[HIGH COURT OF AUSTRALIA.]

JOHN MOORE CHANTER . . . . PETITIONER;

AND

ROBERT OFFICER BLACKWOOD . . RESPONDENT.

RIVERINA ELECTION PETITION.

ON REFERENCE FROM COURT OF DISPUTED RETURNS.

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March, 7, 8, 10.

Griffith, C.J., Barton and O'Connor, JJ.

Commonwealth Electoral Act 1902 (*No.* 19 *of* 1902), *secs.* 124, 132, 133, 139, 151, 155, 158, 163, 164, 181, 199; *Schedule, Form P, Form Q—The Constitution, sec.* 44—*Election—Form of ballot-paper—Cross within a square—Mandatory or directory provision—Striking out name of candidate—Writing name of candidate—Illegal practices—Jurisdiction of Court to set aside election for single act of bribery—Common Law of Parliament.*

The provisions of Part XI. of the *Commonwealth Electoral Act* 1902, requiring the cross made by a voter on a ballot-paper to be placed within a square, are directory and not mandatory, and it is sufficient if they are substantially complied with by making a cross opposite the name of the candidate.

So held by Griffith, C.J., and Barton, J., O'Connor, J., *diss.*

The striking out of the name of a candidate not voted for does not of itself render the ballot-paper informal.

Ballot-papers to be used by voters voting at a polling place other than that for which they are enrolled, on making a declaration in Form Q in the Schedule, must be in the ordinary form, and the voter must vote by placing a cross opposite the name of a candidate.

Held, therefore, that votes given by such persons by writing the name of a candidate on a blank ballot-paper are invalid.

The High Court has no jurisdiction under the Statute to avoid an election on the ground that one of the candidates has by himself or his agents been guilty of illegal practices, unless there is reasonable ground for believing that the result of the election may have been affected by such illegal practices.

Quære, whether by the Common Law of the Commonwealth the High Court has jurisdiction to avoid an election on the ground of a single act amounting to bribery at Common Law, committed by or on behalf of a candidate.

At an election for the House of Representatives for the Electoral Division of Riverina, in the State of New South Wales, held on 16th December, 1903, there were two candidates, Robert

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Officer Blackwood and John Moore Chanter, the former of whom was, on the 26th December, 1903, declared by the returning officer to have been duly elected, the voting being, for Blackwood 4,341 votes, for Chanter 4,336 votes. Chanter thereupon filed a petition praying (*inter alia*) that the respondent Blackwood be declared not to have been duly elected, and that the petitioner be declared to have been duly elected, or, in the alternative, that the election be declared to be absolutely void.

The petition contained the following allegations (*inter alia*):—

"8. That upwards of fifty ballot-papers marked in my favor at sundry polling places within the Riverina Division on the occasion of the said election were in the scrutiny rejected by the counting officers as informal on the ground that the crosses marked on such ballot-papers were not marked within the squares on such ballot-papers opposite my name, but were marked between my name and the left-hand side of the square, thus—

BLACKWOOD, ROBERT OFFICER	
CHANTER, JOHN MOORE ×	

"That I am advised and believe such ballot-papers as had crosses set opposite my name should have been credited to me in the scrutiny under the *Electoral Act*, sec. 163 (1).

"9. That the ballot-papers used in connection with the said election were not in accordance with Form P prescribed in the Schedule to the *Electoral Act* in that—

"(*a*) They were not of uniform shape and size, but were of different shapes and sizes, some containing two lines for the names of two candidates, with a square opposite each name, and others contained lines for the names of more than two candidates, with squares at the end of blank lines.

"(*b*) In many ballot-papers the squares opposite the names of the candidates nominated were not printed in deeply leaded and conspicuous lines, as required by the statutory Form P.

"(*c*) The squares were not sufficiently removed to a uniform distance from the names of the two candidates nominated as required by the statutory Form P.

"(*d*) Whilst my opponent's name was printed right up to and against the left-hand side of his square, a blank space sufficient to cause mistakes was left between the end of my name and the left-hand side of my square (see sketch of ballot-paper in paragraph 8, *supra*).

"10. That the above described departures from the statutory form of ballot-papers caused many of the electors who wished to vote for me to do so by placing crosses in the blank spaces on ballot-papers between the end of my name and the left-hand side of the square opposite my name. That I believe if the statutory form had been followed there would have been no confusion or mistake as to the real position on the ballot-paper intended to be marked with a cross.

"11. Tha tI believe that the ballot-papers supplied to the electors referred to in paragraph 8 of this my petition were not only contrary to law, but were calculated to lead to informality in voting.

"12. That several ballot-papers, being not less than three, marked in my favor at sundry polling places within the Division were in the scrutiny rejected by the counting officers as informal, although crosses were marked in the squares on such ballot-papers opposite to my name, on the ground that the name of the other candidate on such ballot-papers was erased by a line drawn through the same thus—

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"That such ballot-papers were, your Petitioner believes, improperly rejected, as such erasure could not enable any person to identify the voter within the meaning of the *Electoral Act*, sec. 158 (*d*).

"13. That at the Moama polling place within the Division the Assistant Returning Officer allowed forty-one electors whose

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names were on the rolls for other polling places within the Division, to record their votes, not in the manner prescribed by the *Electoral Act*, sec. 139 (1), but on special ballot-papers with counter-foils attached, and on which the names of the candidates were written, in the manner prescribed by sec. 139 (3) and by the Regulations, Part II. thereunder, made by the Governor-General with the advice of the Federal Executive Council, bearing date 19th October 1903, pp. 685-6, relating to electors voting at any polling place in the State other than for the Division in which they are enrolled, and that of such votes your petitioner believes that twenty-eight were given for my opponent and thirteen for myself.

"14. That such votes were improperly received and should have been in the scrutiny rejected as informal, on the ground that the method of voting prescribed by Part II. of the said regulations is exclusively applicable to electors absent from the Electoral Division for which they are enrolled, and who wish to vote at polling places other than for the Division.

"30. That I am informed and believe that the said Robert Officer Blackwood his agents and supporters on his behalf, with his knowledge and sanction, did during the said election supply meat, drink and entertainment to certain electors, with a view to influencing the votes of such electors, and I say that he was thereby guilty of bribery within the meaning of the *Electoral Act*, sec. 176.

"32. That I am informed and believe that during the said election the said Robert Officer Blackwood dismissed from his service one Edward Healey, a cook, employed on his station, because the said Edward Healey was supporting my candidature, and I say that in so doing he was guilty of undue influence within the meaning of the *Electoral Act*, sec. 177."

The petition coming on for hearing before *Griffith*, C.J., His Honor referred to the Full Court the following questions, viz.:—

1. Whether the ballot papers in the forms set out in paragraphs 8 and 12 of the said petition are informal.

2. Whether the votes given in the manner alleged in paragraph 13 of the said petition were valid.

3. Whether the High Court as a Court of Disputed Returns has any and what jurisdiction in respect of illegal practices.

Sir John Quick, for the petitioner. As to the first question, sec. 151 of the *Commonwealth Electoral Act* 1902, is a direction to the voter as to how he is to record his vote; it does not say that he is not to record it in some other way. This section is based on sec. 126 of the *South Australian Electoral Code* 1896. Sec. 134 of that Code provides that the vote shall be informal "if the voting paper contains anything except the cross by which votes are required to be cast." Although the placing the cross in a square is spoken of in some of the sections of the *Commonwealth Electoral Act*, yet in secs. 163 and 164, which are mandatory, there is no reference whatever to the cross being within a square. The provisions as to marking the ballot-papers are directory only and not mandatory, and if the preference is distinctly shown that is sufficient. See *Woodward* v. *Sarsons* (1875), L.R., 10 C.P., 733, at p. 748.

[BARTON, J., referred to *Wigtown Election Petition* (1874), 2 O'M. & H., 215, at p. 229.]

The answer to this question should turn on what is the duty of the returning officer. He should admit all votes which have a cross opposite the name of a candidate. Even if these votes are strictly speaking informal, this Court has jurisdiction to now admit them under sec. 199, which provides that the Court is to be guided by the substantial merits and good conscience of each case, and that it is not to regard legal forms and technicalities.

[GRIFFITH, C.J.—Do not these words refer only to procedure ?]

No, the words are without limitation. See *In re Cambooya Election Petition* (1900), 9 Q.L.J., 341; *Galloway* v. *Porter*, 3 and 4 Q.L.J., 62.

[GRIFFITH, C.J.—Sec. 199 cannot give the Court power to give the go-by to the directions of the Act.]

