[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND OTHERS;

EX PARTE FEDERATED CLERKS UNION OF AUSTRALIA, NEW SOUTH WALES BRANCH, AND ANOTHER.

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MELBOURNE, *June* 1, 2;

SYDNEY, *Aug.* 2.

Latham C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Industrial Arbitration (Cth.)—Disputed elections in industrial organizations—Application for inquiry into alleged irregularities in election—Form of application—Jurisdiction—Procedure—Conditions precedent to inquiry—Writ of prohibition—Circumstances in which writ will lie—Statute—Retrospective operation—Commonwealth Conciliation and Arbitration Act 1904-1949 (*No.* 13 *of* 1904—*No.* 28 *of* 1949), *ss.* 32, 34, 40, *Part VI., Div.* 3.

Part VI., Div. 3, of the *Commonwealth Conciliation and Arbitration Act* 1904-1949, which Division came into operation on 12th July 1949, provided, by s. 96A (1), that, where a member of an organization registered under the Act, or a person who, within the preceding period of twelve months, had been a member of such an organization, claimed that there had been an irregularity in or in connection with an election for an office in the organization, he might lodge an application for an inquiry by the Commonwealth Court of Conciliation and Arbitration into the matter; by s. 96A (2), that "an application under this section shall—(*a*) be in writing in accordance with the prescribed form; (*b*) be lodged with the Industrial Registrar before the completion of the election or within such time after the completion of the election as is fixed by or under the regulations; (*c*) specify the election in respect of which the application is made and the irregularity which is claimed to have occurred, and state the facts relied on in support of the application; and (*d*) be accompanied by a statutory declaration by the applicant declaring that the facts stated in the application are, to the best of the applicant's knowledge and belief, true"; by s. 96B (1), that, "where an application under the last preceding section is lodged with the Industrial Registrar, he shall—(*a*) if he is satisfied—(i) that there are reasonable grounds

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for an inquiry into the question whether there has been an irregularity in or in connection with the election, which may have affected or may affect the result of the election; and (ii) that the circumstances of the matter justify an inquiry by the court under this Division, grant the application and refer the matter to the court"; by s. 96B (6) that "an act or decision of the Industrial Registrar under this section shall not be subject to appeal to the Court"; and, by s. 96C (1), that, "upon the reference of a matter to the Court under the last preceding section, the inquiry shall be deemed to have been instituted in the Court."

Held:—

(1) By the whole Court, that Part VI., Div. 3, applies to an election completed before 12th July 1949, the persons elected at which hold office after the coming into operation of the Division.

(2) By *Latham* C.J., *McTiernan*, *Webb* and *Kitto* JJ. (*Fullagar* J. dissenting), that, where the Industrial Registrar had purported under s. 96B (1) (*a*) to grant an application as to which there had not been substantial compliance with the requirements of s. 96A (2) and to refer the matter to the court, and the court was proposing to proceed with an inquiry into the matter pursuant to the powers conferred on it by Part VI., Div. 3, a writ should issue to prohibit further proceedings. The Commonwealth Court of Conciliation and Arbitration had no power to correct or waive deficiencies which existed by reason of non-compliance with s. 96A (2).

R. v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Grant*, (1950) 81 C.L.R. 27, considered.

ORDER NISI for prohibition.

Claude Bernard Grace, a member of the New South Wales branch of the Federated Clerks Union of Australia, purported to make an application under Part VI., Div. 3, of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. He caused to be lodged with the Industrial Registrar a summons which was headed "In the Commonwealth Court of Conciliation and Arbitration" and "In the matter of an application by Claude Bernard Grace." The summons, which was dated 5th August 1949, signed by the Industrial Registrar and expressed to be filed by the solicitors for "the applicant herein," called on the Federated Clerks Union, New South Wales branch, and Thomas James Bond to appear before the Commonwealth Court of Conciliation and Arbitration on 7th December 1949 to show cause why certain orders should not be made. These orders included the following:—That pursuant to Part VI., Div. 3, of the Act "an inquiry may be held into irregularities in and in connection with an election for the offices of President, Vice-President, and Deputy-President to the Executive, members of Federal conference and Central Councillors as elected

