the functions or duties conferred by S. 86 of the Constitution Act are of an administrative or legislative and not a judicial kind, that alone does not deprive the Supreme Court of its character as a court of judicature; and

10 (iii) BECAUSE the Supreme Court was constituted by the South Australian Ordinance of 1837 and not in any relevant sense by the Act 4 & 5 Wm. IV c. 95 or any other Act of the Parliament of the United Kingdom,

so that the question of repugnancy does not arise. But if that question does arise -

20 (2) BECAUSE the amending Act is not repugnant to the Act 4 & 5 Wm. IV c. 95 or to anything done pursuant thereto or to the Act 5 & 6 Vict. C. 61 or to any other Imperial Act.

(3) BECAUSE it is within the power of the Parliament of South Australia to attach to the Supreme Court of South Australia the functions or duties imposed on it by S. 86 of the Constitution Act whether those functions or duties are appropriate to a court of judicature or not.

30 (4) BECAUSE if S. 86 of the Constitution Act does confer functions or duties that cannot be imposed upon the Supreme Court of South Australia as a court of judicature, those functions or duties are nonetheless validly conferred upon Judges of that Court as individuals or personae designatae.

40 (5) BECAUSE if the appeal provisions of S. 86 of the Constitution Act are invalid on the ground of repugnancy, the remainder of the amending Act is severable therefrom and stands as a valid enactment of the South Australian Parliament and the validity and effectiveness of the

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Commission's order are unimpaired.

G. C. PRIOR.

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