The Court can say that, although there are directions in the Act as to how the voter should express his preference, which the voter has not followed, nevertheless he has sufficiently expressed his preference in some other way. As to the second point in the first question, the mere erasure of the name of one candidate is not sufficient to invalidate a vote. Such a thing is not prohibited in

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the Act. As to the second question, an absent voter voting pursuant to sec. 139 must vote on a ballot-paper in the ordinary form. Regulation 13 of the Regulations of 19th October, 1903, is to that effect. The only case in which a voter can write in the name of the candidate he wishes to vote for is that of postal voting. Under the regulations the presiding officer should have written in the names of both candidates and the voter should have put a cross opposite one of them. The writing of the name of a candidate by the elector tends to disclose who the voter is, and the the ballot-paper is therefore informal under sec. 158 (*d*). If there is no power in this Court to allow informal votes of the kind referred to in the first question, there is no power to allow votes of this class. As to the last question, sec. 47 of the Constitution gives each House exclusive jurisdiction as to its own elections. Parliament has delegated its power to this Court. No indications, however, are given as to the grounds upon which this Court may exercise its jurisdiction. That jurisdiction is given without conditions or limitations. Therefore this Court is in the same position as the Parliament, and that is the position in which the House of Commons was as to its elections. There is no law to follow except this Act, but there are principles to be acted upon which may be deduced from parliamentary practice. The House of Commons had from the earliest times power to deal with bribery. It would not, however, be mandatory on this Court to declare an election void because of one act, or a few acts of bribery by a candidate. The Court would have jurisdiction to enter upon an enquiry, and if it were found that the bribery might have affected the result of the election, the Court might declare the election void.

[BARTON, J.—In the *Westbury Election Petition*, (1869) 1 O'M. & H., 59, *Willes*, J., said that one act of bribery by a candidate was enough to avoid an election.]

See also *Rogers on Elections*, 16th ed., Part II., p. 831; *May's Parliamentary Practice*, 10th ed., p. 621.

[GRIFFITH, C.J.—Does the "Common Law of Parliament" apply to the House of Representatives?]

Yes.

[GRIFFITH, C.J.—Is it Common Law that bribery will avoid an election other than a Parliamentary election ?]

[BARTON, J., referred to *Blackburn Election Petition* (1869), 1 O'M. & H., 198, at p. 202.]

This Court has jurisdiction to avoid an election for bribery, assuming that the bribery has materially affected the election, because bribery is an offence at Common Law, and it has also jurisdiction because the Act prohibits and penalizes certain practices.

[GRIFFITH, C.J.—When a Statute creates an offence and indicates its consequences, are not these the only consequences ?]

That is the general principle for construing a Statute.

[BARTON, J.—A question arises whether the avoiding an election is to be considered as a punishment or as a means for securing purity of elections.]

Certain things are prohibited by the Act, and if they are done by a candidate this Court may avoid the election.

[GRIFFITH, C.J.—Where do you draw the line ?]

The Act draws it by distinguishing between illegal practices and electoral offences.

[GRIFFITH, C.J.—When you say the Court has jurisdiction to deal with bribery, do you mean Common Law bribery, or bribery according to the Act ?]

The Court will be entitled to accept the statutory definition. The Court is not, however, bound to declare an election void for any one act of bribery, as it has under sec. 199 a certain amount of judicial discretion.

[GRIFFITH, C.J.—In my opinion there is no discretion at all. The Court either has no jurisdiction, or it is bound, to avoid the election, in the case of bribery.]

The Statute does not limit the power of the Court, but assumes that the Court will exercise its power according to legal principles. The Common Law will apply so far as the statutory law does not apply. See sec. 80 of the *Judiciary Act*.

[GRIFFITH, C.J.—As to elections other than Parliamentary elections, it appears to be doubtful whether bribery avoids an election. *Grant on Corporations*, p. 232 ; *R.* v. *Mayor of Norwich*, (1706) 2 Lord Raymond, 1,244.]

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[O'CONNOR, J.—Bribery at an election is punishable at Common Law. *R.* v. *Pitt*, (1761) 1 Wm. Black., 379, at p. 383. Would you go to the extent that once there is an offence at Common Law affecting the result of the election, that would be sufficient to avoid the election ?]

Yes, or an offence created by the Act. The Statute on this subject is merely a declaration of the Common Law. The Act does not define the grounds for avoiding an election, but leaves it to the Court to determine judicially what are such grounds.

[O'CONNOR, J.—Both bribery and attempted bribery are offences at Common Law. *R.* v. *Steward*, (1831) 2 B. & Ad., 12; *R.* v. *Cripland*, (1724) 11 Mod., 387.]

[*Mitchell.*—It is not contended that bribery is not an offence at Common Law.]

If the petitioner does not succeed on any of the grounds on which he claims to be in a majority, then the election should be declared void.

Mitchell, for the respondent. As to the first point, the sections of the Act relating to the placing of a cross in a square are mandatory, and those requiring ballot-papers to be rejected as informal are also mandatory, therefore these votes were properly rejected. If the presiding officer notices a defect, although his attention is not called to it, his duty under sec. 158 is to reject the ballot-papers. All the secs. 132, 133 (4), 147 (*a*), 150, 151, 155 (4), 158 (*c*) must be read together with secs. 163, 164. The word "shall" is not necessarily mandatory, but its use is a strong argument that the section in which it is used is mandatory, especially when in other sections near it the word used is "may." In *Byrne* v. *Armstrong* (1899), 25 V.L.R., 126; 21 A.L.T., 78, the words "it shall be lawful" were held to be mandatory. See *Hardcastle on Statutes*, 2nd ed., p. 179. *Primâ facie* "shall" is mandatory. *Woodward* v. *Sarsons*, *supra*, is a distinct authority in the respondent's favour, when the distinction between the Act under consideration in that case and the *Commonwealth Electoral Act*, is regarded. In that case a great number of variations in marking the ballot-papers were held nevertheless to be good votes. The Commonwealth Parliament did not intend that all those variations should be allowed, and therefore limited the mode to making a

cross in a square. Sec. 158 takes the place of that part of sec. 2 of 35 and 36 Vict., c. 33, which causes ballot-papers to be rejected in England. Sec. 13 of the latter Act is very strong, and on that mainly the judgment went. As to sec. 199, that cannot enable the Court to disregard anything in the nature of a mandatory command. It will not enable the Court to declare a vote to be formal which the Act says is informal.]

[GRIFFITH, C.J.—It might enable the Court to say that a vote which substantially complied with the Act was good.]

[BARTON, J.—The object of the square is to see that the cross is opposite the name of a candidate.]

The object is rather to secure uniformity in voting, and to prevent marking that can afterwards be identified. [He referred to *In re Cambooya Election Petition*, *supra*]. As to the second point in the first question, the only ground upon which these votes can be supported is sec. 158 (*d*). The test of rejection is the opinion of the returning officer. This particular mode of marking might have been pre-arranged. As to the second question, a voter who votes by writing the name of the candidate preferred by him does not vote in the manner provided by sec. 139. But sec. 200 then protects the respondent, for this was an error of an officer, and if the voters had voted rightly they would have voted for the respondent, so that the result of the election has not been affected. "Election" in sec. 200 means election of a candidate as well as an election generally.

[GRIFFITH, C.J.—It would be for the respondent to counter-charge on the ground of a mistake which affected the result of the election.]

If the Court holds that the making of a cross in a square is directory only, then the provision as to putting a cross opposite a name is also directory. The last question must be dealt with having regard to the allegations in the petition.

[GRIFFITH, C.J.—The question I wished to reserve was whether by law an election can be avoided for a single illegal act—whether it is the law of the Commonwealth, either at Common Law or by Statute, that a candidate guilty of an act of illegal practice is incapable of being elected ?]

Dealing with the allegations, the first is treating. That would

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not be bribery at Common Law. There is no case apart from Statute in which an election has been avoided for treating. The English Courts have not until recently had power to deal with Parliamentary elections, and it is hard to see how Common Law as to those elections could arise. Paying canvassers is not an offence at Common Law, but is made an illegal practice by sec. 180.

[GRIFFITH, C.J.—Is there a Common Law of the land with respect to Parliamentary elections? If there is in England, was it brought out to the various States, and does it now apply to the Commonwealth? [He referred to *Kielley* v. *Carson*, (1843) 4 Mo. P.C., 63.] The House of Representatives could apply what it thought was the law of elections, but we have to decide whether what has been called the Common Law of Parliament is the law which applies in Australia to elections for the House of Representatives.]