by ballot in the Federated Clerks Union (New South Wales Branch) . . . the result of which was declared on or about Monday, 27th day of June 1949"; that named persons, "being persons claiming to act as President, Vice-President and Deputy-President . . . shall not act in the said respective offices"; "that the said election may be declared to be void"; "that a new election may be ordered to be held"; "and for such further or other order as the court thinks fit on the grounds appearing in and by the statutory declaration of Claude Bernard Grace made and sworn" 4th August 1949. There was lodged, at or about the time of the lodging of the summons, a statutory declaration (made on 4th August 1949) by Grace in which he declared that he was "the applicant referred to in an application of even date herewith issued out of the Commonwealth Court of Conciliation and Arbitration" and that "the facts set out in the annexure hereto . . . are the grounds referred to in the said application and are true to the best of my knowledge and belief." The annexure was a lengthy document (sufficiently described in the judgments hereunder) containing statements having relation to the conduct of the election in question. A document dated 30th August 1949 and signed by the Industrial Registrar recited that Grace claimed that irregularities had taken place in or in connection with the election in question, and that Grace "has made application . . . for an inquiry by the court into the matter" and went on to say that he (the Industrial Registrar), "having considered the said application as required by s. 96B of the . . . Act and being satisfied (1) that there are reasonable grounds for an inquiry into the question whether there had been an irregularity in or in connection with the election, which may have affected or may affect the result of the election; and (2) that the circumstances of the matter justify an inquiry by the court, hereby grant the application of the said Claude Bernard Grace and refer the matter to the court." Pursuant to this purported reference *Dunphy* J. appointed a time for the conducting of an inquiry.

The New South Wales branch of the Federated Clerks Union and the secretary of the branch, Morris John Rodwell Hughes, obtained in the High Court an order nisi for a writ to prohibit further proceedings in the matter on the grounds following:—
(1) that Division 3 of Part VI. of the *Commonwealth Conciliation and Arbitration Act* 1904-1949 has no application to the election in question inasmuch as such election had been completed before the *Commonwealth Conciliation and Arbitration Act* 1949 (No. 28 of

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1949) received the Royal assent; (2) that, inasmuch as the purported application made to the Industrial Registrar was not in accordance with the prescribed form as required by Section 96A of the said Act, the purported reference of the said application was invalid and the Commonwealth Court of Conciliation and Arbitration has no jurisdiction to hold an inquiry into the said election; (3) that, inasmuch as the purported application made to the Industrial Registrar did not specify the election in respect of which the application was made and the irregularity was claimed to have occurred and did not state the facts relied on in support of the application as required by sub-section (2) of Section 96A of the said Act, the purported reference of such application was invalid and the Commonwealth Court of Conciliation and Arbitration has no jurisdiction to conduct an inquiry into the said election.

The respondents to the order nisi were the Commonwealth Court of Conciliation and Arbitration, *Dunphy* J., James Edward Taylor (the Industrial Registrar) and Claude Bernard Grace.

M. J. Ashkanasy K.C (with him *J. B. Sweeney*), for the prosecutors. The new Div. 3 of Part VI. of the *Commonwealth Conciliation and Arbitration Act* does not apply to the election in question here; it was completed before 12th July 1949, the date on which Div. 3 came into operation. Neither the decision nor the reasoning in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Grant* (1) covers this case. There, although the election which was in question commenced before the new Act (No. 28 of 1949) and the irregularity complained of occurred before the Act came into operation, the election was not completed until after the commencement of the Act. A person elected to an office of profit in an organization before the Act came into force, and still holding office thereafter, would have a valuable vested right; that is, unless the election could be invalidated at common law. If elected after the Act came into force, his rights, of course, are subject to the Act. The clearest language is required before a statute will be construed as affecting rights already acquired before the statute comes into operation. It may be suggested that the holding of office after—as the result of an election which took place before—the commencement of the Act is a present fact on which the Act can operate; but, as appears from *Grant's Case* (1), it is the election that is the subject of consideration in the Act, and it is consistent with that case to regard the Act as prospective. It is difficult to see how the present holding of office could be used to

(1) (1950) 81 C.L.R. 27.

draw the line between prospectivity and retrospectivity; one would not only go back beyond the commencement of the Act for the election but one might also have to do so as to things done by the office-bearers in their capacity as such. Regulations have fixed the time under s. 96A (2) (*b*) at six months; so that an application for an inquiry must be made within six months of the completion of the election. But, so far as the language of the Act goes, it might have been fixed at six or more years. If the Act is to be regarded as retrospective, there seems no reason—merely on the words of the Act, apart from the regulations—why an inquiry should not now be held into an election held many years since, all the office-bearers elected at which have long since gone out of office. The long title of Act No. 28 of 1949 shows that it is for the "prevention" of irregularities; this is not apt to apply to the past; it shows that the Act is looking to the future. Even if the Act applies to the election now in question, the Commonwealth Court of Conciliation and Arbitration has no jurisdiction to enter upon the proposed inquiry, because the matter is not properly before the court. There was before the Industrial Registrar no application which he could grant or matter which he could refer to the court under s. 96B (1) (*a*), because the requirements of s. 96A (2) had not been complied with. There was really no application at all of the kind which the Act contemplates. The summons signed by the Registrar, although it mentions an "applicant" and purports to be filed by his solicitors, is not expressed as an application by anyone. However, even if the summons might be said to be in the nature of an application, it did not comply with s. 96A (2), the provisions of which are the foundation of jurisdiction. They are express requirements of the Act, not merely procedural provisions such as might be found in rules of court and compliance with which might be excused. Accordingly, the case is one for the issue of a writ of prohibition.

[LATHAM C.J. referred to *Ridley* v. *Whipp* (1).]

[Counsel referred to *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (2); *McIntosh* v. *Simpkins* (3); *Alderson* v. *Palliser* (4).]

A. Bridge, for the respondent Grace. This is not a case in which prohibition should issue. There has been substantial compliance with the requirements of the Act. Within the meaning of s. 96A (2) (*a*), there was an application in writing—the summons. It could not be in "the prescribed form," because the regulations

(1) (1916) 22 C.L.R. 381.
(2) (1937) 59 C.L.R. 369.
(3) (1901) 1 Q.B. 487.
(4) (1901) 2 K.B. 833.

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had not then come into force and no form was prescribed. It was lodged with the Industrial Registrar, and it specified the election in question. It referred to the statutory declaration lodged with it and thus incorporated by reference the contents of the declaration and the annexure thereto; the irregularity alleged is stated in the annexure. However clumsy the documents are in form, they contain the material which the Act requires; and the matter of form is not a sufficient ground for prohibition. [He referred to *R.* v. *Deputy Industrial Registrar*; *Ex parte J. C. Williamson Ltd.* (1).] *McIntosh* v. *Simpkins* (2) is quite different from the present case. There the liberty of the subject was involved, and it was considered essential that the affidavit should strictly accord with the rules. Here the legislation is remedial, and there is no reason for such strictness. The matter was one for the Registrar, and he was satisfied with the materials presented. That the matter is largely in the hands of the Registrar is shown by s. 96B (2), which empowers him to inform himself on relevant matters, and s. 96B (6), under which his decision is final. Moreover, s. 40 (*m*) of the Act empowers the court to correct or waive any error or irregularity whether in substance or in form. To treat the Act as applying to the present case is not to attribute to it any retrospective operation. Although the election took place before the Act, the persons elected held office after the Act. The real object of the Act is to prevent the improper holding of office, and in achieving that object it is not retrospective. [He referred to *Craies* on *Statute Law*, 3rd ed., p. 324; *West* v. *Gwynne* (3); *Welby* v. *Parker* (4); *Waterside Workers Federation of Australia* v. *Commonwealth Steamship Owners Association* (5); *George Hudson Ltd.* v. *Australian Timber Workers' Association* (6); *Australian Timber Workers' Association* v. *George Hudson Ltd.* (7); *Coleman* v. *Shell Co. of Australia* (8); *Ex parte Redgrave*; *Re Bennett* (9); *Ex parte Belling*; *Re Municipal Council of Woollahra* (10).] No interference with vested rights is involved. If a person is not validly elected in the view of the common law, he has no right at all. If the new Division has a wider application so that elections not invalid at common law may be avoided, still, in the view of the Act,