There is no case in which Courts of Law have applied the Common Law of Parliament to elections. If *Woodward* v. *Sarsons* (*supra*) lays down what is that Common Law of Parliament, it is contrary to the opinion of *Willes*, J. The principle laid down in that case appears to include the Common Law of Parliament, and to be intended to be exclusive. [He referred to *Rogers*, 17th ed., pp. 261, 293, 325, 331; *Broom's Constitutional Law*, 2nd ed., p. 981; 1 *Chitty's Blackstone*, p. 161.] The avoiding of an election for bribery is always put on the ground of securing freedom of election. Here there is no allegation that the freedom of election was interfered with.

[GRIFFITH, C.J.—If this Court is bound to avoid an election for one act of bribery, it is in a different position from that of the House of Commons, for the latter need not have avoided an election for such an act.]

Apart from Parliamentary Common Law, it was not the Common Law that one act of bribery avoided an election. Treating was not a cause of avoidance unless it amounted to bribery, until it was made so by Statute. *Warren's Election Law*, p. 542; *Clark on Election Committees*, p. 96.

[BARTON, J.—The decision of *Mellor*, J., in the *Borough of Bolton Election*, (1874) 2 O'M. & H., 138, at p. 142, raises the question whether in view of the very express provisions of the

Commonwealth Electoral Act as to the consequences of an act of bribery to the person convicted of it, while the avoidance of the election is not specified as a consequence, an election can under that Act be avoided for bribery. One question then is whether sec. 192 affects the principle laid down in that case.]

[GRIFFITH, C.J.—The word "validity" in that section must mean validity according to the law of the Commonwealth.]

[O'CONNOR, J.—Sec. 192 seems to me to hand over to the Court the whole power of Parliament in relation to the validity of elections, because of the words at the end "and not otherwise." To give any effect to that section, must not this Court have power to apply the Common Law of Parliament to petitions ?]

That is necessarily inferred. But from sec. 47 of the Constitution it cannot be inferred that Parliament, when it created the Court of Disputed Returns, necessarily transferred to it all its own powers. By the effect of sec. 44 (2) of the Constitution, and of sec. 181 of the *Commonwealth Electoral Act*, a candidate convicted of bribery or undue influence would forfeit his seat.

[GRIFFITH, C.J.—It may be that Parliament fixed the penalty with the object of avoiding the election.]

If Parliament intended to give this Court power to deal with these serious offences, it is strange that they should have also given the Court power to disregard the laws of evidence.

Sir John Quick in reply. The petitioner only relies on the statutory offence, and not on the Common Law offence. In order to avoid an election it would not be sufficient to prove treating, but it would also be necessary to show that the treating interfered with the result of the election, or that the treating was with the view of interfering with the election. In the discretion of the Court one case of treating might avoid an election, but it must be such as would influence the election.

[GRIFFITH, C.J.—The Legislature has drawn a distinction between offences which will avoid an election and those which will not, by fixing the amount of the penalty.]

The Court has an additional concurrent jurisdiction to impose punishment. As to the first question, the rejection of these votes is subject to being reversed by this Court. There are three matters of substance in the *Electoral Act*, majority rule, secrecy of the

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ballot, and certainty of expression of the voter's preference; provisions as to them are mandatory. The mode in which the voter expresses his intention is matter of form, and provisions as to it are directory only. At any rate a substantial compliance with the requirements of the Act in this respect is sufficient.

[GRIFFITH, C.J.—In *R.* v. *Lofthouse*, (1866) L.R., 1 Q.B., 433, the use of the word "shall" was held not to be conclusive as to whether an Act was mandatory or not.]

Cur. adv. vult.

GRIFFITH, C.J. In this case three questions of law were referred to the Full Court for decision, before taking evidence at the trial. The first question divides itself into two parts dealing with different points. The first is whether votes given in the manner set out in paragraph 8 of the petition are formal or informal. There were only two candidates. According to the allegation in the petition the names of those two candidates were in alphabetical order. It is not alleged that they were printed, but we have seen the ballot-papers, and know that they were.

The names were enclosed in rectilineal lines. At the left hand side of the names there was a perpendicular black line, and to the right of the names were two perpendicular black lines crossing the horizontal lines, so forming a square, or a kind of square, at the extremity of the lines. In the petition they are represented as wider than their height, but on the ballot-papers they are higher than their width. They are not perfect squares. The ballot-papers in respect of which this question is submitted to the Court had a cross set opposite the name of the petitioner, not in the square formed in the manner described, but to the left of it, in the blank space between the end of the name of the petitioner and the first of the two perpendicular lines to the right. The space so formed had a straight line printed on its right, but no such line printed on its left; and it was a tolerably large space. The question is whether these votes are bad or not. They were rejected on the scrutiny on the ground that the cross was not within the square printed on the ballot-paper. In order to determine whether that is a valid objection or not it is necessary to examine the Act. I will refer to the sections relied upon by the respondent in justification of the action of the

officer conducting the scrutiny. Sec. 151 says: "In elections for members of the House of Representatives the voter shall mark his ballot-paper by making a cross in the square opposite the name of the candidate for whom he votes." That section assumes that there is a square on the ballot-paper opposite the name of each candidate. The contention is that that provision is imperative, and that if the cross be anywhere but within the square printed on the ballot-paper, the vote is informal, and must be rejected. In considering whether that provision is imperative or directory, it is necessary to have regard to several other sections, to which I will call attention, but I will, first of all, read the rule laid down by *Lord Campbell*, L.C., in the *Liverpool Borough Bank* v. *Turner*, (1860) 30 L.J. (Ch.), page 380: "No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered as directory only or as obligatory, with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed." This section assumes, as I have just said, that there is a square on the paper. Let us turn back to the previous provisions of the Act to see how far each of those provisions can be considered imperative, and then how far sec. 151 can be considered imperative. If the words of sec. 151 are dependent upon provisions which are merely directory, then it would be hard to suppose that a provision introduced as a subordinate element of a provision which is itself only directory is, nevertheless, imperative. That seems to me to be a sound principle to start with. Sec. 124 provides that the Returning Officer shall provide ballot-papers —so far nothing is said about their form. There is nothing in that section to say that they shall be printed or written, but it is imperative that he shall provide ballot-papers. Sec. 132 says: "Ballot-papers to be used in the election of members of the House of Representatives may be in the Form P in the Schedule." These words are in form plainly directory. The word "may" is sometimes construed as imperative, but that is only when a person has a legal right which he cannot exercise without the intervention of some other person, and the latter person is author-

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ized by the word "may" to take the necessary steps to enable that legal right to be exercised, as in the case of *Julius* v. *The Bishop of Oxford*, (1880) 5 App. Cas., 214. Ordinarily the word "may" is directory. Sec. 132, therefore, is apparently directory. The ballot-paper may be in that form. The Form P represents the names of all the candidates printed in alphabetical order between lines with leaded squares at the end of them, the perpendicular lines being continuous, and the horizontal lines not being continuous and not being represented as joining the perpendicular lines. That is the Form that "may" be used. So far there is nothing to show that the Returning Officer may not use either written or printed papers, or that in either case they may not have squares marked upon them otherwise than by printing. Sec. 133 provides that "in printing the ballot-papers," which I take to mean "if they are printed," "the names of all candidates duly nominated shall be printed in alphabetical order," and "a square shall be printed opposite the name of each candidate." Putting these two sections together, ballot-papers may be printed, and if they are printed, the squares are to be printed opposite the name of each candidate. Then comes sec. 151:—"In elections for members of the House of Representatives the voter shall mark his ballot-paper by making a cross in the square opposite the name of the candidate for whom he votes." That clearly must mean, if there is a square there. Putting a square there beforehand is not imperative. To say that the ballot-paper is invalid from the failure to do that which under the circumstances he cannot do, the circumstances being such as the law permits, would be a very extraordinary construction. It seems to me, so far, that the provision can only be read as saying that, if there is a square there, that is the place in which the cross is to be put. Making a cross opposite the name of the candidate may, I think, be taken to be an imperative provision, because it is the only way indicated by the Act in which an elector is to show his preference. I pass on to sec. 155, which provides:—"The scrutiny shall be conducted as follows:— . . . All informal votes shall be rejected"—and sec. 158 defines what are informal votes. The part of that section which is important in this case is (*c*), which says—"A ballot-paper shall be informal if—(*c*) In elec-