(1) (1912) 15 C.L.R. 576, at pp. 580-582, 585.
(2) (1901) 1 Q.B. 487: See p. 491.
(3) (1911) 2 Ch. 1, at pp. 3, 4, 10-12, 15.
(4) (1916) 2 Ch. 1.
(5) (1920) 28 C.L.R. 209, at pp. 238, 239.
(6) (1922) 32 C.L.R. 413, at p. 447.
(7) (1922) 22 S.R. (N.S.W.) 534, at p. 539; 39 W.N. 181.
(8) (1945) 45 S.R. (N.S.W.) 27, at pp. 30, 31; 62 W.N. 21.
(9) (1946) 46 S.R. (N.S.W.) 122; 63 W.N. 31.
(10) (1947) 47 S.R. (N.S.W.) 166; 63 W.N. 295.

the person irregularly elected has no right to office. Throughout the Division the distinction is drawn between *de facto* and *de jure* holding of office (see ss. 96E (1) (*b*), (*c*), (2), 96G (3) (*b*), (4), 96J); and, by s. 96J, in particular, a substantial measure of protection is given to truly vested rights. The use in the long title of the Act of the word "prevention" does not tend against the view now submitted. An irregularity in connection with an election can be an irregularity arising out of an election already held; the holding of office may be within the description.

R. J. Leckie, for the Industrial Registrar. The Registrar is not properly a respondent in this matter; he is not a person against whom prohibition lies in the circumstances. In the first place, he is *functus officio*; there is nothing remaining for him to do in the matter. Having made the reference, he cannot alter it or pursue it any further; under s. 96C (1), the matter is in the hands of the court. There are apparently some cases in which prohibition has gone notwithstanding that a function has been entirely discharged; such a case, for instance, as that in which an order affecting the rights of parties has been made by a quasi-judicial tribunal and its enforcement is in some other hands; but here there is no order which affects the rights of parties. This affords a second ground for the submission on behalf of the Registrar: His function is purely administrative or ministerial. His order is not of the kind referred to in *R.* v. *Hickman*; *Ex parte Fox and Clinton* (1) as assuming to impose any continuing liability upon parties, or assuming to bind parties. [He referred to *Ex parte Cousens*; *Re Blacket* (2).] A third ground, or perhaps it is merely a particular aspect of the second ground, is that the Registrar is an officer of the court acting in a ministerial capacity.

R. M. Eggleston K.C. (with him *G. H. Lush*), for the respondents the Commonwealth Court of Conciliation and Arbitration and *Dunphy* J., and also for the Attorney-General of the Commonwealth (intervening by leave). Where an Act is penal, or where it interferes with rights recognized by law, and that is its only effect, there is, in general, a presumption that it is not intended to apply to antecedent events; but that presumption does not apply to an Act which is remedial (*R.* v. *Vine* (3)). The Act now in question contains some penal provisions which are incidental to the achievement of its objects. These may well be construed as applying

(1) (1945) 70 C.L.R. 598.
(2) (1946) 47 S.R. (N.S.W.) 145; 63 W.N. 228.
(3) (1875) L.R. 10 Q.B. 195.

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only to events occurring after the Act came into force; but there is no reason why these provisions should not be treated as prospective and the remedial provisions as retrospective. The emphasis of the Act is on remedies rather than on punishments or the deprivation of rights. In s. 96A the only thing that is prospective is the claim; it is a claim that there "has been" an irregularity. On the words of the section there is no reason why it should not apply to any election, past or future, subject to the power of the Executive under s. 96 (2) (*b*) to say what is a reasonable time limit. It is significant that this was left to the Executive; it made it unnecessary for the legislature to draw any distinction between past and future elections. This is reinforced by the consideration that the Act does not interfere with rights; it merely gives a court a discretionary power to upset elections where the court feels that the interests of justice require that to be done. No doubt it was content to leave it to the court to decide whether the interests of justice required that a past election should be upset. Normally no such action would be required where the persons elected had gone out of office before the application was made; but there is a strong indication in s. 96A (1) that this is not necessarily the test of its retroactivity, that it may be more fully retrospective. The right to make the application is given to a person who within the preceding twelve months has been a member of the relevant organization. He may have been expelled by a committee which was irregularly elected, and the rules may provide that the acts of the officers shall be valid notwithstanding any defect in their appointment. The Act provides the only means by which he can resume membership. This illustrates the class of cases for which the legislature must have had it particularly in mind to provide a remedy; and the provisions would not be complete if they did not cover past elections. As to the question of retrospective interference with rights, cf. *Colonial Sugar Refining Co.* v. *Irving* (1); see also *Kraljevich* v. *Lake View and Star Ltd.* (2). A person elected at an irregular election has no vested right. This is decided in *Grant's Case* (3), the reasoning in which is conclusive of this case, both on the point of retrospectivity and that of procedure. On the question of procedure, the whole framework of the *Commonwealth Conciliation and Arbitration Act* is that the legislature does not want to tie anyone's hands by procedural requirements. On this point ss. 32, 34 and 40 are important,

(1) (1905) A.C. 369.
(2) (1945) 70 C.L.R. 647, particularly at p. 650.
(3) (1950) 81 C.L.R. 27.

quite apart from any direct application they may have here because of the setting they provide for s. 96A (2) and the light they throw on its interpretation. It is a screening provision, to prevent trivial and unfounded applications coming before the Registrar; it is for his convenience and cannot be the foundation of any jurisdiction with which the prosecutors are concerned. The attitude of the prosecutors is that they seek to prohibit proceedings to which they were not parties, proceedings which determine nothing except that there shall be a reference to the court for an inquiry; they do not become parties to any proceedings except such as take place when a reference under s. 96B (1) comes before the court. No-one is entitled to inspect the material before the Registrar with a view to saying that he should not have acted on it. He was satisfied in this case on the material before him, and it does not matter what defects others may see in it. The only effect non-compliance with s. 96A (2) has is that the applicant cannot complain if his application is rejected. It may be suggested that the result of this view is to wipe s. 96A (2) out of the Act. That is not so; the sub-section serves its purpose if it enables the Registrar—in any case in which he thinks it proper to do so—to say to an applicant: "I am not going to deal with your application until you put it in proper form." Non-compliance with s. 96A (2) cannot have anything more than procedural effect unless the proper construction of the sub-section is that a purported application is to be regarded as void if it does not comply with the sub-section. If, as is submitted, there is no specific intention disclosed in s. 96A (2) that non-compliance shall result in invalidity, prohibition should not go. From the point of view of prohibition, the question is whether the ultimate order is of a kind which the court can make; if it is, then the court can amend or waive any defect in the steps by which the matter comes before it. [He referred to *R.* v. *Murray*; *Ex parte Proctor* (1).]

M. J. Ashkanasy K.C., in reply. The prosecutors do not ask for prohibition against the Industrial Registrar; he has done all he can do in the matter, whether it is valid or invalid. Section 40 of the Act cannot be invoked here, because it applies only in a matter which is properly before the court. Section 96B (2) does not excuse non-compliance with s. 96A (2). If the prosecutors were not entitled to be heard before the Industrial Registrar, that is all the more reason why there should be strict compliance with s. 96A (2). Section 96L could not operate retrospectively; it

(1) (1949) 77 C.L.R. 387, at pp. 398, 399.

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strongly suggests that the Division is not intended to have any retrospective operation.

Cur. adv. vult.

The following written judgments were delivered:—

LATHAM C.J. This is the return of an order nisi for a writ of prohibition directed to the Commonwealth Court of Conciliation and Arbitration, *Dunphy* J., a judge of that court, James Edward Taylor, Industrial Registrar of the court, and C. B. Grace, a member of the Federated Clerks' Union of Australia, New South Wales Branch. The prosecutors are the said branch of the Federated Clerks' Union and M. J. R. Hughes, Secretary of the branch. The prosecutors seek to prevent any action under a summons issued in the Arbitration Court by which it is sought to obtain an order declaring an election of officers of the branch void on the ground of irregularities in the election. The summons was issued at the instance of C. B. Grace, who sought an order for an inquiry into irregularities in the election and orders that certain persons claiming to be officers of the branch, members of the Federal conference, or central councillors should not act, that the election should be declared to be void, and that a new election should be held.

The prosecutors in these proceedings contend that the Commonwealth Conciliation and Arbitration Court has no jurisdiction to take any action in pursuance of the summons on substantially two grounds: first, that the relevant provisions of the *Commonwealth Conciliation and Arbitration Act* which are contained in the amending Act of 1949 do not apply to the election because the election had been completed before that Act had received the Royal assent, and, secondly, that the alleged application made to the Industrial Registrar did not satisfy the conditions specified by s. 96A of the Act, with the result that there was no basis for the reference of an application to the court, with the further consequence that the court had no power to act in the matter.