tions for the House of Representatives it has (not being a postal ballot-paper) no cross in a square opposite the name of a candidate." Bearing in mind that the ballot-paper is not required to have a square upon it unless printed, and might be issued without any square at all, it appears to be plain that a ballot-paper would not be informal if, having been printed without a square, the elector had put a square himself opposite the name of a candidate and put a cross in it. There is nothing to indicate that the cross must be on the right-hand side or the left-hand side of the name. The words are "a" square, and these are the only words in the Act which require a vote to be rejected if the provisions are not complied with. It is to be noticed that in Acts *in pari materia* of the various States from which these provisions are manifestly adopted there are express provisions that a vote given in any other way than that expressly provided shall be rejected. There is no provision of that kind here. The only provision is that the ballot-paper shall have a cross in a square opposite the name of the candidate. Sections 163 and 164 then, singularly enough, refer to papers with a cross opposite the name of the candidate without using the words "in a square." The words of both sections are the same. The papers are to be arranged "By placing in a separate parcel all those which have a cross set opposite the name of the same candidate rejecting all informal ballot-papers." Those words are, however, ambiguous, because the words "rejecting all informal ballot-papers" may be read as meaning rejecting all those which have the cross opposite the name of a candidate, but have that cross not within a square. There is no certain indication to be derived from those two sections. One other section it is necessary to refer to. Sec. 199 provides that "The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities or whether the evidence before it is in accordance with the law of evidence or not." Now, for the reasons which I have briefly stated, it seems to me that the provisions about the square are directory only. The provision for printing the square on the ballot-paper before it is issued to the elector is directory. The provision that the ballot-paper itself shall be printed is, at best, only inferential, and is clearly directory; and that being only directory, I have great difficulty in holding

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that a provision, compliance with which depends upon what the Returning Officer has done at his option, is imperative, so as to deprive the elector of his vote in consequence of the Returning Officer not doing what he may or may not do. For these reasons I should be prepared to hold that the cross is mandatory and the square directory. But it is not necessary to go so far in this case. I take it that the word "square" in the Act does not necessarily mean a four-sided equilateral figure with right angles, having the four sides joining at the angles. No doubt an irregular square would do. Nor can I find anything requiring the square to be on the right hand of the line or the left hand of the line or that all four sides should be completely marked. Take this case for example: Two names divided by a horizontal black line, with two vertical lines intersecting the right-hand end of the line and extending above and below the names of the candidates. There would then be two spaces, one above the line and one below it, neither of which would be a perfect square, because each of them would have three sides only, two perpendicular lines in each, but one wanting the top line, the other wanting the bottom line; they would be squares imperfect in form. Could it be suggested that if a ballot-paper were issued in that form, which is perfectly lawful according to the Act, and an elector were to put a cross in that square of three sides, the vote would be bad? If we were to hold that, it would be distinctly contrary to the injunction laid on the Court by sec. 199. This leads me to the conclusion that what is meant by square is a square space—something that an ordinary person looking at the paper would consider a square space. If drawing a line across the top or bottom of the square is not imperative — and that seems to me plain law—why should drawing a line at one side of the square be imperative? Take another illustration: The names of two candidates are printed each of them between two horizontal black lines, and at a distance, slightly to the left of the right-hand extremity of those lines, a perpendicular line is drawn. Then there would be spaces marked by three lines, separated by a vertical line from the names of the candidates and having one side open. Strictly speaking that is not a square, but to hold that a vote given by making a cross in such a space was

invalid, would be having regard to a technical formality of the minutest character. If that is so, does it matter whether the line that is absent is at the right side of the square or the left side of the square? That distinction seems to me to be so extremely shadowy that it would be wrong to say the vote would not be good. In the present case, the space in which the cross is put is a space having lines on the top and bottom and the right-hand side. The vacant space on the paper is nearly square, but is a little longer from left to right than from top to bottom. And in that the elector has put his cross. If in addition to putting his cross he had drawn a line indicating anything like a demarcation on the left, then the vote clearly would be good because it would be in a square: and, if we are called upon to use the extremest technicality in construction, I think we ought to use it in favor of the franchise rather than against it. It is perfectly clear that if the elector had drawn or tried to draw a perpendicular line to the left of the cross the vote would have been good. Having then put his cross in the space opposite the name of the candidate, is his vote rendered invalid by his omission to draw that perpendicular line? Suppose again that a line had been drawn from one line half-way across to the other, would that have been sufficient? It seems to me to hold these votes informal would be to disregard the provisions of sec. 199. For these reasons I think that the votes in question are not informal.

The second part of this question is:—Are votes given by putting a cross in a square opposite the name of one candidate, and striking out the name of the other, good? This is not forbidden by the Act except under the provision of sec. 158, sub-sec. (*d*), which provides that "a ballot-paper shall be informal if it has upon it any mark or writing not authorized by this Act to be put upon it which in the opinion of the Returning Officer will enable any person to identify the voter." The rejection must stand on that ground, and the opinion of the Returning Officer appears to be reviewable by this Court. All that we can say is, the ballot-papers are not necessarily void on the ground of having the name of another candidate simply struck through.

The second question submitted to the opinion of the Court is a different one altogether. It relates to votes cast by voters who

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did not vote at the polling places for which they were enrolled. Electors may vote at other polling places under the conditions prescribed by sec. 139, that is, upon making a declaration in the Form Q in the Schedule. In the present case it is not suggested that they did not make the declaration in the Form Q or substantially in the Form Q. But there is nothing in that section to suggest that on making that declaration they are to vote in any different way. The elector is entitled to have handed to him a ballot-paper in the ordinary way, with the names of the candidates printed or written on it, and he is to deal with that ballot-paper in the ordinary manner, that is by marking a cross in a square —the imperativeness of the cross in the square being subject to what I have already said as to the first question in this case. The objection taken on this point is that these electors had not the ordinary ballot-papers given to them, but blank papers upon which they themselves wrote the name of the candidate without any cross or square. For reasons which will be given more fully in the next case I think these votes were invalid. They did not in any way comply with the provisions in the Act which require the elector to indicate his preference by making a cross in a square opposite the name of a candidate.

The third question raised by this petition is, whether the High Court has any and what jurisdiction with respect to illegal practices. I am afraid I am responsible for putting the question in that form, and it does not exactly raise the question I desired to be decided. This Court has clearly jurisdiction to administer the law, whatever the law is, and, if the law is that a candidate who is guilty of an illegal practice is not duly elected, this Court has clearly jurisdiction to say so. The real question is whether, by the law applicable to elections for the House of Representatives, a candidate guilty of an illegal practice as defined by the *Electoral Act* is disqualified from being elected. Sir John Quick expressly disclaimed any intention to set up that the respondent was liable to lose his seat under what is called the Common Law of Parliament, that is the Common Law relating to the House of Commons. It is said that by the Common Law of England relating to the House of Commons (I do not quite understand the expression) a candidate guilty of bribery at Common Law forfeited his seat.

Whether that law is part of the Common Law of Australia or not is a question which I should be very sorry to decide without much fuller argument than has been possible on this occasion. I say this because there are very weighty authorities to the effect that Parliamentary law is not introduced into the colonies, and therefore not into the Commonwealth. I refer to the opinion of Sir A. Cockburn, A.G., and Sir R. Bethell, S.G., (Feb. 15, 1856, quoted in *Forsyth's Cases and Opinions on Constitutional Law*, at p. 25), and the decision of the Privy Council in *Kielly* v. *Carson*, (1843) 4 Moo. P.C., 84. We are fortunately relieved from the necessity of determining that point. All we have to decide is whether, under the provisions of the Statute Law before us, a candidate is incapable of election if he has committed one of the acts prohibited by the *Commonwealth Electoral Act*. On this question two lines of argument commend themselves to my mind, each of which leads to the same result. One is the general rule, stated in many forms, that, when a Statute creates a new obligation or imposes a new duty, and prescribes specific consequences or remedies for non-performance of the duty or breach of the obligation, those remedies must be adopted and no other. Now, in this case the Legislature has enacted a number of provisions, and has attached to the breach of some of them liability to imprisonment for 12 months, and the Constitution had already provided that a person subject to punishment of that kind should lose his seat. So that, from that point of view, it would appear that Parliament was aware that any person guilty of any of those offences to which the punishment of 12 months imprisonment was attached would lose his seat under the Constitution, and that therefore it was unnecessary to make further provision in the *Electoral Act*, leaving his guilt to be established in the ordinary way. Another and perhaps a wider argument is this:—The Commonwealth was formed by the union of six separate States. Now, in all those States there had been electoral laws which, after the establishment of the Commonwealth, continued to be the law of the Commonwealth as to the respective States until this Commonwealth electoral law was passed. The earliest was that of New South Wales. Now, in the Act of the Legislative Council, passed before Responsible Government was established,

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it was expressly enacted that any candidate guilty of certain offences enumerated in that Act, should be incapable of election, and all subsequent legislation in New South Wales was on the same footing. It was never assumed that the New South Wales Parliament had power to avoid an election on that ground without express legislation. This provision was again enacted in a later Act. The same Constitution was adopted in Queensland, and in the Constitution of Victoria there is a similar provision. I cannot speak of the later Acts in Victoria, but I know that certainly in the other States, there were continuous provisions to the same effect. So that we find a uniform course of legislation all to the same effect, by which the conditions under which a candidate can become incapable of election, were expressly laid down, and when power was intended to be given to the Committee of Elections and Qualifications or other tribunal to determine the question, it was expressly conferred. Then we find the Commonwealth Parliament in this *Electoral Act* deliberately omitting any such provision. In these circumstances I do not think that it can be inferred that this Court has power to declare that a candidate is guilty of an electoral offence, or to declare that, if he has been so guilty, he shall forfeit his seat. In what I have said as to the Common Law, I must not be supposed to suggest that there is not a Common Law applicable to elections. I take it that the law is correctly laid down in this passage in *Woodward* v. *Sarsons*, (1875) L.R., 10 C.P., p. 743, where Lord *Coleridge*, C.J., says, in delivering the judgment of the Court:—"As to the first point, we are of opinion that the true statement is that an election is to be declared void by the Common Law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, *i.e.*, that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own

preference, by general corruption or general intimidation, or to be prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished, or not open, or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declarations of numbers by a Returning Officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors *may have been* prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitled the tribunal to declare the election void by the Common Law of Parliament."

I think that statement of the law is applicable to any election in respect of which a judicial tribunal is called upon to say whether there has been a due election or not, and I adopt it as laying down the law applicable to this case. But whether it is the law of the Commonwealth that, where there has been a single act of bribery at Common Law on the part of the successful candidate, or his agents, the election is void, is a matter which we are fortunately relieved from deciding.

BARTON, J. I am in general concurrence with the judgment which has just been pronounced, and it expresses the view I hold in common with the learned *Chief Justice*. I think any construction less broad than that which His Honor has placed on the provisions directing the mode of expression of the preference of the voter by placing his cross in a certain position, would tend to put the franchise at the mercy of the officer himself or of the slightest slip the printer may make. Imagine a printer's error which left out one side of the square. That either a number

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of electors must thereby be disfranchised or there must be another election in order that they may record their votes, is a proposition too extreme to maintain. If it were necessary I am prepared to go as far as His Honor indicated in holding that, while the making the cross and making it opposite a name is essential, and a mandatory provision, the placing of that cross inside a square is not essential and therefore not imperative, although the two directions occur in the same section. There were half-a-dozen varying laws of election by ballot which not only were in force in the six States before Federation became a fact, but whose operation continued as to Federal elections until the Commonwealth passed this Electoral Act, and, as a matter of fact, an election had already been held under these varying laws so far as it was possible to apply them to the conditions of the new Commonwealth; for the very Parliament which passed this Act had been so elected. There were varying methods of indicating a voter's preference, some by striking out the names of all the candidates but one, if one only were to be elected; others by putting a cross against the names of as many candidates as there were to be elected; and in the case of South Australia, there was an express provision making the vote void in case that requirement was not complied with, which made it beyond doubt a condition and mandatory. So, in this case, if we could trace the clear intention of Parliament to make such a thing as placing the cross in a square, an imperative condition, there would be nothing for this Court to do but to give way to it. I have, during the argument, referred to the language of *Martin*, B., in *Thompson* v. *Harvey*, (1859) 4 H. and N., at p. 262. "It is a rule of construction that matters shall not be deemed to be conditions precedent unless they are declared to be so. That is a sound rule to apply to statutes and unless the legislature has in plain words said that a certain thing shall be a condition precedent we must not so construe it." One can quite understand why in this case the setting of a cross opposite the name of a candidate should be a condition precedent. Here it was essential in the very nature of the case that there should be some specified mark by which the preference should be indicated, whether it was a line through the name or names of a candidate or candidates, or a circle or cross set opposite

the name of the candidate preferred. But I am loath to believe that the legislature, having regard to that which was an essential in its very kind and nature, went on to prescribe, as something which is also essential, the mere locality of that cross, beyond and apart from the strict and positive indication of the voter's preference, as the placing of the cross opposite the name of the candidate for whom he desires to vote clearly is. Taking into consideration the sections cited by His Honor, and secs. 163 and 164, in which there is no mention of a square, and having in view sec. 157, which does not place any rigid limit upon the power of this Court to declare a vote valid which may be in some minute respect strictly informal, coupling these with the provisions of sec. 199 which expressly warn us against the adoption of legal formalities and technicalities, I have come to the conclusion that it was not an essential to the validity of these votes that the cross should have been placed within a square. But, as His Honor has pointed out, if it were an essential that it should be placed in a square, it is in a square space, and greater particularity than that I do not think the legislature requires. And, looking at the case of *Woodward* v. *Sarsons*, (1875) L.R., 10 C.P., 733, I do not see anything in the judgment that limits its principle to the precise state of facts which arose in that case. It is true that in that case certain provisions or directions for the guidance of voters were placed in a schedule to the Act, and others were placed in the Act itself. But I cannot bring myself to the conclusion that the principles there stated, if we find them applicable, should not apply even where there may be two provisions in question, both occurring in the body of the Act; and I may go even further, and say that, if the application of the principle can be deduced from the whole meaning of the clause, and the scope and purport of the Act, then it can be applied even where the two requirements occur in the same section; and where their nature is different it is open to infer that the degree of force to be given to them is different.

Now as to the second class of votes included in the first question, namely those in which in addition to placing a cross in a square, the voter has struck out the name of the opposing candidate, I do not think that that question was seriously argued at the Bar, or that the validity of those votes was in fact con-

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tested. Where a ballot-paper has been marked by an elector in full compliance with a Statute which does not prohibit any further marking it would be too much to hold that a further marking, still more clearly expressing the intention of the voter, rendered the vote illegal. I think we are unanimous in that respect.

As to the second question, which is "whether the votes given in the manner alleged in paragraph 13 of the petition were valid"—are the votes valid of 41 electors whose names were on the rolls for other polling places within the Division, and who recorded their votes (that must be taken to be the correct statement of the facts for the purpose of this argument), not in the manner prescribed by the *Electoral Act* and the Regulations made thereunder? Now it appears that we are to discuss this paragraph in the light of the facts disclosed during the argument, the chief of which facts were these. The voters went through the formalities prescribed in the Regulations to cover their being absent from the polling places in which they were enrolled, and so they were entitled to vote at polling places in some other part of the Division, if they first made and signed a declaration in the Form Q in the Schedule. That was a declaration that the applicant was the person whose name appeared on the electoral roll, and that he had not voted at that election, and that he promised that, if permitted to vote at the polling place designated in the Form, he would not vote at the same election at any other polling place. Having made those declarations (and it is not contended, although they were in a form different as to words from Form Q, that they were thereby invalid), the electors voted, apparently through the fault of the officer, by merely writing the name of a candidate upon papers which up to then did not contain the name of any candidate. The Act is clear I think that persons who vote under this section must vote in the ordinary way. There is nothing to distinguish the method of their voting from the voting of other electors, but, beyond all question of crosses and squares, the matter is deep-seated, because, except in one case, that of postal votes, there is no provision which allows an elector to vote by writing down the name of a candidate for himself. It is so absolute a departure from all the conditions required for an ordinary vote (and it is an ordinary vote when once the declaration is made) that it would

be impossible to hold the vote valid. Of course, the question as to the effect on the election is for the *Chief Justice* at the hearing, and not for this Court.

The third question is—"Whether the High Court as a Court of Disputed Returns has any and what jurisdiction in respect of illegal practices." But this form of words does not express the exact point we are asked to determine. It appears from a statement made by the *Chief Justice* during the argument and assented to at the Bar, that the real question to be determined is, whether an election can be avoided for a single act of bribery or other illegal practices. On that question I am also in accord with the *Chief Justice*. I do not at present express any opinion (because it is unnecessary in this case) as to the construction to be placed upon the second paragraph of sec. 44 of the Constitution taken in conjunction with the provisions of the *Electoral Act*. But upon the general question I should like to call attention to a further passage in the judgment of *Mellor*, J., in the case of the *Bolton Election*, (1874) 2 O'M. & H., at p. 150. That judgment has already been cited by the *Chief Justice*. The additional passage is in these words—"I agree with the opinion of the late Mr. Justice *Willes*; he was decidedly of opinion that a violation of an Act of Parliament which itself created the offence and provided the penalty could not avoid the election; all it did was to inflict penal consequences upon the persons who did the acts. That also is in exact conformity with the evidence given by my brother *Martin* to which I have already referred, and it is also, I know, the opinion of my brother *Bramwell*, for when I communicated with him upon the point of the telegram, I took the opportunity of asking his opinion upon this particular point, and in the answer which he gives me he entirely goes the length of Mr. Justice *Willes*, and entirely concurs in the view I have taken of the effect of sec. 36 of the *Reform Act* 1867." So that that opinion expresses the concurrence of three judges on the question. Now let us have some regard also to the legal history of this question. The legislation of all the colonies which afterwards became the States of the Commonwealth, provided for several electoral offences and their punishment, including among such offences corrupt practices, and in each case, so far as I have been able to discover, and I

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have looked through the majority of the Acts, the commission of a single act of these corrupt practices has been in the past laid down as both disqualifying the candidate elected and forfeiting the seat. But singular to relate, the Commonwealth Parliament, although it provided for the definition and the punishment of these offences, did not provide that the commission of them should disqualify the candidate or forfeit his seat. I regard it as a strong feature that Parliament had all these enactments before it, being those severally applied within the States to the election of the members who passed this uniform Act, and yet refrained from placing them in its legislation. How could it have meant that the consequences of the previous legislation should apply to the legislation it was about to enact? If the Federal Houses had that intention, they have not expressed it; and it may be that the course we are now taking in not going beyond the mere necessities of this case has additional reason in its favour because, before any such question comes before us again, the representatives of the people will have had an opportunity of considering this question, and of taking such course as they may deem advisable. In the meantime we find this question argued by counsel for the petitioner on the basis that he rests his claim on the Statute, and on the Statute alone. The answer I think the Court is obliged to make to that is, as has been pointed out by *Mellor*, J., in the *Bolton case*, *supra*, that it is within the four corners of the Act in this case that we must look for the offences, their punishment and consequences; and not finding (applying the policy of the Act as broadly as we can) any provision which would justify us in saying that a single act of bribery or of treating would render a seat void, we are obliged to answer that question in the negative. The Common Law is not here invoked, because counsel for the petitioner relies merely on the Statute. It may be that the Common Law as stated on the high authority of Mr. Justice *Willes*, is that a single act amounting to bribery whether by treating or otherwise, committed by a candidate or his authorized agent, would avoid the whole election; but on that point His Honor the Chief Justice has read a passage from *Woodward* v. *Sarsons*, *supra*, which seems to point the other way, and to require that, even at Common Law, the corrupt practice proved must be general in its character so as to

have permeated the election, possibly on the part of both parties, so that it is no election at all, or that the corrupt practice must either have affected the result or given reasonable ground for belief that it might have affected it, so that what purported to be an election was not a free and pure election. In the meantime it is sufficient for us to answer the question which arises out of the reference put to us, together with the argument of Sir John Quick in the negative; that is to say, the question as re-stated by the *Chief Justice*, and argued for the petitioner, namely, whether under the *Commonwealth Electoral Act* a single act of bribery or treating would defeat an election. We are therefore relieved from answering that broad question of jurisdiction put to us in the original question, and I think it is fortunate that the Court is so relieved. For these reasons, in addition to those which the *Chief Justice* has put forward, I concur in the conclusions stated by him.

O'CONNOR, J. As to the first point, I regret that I cannot agree with the opinion which has just been expressed by His Honor the *Chief Justice* and Mr. Justice *Barton*. It would have been well if in this decision which will be a guide to the administration of the Act throughout the Commonwealth, the judgment of the Court had been unanimous. I have given the utmost possible consideration to the opinion of my learned brothers, with a view to seeing whether I could not agree with them. Notwithstanding the most careful consideration, I still hold a very clear opinion that the ballot-papers referred to in the first point were properly declared informal. One of the principal rules in the interpretation of a Statute is this:—That the Statute should be construed according to its ordinary grammatical meaning; in other words, that the Legislature should be taken to have meant what it said. Of course it sometimes happens that, owing to the difficulty of expressing thought with absolute accuracy, whether in an Act of Parliament or in any other document, the intention has not been clearly indicated by the words used: then, the intention is to be gathered from the whole scope and purpose of the Act or document reading it altogether, and, in so reading it, full effect must be given to every portion of it. I adopt the rule of interpretation referred to

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by His Honor the *Chief Justice,* in considering whether the provisions of this Statute are directory or mandatory. In my view, the section, according to the ordinary grammatical construction of the words, is mandatory, and, in addition to that, I think if the test to which His Honor has referred be applied, that the whole scope of the Act shows that the language of that section is intended to be mandatory and not merely directory. To the rule laid down by Lord *Campbell* I would like to add the observations of Lord *Penzance* in *Howard* v. *Bodington,* (1877) 2 P.D., 203, at p. 211, where he says:—"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory." Taking these two rules of interpretation together, that is to say that the language of the Act must be given its ordinary grammatical meaning, and that regard must be had to the subject-matter and the importance of the provision in question, I shall now proceed to refer to the sections of the Act. But before I do that, I would like to state in a very few words the facts which are before us for our consideration. It appears that the ballot-papers handed to voters by the Returning Officer, it being his duty as has been pointed out by the *Chief Justice* to supply the ballot-papers under sec. 124, were ballot-papers strictly in accordance with the Act, and identical with Form P in the Schedule; that is to say they contained lines within which the names of the candidates were printed, and contained opposite the name of each candidate a separate square, or enclosure in the nature of a square, and at the end of the ballot-paper there was a note as follows:—"Indicate your vote by making a cross in the square opposite the name of the candidate for whom you vote." Having that ballot-paper in their hands for the purpose of voting, the electors whose votes have been declared invalid, instead of making a cross in the square printed upon the ballot-paper for the purpose of having a cross marked in it, made a cross outside the square between the square and the name of the candidate for

whom they voted. Now those are the ballot-papers which have been declared to be invalid on the ground that the cross is not in the square opposite the name of the candidate but outside the square. Some suggestions were made in the judgments of their Honors as to what would happen if the square was not complete, that is, was not an actual mathematical square. It appears to me that when the expression "square" is used in an Act of Parliament dealing with a subject of this kind, it must be taken to be used in the ordinary popular sense, not as meaning a mathematical square, but an enclosure which may be fairly described as a square. In this instance that which purports to be a square opposite the name of the candidate is not a mathematical square, but nobody who saw it would hesitate for a moment to say that it may be fairly described as the square set opposite the name of the candidate. Now that being so the voter did not use that square, but put a cross opposite the name of the candidate outside the square. The question is whether that vote is valid or not. It has been said that there is no obligation upon the Returning Officer to issue a ballot-paper containing the square. I cannot agree with that view. It is true that the Act says in sec. 132:— "Ballot-papers to be used in the election of members of the House of Representatives may be in the Form P in the Schedule." But in having regard to what are the essentials of a ballot-paper you must look at other sections besides that. Form P is intended merely to give the form in which the essentials of the ballot-paper are arranged; and as long as you have the essentials of the ballot-paper, it appears to me to be immaterial whether they are in the Form P or some other Form. There is no doubt that the general provision at the end of the Act, namely, sec. 209—"The forms in the Schedule may be varied as the circumstances of the case may require"—is really directed to the same end. The ballot-paper need not contain those particulars which are not material. There may be in that respect a variation of the form which is laid down in the Schedule. Now in determining what is material in the Form of the ballot-paper, it is necessary to look at other portions of the Act; and it appears to me that we must gather what is material from sec. 133. That section provides:—

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"133. In printing the ballot-papers—

"(I.) The names of all candidates duly nominated shall be printed in alphabetical order according to their surnames:

"(II.) If there are two or more candidates of the same surname their names shall be printed according to the alphabetical order of their christian names, or if their christian names are the same, then according to the alphabetical order of their residences, arranged and stated on the ballot-paper:

"(III). Where similarity in the names of two or more candidates is likely to cause confusion, the Commonwealth Electoral Officer for the State or the Divisional Returning Officer conducting the election may arrange the names with such description or addition as will distinguish them from one another:

"(IV.) A square shall be printed opposite the name of each candidate."

Sub-section 1 must be carried out exactly. The words of that sub-section are not permissive words as in sec. 132, and there is no liberty to alter the Form under sec. 209 which would enable that condition to be dispensed with. In the same way there must be an arrangement of the names of the candidates as provided in sub-sec. 2. Sub-sec. 3 is, I think, permissive. But when we come to sub-sec. 4 the words are "A square shall be printed opposite the name of each candidate." Now the essentials of a ballot-paper are, I think, to be gathered from that section, which directs that, in the printing of the ballot-papers, the names of the candidates are to be arranged in a certain order, and that there shall be printed a square opposite the name of each candidate. In addition to that if we look at sections 155 and 158 which relate to the scrutiny and which declare the grounds of informality, we find that it is an essential part of that scrutiny to see that the cross is inside a square opposite the name of the candidate. How can it be said in the face of all these sections making the use of a square imperative, that a square is not essential, or that it is optional whether there is a square or not? In my view it is expressed as plainly as anything can be in the different sections of the Act, that whatever else may be immaterial, or however the Form may be varied, there are certain essentials of the ballot-paper, one is that the names of all the candidates shall be there, and the other is that opposite the name of each candidate a square shall be printed. Now, the ballot-paper having been

supplied in that form (there is no question here that the ballot-paper was in the form laid down by the Act), it had in it a square opposite the name of the candidate. Let us next consider, following the rules laid down by Lord *Penzance*, of what importance or materiality is the marking inside the square opposite the candidate's name in the general scheme of the legislation provided in the Act. I suppose we are entitled to have the same knowledge of public affairs as any other members of the community, and everyone will admit that, in the varying systems of marking ballot-papers which existed all over Australia before the passing of the Commonwealth Act, one of the most fruitful sources of informalities and uncertainty was the carrying out of the method by which the voter was to mark his preference. In some cases it was by striking out names, in other cases it was by putting a cross opposite the name; and the question was constantly being raised as to whether the mark was opposite the name, or whether it indicated the intention to vote for any particular candidate. It appears to me that the legislature has indicated an intention throughout the whole of this Statute to ensure as far as possible certainty in the method of voting, and to leave as little as possible to the discretion of the Returning Officer at the scrutiny, by providing not only that there shall be a mark opposite the name, but also by setting out the position in the ballot-paper within which that mark shall be placed. This is not new legislation. We find in the South Australian Act—the electoral code of 1896 it is called—this very system is in force. There is a form of ballot-paper in the Schedule exactly like this, except that the squares are merely separate squares and not connected by any lines with the enclosures in which are the names of the candidates. That Act is more detailed than ours in the provisions as to the manner in which the marking is to be done. It provides that a voter shall vote by making a cross having its centre within a square opposite the name of the candidate for whom he desires to vote. That is the only difference. Here the cross is to be within the square; there the cross is to have its centre in the square. Mr. Justice *Barton* stated that there is some provision in the South Australian Act making a vote void if that is not done. I am unable to find it. I do not know whether Sir John Quick

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can assist me in that. I have looked carefully and can find no provision making a vote invalid if the centre of the cross is not within the square.

Mitchell.—He relied upon the words "and not otherwise."

[*Quick* referred to sec. 134, sub-sec. (*b*).]

O'CONNOR, J. In the view that I take of this matter I think that the Commonwealth Act has expressed the intention of the legislature just as strongly as the legislature of South Australia expressed its intention in the Act I have referred to. That intention is to be gathered not only from the sections which deal with the scrutiny, but from sections all through the Act dealing with voting. Now it appears to me that the legislature might very well have come to the conclusion that it was an exceedingly important thing that these different methods, by which uncertainty was not only produced but encouraged in the methods of marking votes, should be put an end to by adopting the South Australian system by which a voter could make no mistake, because there is a place marked out on the ballot-paper within which he must mark his cross. I find it difficult to see how a provision of that kind can be regarded as immaterial or unimportant. One of the difficulties I have felt in acceding to the view of the *Chief Justice* and Mr. Justice *Barton* is how to avoid giving the go by altogether to those provisions in the Act regarding the place on the ballot-paper in which the preference is to be stated. Because, if it is the law that these provisions are directory only, it is quite obvious that those squares, which are put there expressly for the purpose of having the voter's preference marked in them need not be used unless the voter pleases, and, if that is so, they are of no value whatever. It would then be quite optional whether the votes were marked inside the square or not so long as they were opposite the candidate's name. They might be marked before the name or after the name, under the name or over the name. In any of these ways the marking would be opposite the name. It appears to me that, if it is the law that these provisions are directory only, and it is immaterial whether the mark is put in the

square or not, the whole of the provisions of this Act regarding the square and the particular place in which the vote is to be marked, are mere waste paper. I come now to the sections dealing expressly with the informality complained of. It will be found that in the scheme of the Act, the ballot-papers and the dealing with the ballot-papers of both the Senate and the House of Representatives are put on exactly the same footing. Sec. 133 provides that they are to be printed. No distinction is made as to the printing of the ballot-papers of the two Houses. The printing of ballot-papers is spoken of generally, and when you come to the obligations of the voter you find also that they are treated in exactly the same way. The obligations of the voter are stated in sec. 150, which says :—"In elections for the Senate the voter shall mark his ballot-paper by making a cross in the square opposite the name of each candidate for whom he votes." It having been enacted, that each ballot-paper shall contain a square, sec. 150 provides that the voter shall mark his ballot-paper by making a cross within the square opposite the name of each candidate for whom he votes. That is mandatory. Taking the ordinary grammatical meaning of that section "shall" means "shall." Next take sec. 151 :—"In elections for members of the House of Representatives the voter shall mark his ballot-paper by making a cross in the square opposite the name of the candidate for whom he votes." The same expression is used with reference to the same square. Now that being the duty of the voter, let us next look at the power which is to be exercised by the Returning Officer at the scrutiny. Sec. 155 is a general provision dealing with the scrutiny both for elections to the Senate and elections to the House of Representatives. Sub-sec. 4 provides that :—"All informal votes shall be rejected." That is mandatory. Then sec. 158 provides what votes shall be informal. Here again I take together the provisions relating to both Houses, for it seems to me that they cannot be separated. Sub-sec. (*b*) provides that :—"A ballot-paper shall be informal if in elections for the Senate it has (not being a postal ballot-paper) no cross in the square opposite the name of any candidate." The expression is "*shall* be informal." That is clearly mandatory. The square referred to is the square referred to in sec. 150. It is the square

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which appears in Form O in the Schedule ; it is the square referred to all through the Act wherever the matter is dealt with. When we come to the provisions with respect to the House of Representatives sub-sec. (*c*) provides that :—"A ballot-paper shall be informal if in elections for the House of Representatives it has (not being a postal ballot-paper) no cross in a square opposite the name of a candidate." If the word used had been no cross in "*the*" square, I think there could have been very little room for argument. The section, however, uses the word "*a*" square, while in the provision as to the Senate the word used is "*the*." But can there be any doubt at all that the square mentioned in sub-sec. (*c*) is the same as the square mentioned in sub-sec. (*b*)—that the square for the Senate is the same as for the House of Representatives ? It appears to me that you must take these as one provision for the issue of the same kind of ballot-paper for the Senate and the House of Representatives, putting a duty on electors in both cases to vote in the same way by putting a cross in the square opposite the name of the candidate for whom they vote. I cannot do otherwise than read the words "in a square" in sub-sec. (*c*) as meaning exactly the same as the words "in *the* square" in sub-sec. (*b*). But it is said that however that may be sec. 163 makes a difference. It is to be remembered that this Act is divided in the following way. Part 12 has a general heading, "The Scrutiny." The provisions I have been reading are general provisions applying both to the Senate and the House of Representatives. Then, inasmuch as there must be a different way of conducting the two elections, the returns for the Senate coming in from the whole State, and those for the House of Representatives from the various electorates into which the States are divided, there must be, in some respects, a difference in the provisions relating to them, and, therefore, there are sections relating to the Senate and the House of Representatives separately. It is to be noticed that in these further "provisions relating to the elections for the Senate" there is no mention specifically of the square at all. Sec. 160, sub-sec. (*c*) provides that :—"Divisional Returning Officers and Assistant Returning Officers shall count all the votes found in the boxes opened by them respectively, rejecting all informal ballot-papers, and shall make and keep a record of the

number of votes counted by them from such boxes respectively." The other sub-sections do not deal with the matter. The scrutiny already having taken place by virtue of the earlier sections, this is a provision for enabling votes to be grouped and arranged. In the same way under the general heading "provisions relating to elections for the House of Representatives, there is in sec. 163 the same class of provision. That section provides:—That "each Assistant Returning Officer shall: (1) Arrange the ballot-papers under the names of the respective candidates by placing in a separate parcel all those which have a cross set opposite the name of the same candidate, rejecting all informal ballot-papers." The scrutiny does not take place under that, but under the general provision which directs that all informal votes shall be rejected, and that a ballot-paper which has not a cross opposite the name of a candidate must be rejected. That has been done already. Sec. 165 deals only with the grouping and arranging of the ballot-papers in parcels, and surely it was not necessary in setting out the duties of the Returning Officer for the purpose of arrangement, to describe in the same terms the informality of the ballot-papers, which had already been done. You must read that section as a whole. The rejection of informal ballot-papers takes you back to sec. 158, and these papers that are to be arranged do not contain those informal ballot-papers, because they have been rejected in the scrutiny which has taken place before. That is the only section which deals with the matter. It appears to me it is plainly mandatory, and that there is no discretion whatever in the Returning Officer or the Court or anybody else to count as valid one of these papers which does not contain a cross in the square opposite the name of a candidate. I cannot avoid coming to the conclusion that, if you make this provision directory only instead of mandatory, you give the go by entirely to the whole of the provisions dealing with squares, and neutralize every provision intended in that respect to bring about certainty in the administration of the Act, and to relieve the Returning Officer, and the Court afterwards, of the duty of determining in hundreds of doubtful cases what was the intention of the voter as expressed in the way in which he has marked his ballot-paper. Then it is said that sec.

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199 will aid the Court in coming to the conclusion that this provision should be considered as directory and not mandatory. I am unable to see that. Sec. 199 is a section which is commonly put into Acts of this kind for the purpose of enabling the Court to get rid of what we all understand as legal technicalities. But sec. 199 must be read in connection with the rest of the Act, and if the other portions of the Act have stated that voting shall be conducted in a particular way—in other words, if the section is mandatory—there is no question at all but that the Court has no power under sec. 199 to read it differently. I think the *Chief Justice* in the course of the argument stated that. So that in the view I take of the matter, that these provisions are mandatory, sec. 199 cannot be relied upon. For these reasons I have come to the conclusion that this provision that the voter shall vote by making a cross inside the square and opposite the name of the candidate for whom he votes is mandatory, that it is an essential and important part of the Act and must be complied with, and, if not complied with, the vote is informal, and, therefore, that the Returning Officer properly disallowed the votes mentioned in paragraph 8 of the petition as informal. As to the other votes mentioned in the first question, I agree with the other members of the Court in thinking that these votes ought to have been allowed. I can see no informality whatever in them. Of course if it were shown later on as a matter of fact in the course of the trial before the *Chief Justice* that the Returning Officer has the opinion, founded upon some ground, that the marking tended in some way to violate the secrecy of the ballot, it may be that His Honor would not be obliged to hold these papers valid; but on the face of them as they are presented to us I am clearly of opinion that they are valid votes and ought to be allowed.

As to the second question I agree with the judgments of the other members of the Court in thinking that the votes were not valid. It appears to me invalidity is shown on this one short ground. There is only one case in the whole of the Act which dispenses with the two essential requirements of this Act, first, that there shall be nothing written on the ballot-paper which may indicate or disclose the identity of the voter, and, secondly, that the vote must be given by putting a cross in the square

opposite the name of a candidate. That is the case of the postal vote. It is quite clear that these are not postal voting papers, and, as they are not postal voting papers, a voting in this way was irregular. One can well understand that it is a necessity in the case of voting by post to make provisions which may violate the secrecy of the ballot. That is a necessity of the position. But the Act has taken care to make it abundantly clear that in no other case whatever will votes be allowed which are in any other form than the form specified.

As to the next question also I entirely agree with the opinions expressed by the other members of the Court. I was at first inclined to think that the very definite and wide terms in which jurisdiction was given to this Court, would enable it to exercise all the powers which Parliament could exercise in the case of disputed returns; but I have come to the conclusion that that cannot be so. This Court, being a judicial tribunal, when power is given it to decide, has power to decide only according to law. It must get its power from the law; either from the law laid down in the Act itself or from the Common Law. As to the law laid down by the Act itself I think it is very clear that the Act gives no power whatever to avoid an election on the ground of any misconduct however great on the part of either candidate. The authority cited by the *Chief Justice* and Mr. Justice *Barton*—namely, the *Bolton Case*—is very strong on that point, and as a confirmation of that, I would like to refer to a note in *Chandos Leigh and Le Marchant on Election Law and Petitions*, page 144. "The following important remarks were made by *Martin*, B., with respect to illegal payments, before the Select Committee on Parliamentary and Municipal Elections, 431:—'I discussed the matter this morning with Mr. Justice *Willes*, and I attach much greater importance to and confidence in his opinion than in my own. He is of opinion, as he stated to me to-day, that he thought *that to whatever extent* the provisions of an Act of Parliament were wilfully violated which did not enact that the consequences of those acts avoided the seat, a person sitting judicially could not avoid the seat.'" That bears out in more detail the expression of opinion in the case I have referred to. That is the opinion not only of *Martin*, B.,

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but of *Willes*, J. For these reasons I think there is no doubt that, as far as the Statute is concerned, there is no power in the Court of Disputed Returns to avoid a seat on the ground of misconduct, no matter how great. As was pointed out by the *Chief Justice* in the course of the argument, the object achieved in the States of the Commonwealth prior to federation, by express provisions for avoiding seats on the grounds of bribery and other illegal practices, is really brought about by sec. 44 of the Constitution, which provides that "any person who has been convicted, and is under sentence, or subject to be sentenced for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year, or longer, shall be incapable of being chosen, or of sitting as a Senator or a Member of the House of Representatives." Therefore if a person has been guilty of any of those illegal practices mentioned in sec. 181 of the *Electoral Act*, for which he is liable to imprisonment for one year, he comes under the operation of sec. 44 of the Constitution. For bribery or undue influence he may be imprisoned for one year. That being so, that is a punishment which comes under sec. 44 of the Constitution, and if before any ordinary tribunal on summary conviction, a candidate is convicted of that offence, he forfeits his seat, and is incapable of sitting as a Senator or as a Member of the House of Representatives. Looking at the whole scope of the Act, it would appear that the legislature has expressly taken away any power whatever of punishment from the Court of Disputed Returns. There are numerous provisions for punishment in the Act, but in all cases the proceedings must be taken before the ordinary Courts. That is really consistent with the *Judiciary Act* under which there is no direct criminal jurisdiction given to this Court. The Court may have jurisdiction on appeal, but no direct power to decide or adjudicate in criminal cases ; and in carrying out that principle, it may have been thought well by the legislature to keep entirely distinct the function of deciding a disputed election, from that of punishing a candidate for misconduct, either by a fine or imprisonment or forfeiture of seat. As regards the Statute law, therefore, it seems quite clear that we have no power to avoid a seat on the ground stated. Whether or not that power exists at Common Law is a very different matter. I certainly

am not satisfied that there is at Common Law power in a Judge of this Court to upset an election or declare an election void on the ground of a single act of bribery. Of course it is true that whatever the Common Law is, this Court can administer it, but I am not satisfied that there is any Common Law which would authorize the avoidance of an election for a single act of bribery. However, the withdrawal by Sir John Quick of any imputation of bribery outside the Act itself renders it unnecessary to consider that point. On this ground also I am entirely in accordance with the judgment of the other members of the Court.

GRIFFITH, C.J. Both parties having partly succeeded, there will be no costs of the reference.

Solicitors, for petitioner, *Quick, Hyett & Rymer*, Bendigo.

Solicitors, for respondent, *Blake & Riggall*, Melbourne.

[HIGH COURT OF AUSTRALIA.]

WILLIAM MALONEY . . . . . PETITIONER;

AND

SIR MALCOLM DONALD McEACHARN . RESPONDENT.

MELBOURNE ELECTION PETITION.

ON REFERENCE FROM THE COURT OF DISPUTED RETURNS.

Commonwealth Electoral Act 1902 (*No.* 19 *of* 1902), *secs.* 109, 112, 113, 114, 119, 139, 158, 209; *Schedule, Form K—Acts Interpretation Act* 1901 (*No.* 2 *of* 1901), *sec.* 13—*Election — Voting by post — Application for ballot-paper — Witness to signature—Mandatory or directory provision—Voter voting out of his division—Form of ballot-paper—Writing name of candidate.*

March 8, 9, 10.

Griffith, C.J., Barton and O'Connor, JJ.

The direction in Form K in the Schedule to the *Commonwealth Electoral Act* 1902, introduced by the letters "N.B." as to the persons by whom applications for postal vote certificates are to be attested, is mandatory.