The election which the respondent Grace seeks to challenge was completed on or about 24th June 1949. The officers elected were entitled, if properly elected, to hold office for two years. The *Commonwealth Conciliation and Arbitration Act* 1949 received the Royal assent on 12th July 1949, and came into operation on that date (s. 2). Accordingly the election had been completed before the Act came into operation. The first question which arises is whether the provisions of the Act apply to such an election.

Section 96A (1) of the Act is in the following terms:—"Where a member of an organization, or a person who, within the preceding period of twelve months, has been a member of an organization, claims that there has been an irregularity in or in connexion with an election for an office in the organization, or in a branch of the organization, he may lodge an application for an inquiry by the Court into the matter."

It will be observed that the election to which this provision refers is "an election for an office in the organization." Subsequent provisions, e.g. ss. 96E (1) (*b*), (*c*), 96E (2), 96G (3) (*a*), (*b*), (*c*) and 96J are provisions which show that the Act is directed towards securing that the affairs of an organization are managed by persons who have been properly elected. In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Grant* (1), it was held that the application of the Act was not limited to elections which commenced after the Act came into operation and that the Act was not limited so as to operate only in respect of irregularities which occurred after it came into operation. The grounds of this decision were that the words of s. 96A in their natural meaning apply to an election which was in process when the Act received the Royal assent and that the object of the Act was remedial and was directed towards the maintenance of the right to have officers duly elected and could not be said to interfere with any vested right, because a person who had been elected at an election affected by irregularities as defined by the Act could not be said to have a vested right so as to be able to invoke the presumption that a statute does not interfere with vested rights unless the words are clear. All these reasons in my opinion combine in the present case to lead to the conclusion that the Act applies in the case of any election as a result of which persons were holding office in an organization at the time when the Act came into operation as well, of course, as in the case of pending elections and elections which take place after the Act. Section 96A provides that a member who claims "that there has been an irregularity in or in connexion with an election for an office in the organization, or in a branch of the organization," may lodge an application for an inquiry by the court into the matter. In the present case Grace claims that there has been an irregularity in connection with an election for offices in the New South Wales Branch of the organization. This claim falls within the actual words of s. 96A and there is no reason in the nature of the legislation for refusing to apply them to an election held before the Act in consequence whereof,

(1) (1950) 81 C.L.R. 27.

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at the time of an application under s. 96A, persons hold office in an organization. Accordingly in my opinion the first ground of the order nisi fails.

Secondly, however, it is objected on behalf of the prosecutor that there has been no application upon which the Registrar could refer the matter of an inquiry into an election to the court.

The respondent in these proceedings, C. B. Grace, relies upon the summons issued by the Registrar as being an application for an inquiry into the matter of irregularities in an election within the meaning of s. 96A. This summons called upon the union and the returning officer at the election (T. J. Bond) to show cause why an inquiry into irregularities in connection with the election should not be held and why an order should not be made that certain persons should not act in named offices and why the election should not be declared to be void.

Section 96A (2) is in the following terms:—"An application under this section shall—(a) be in writing in accordance with the prescribed form; (b) be lodged with the Industrial Registrar before the completion of the election or within such time after the completion of the election as is fixed by or under the regulations; (c) specify the election in respect of which the application is made and the irregularity which is claimed to have occurred, and state the facts relied on in support of the application; and (d) be accompanied by a statutory declaration by the applicant declaring that the facts stated in the application are, to the best of the applicant's knowledge and belief, true."

It is contended for the said respondent that the application (that is, the summons) was in writing, though not in accordance with the form prescribed under the regulations. Statutory Rules 1949, No. 49, reg. 4, introduced a new regulation, 133A, into the *Conciliation and Arbitration Regulations*, Statutory Rules 1947, No. 142, as amended. Regulation 133A is as follows:—"(1) An application under section 96A of the Act shall be substantially in accordance with Form 46, and lodged in duplicate. (2) The time after the completion of an election within which an application under section 96A of the Act in respect of the election may be lodged shall be six months."

The form contains the following:—"I . . . hereby apply for an inquiry by the Commonwealth Court of Conciliation and Arbitration into the matter of the alleged irregularities specified hereunder which I claim have occurred in or in connexion with the election specified hereunder. I rely on the facts stated hereunder."

Then follow " particulars " of the election under four headings and " particulars " of alleged irregularities and facts relied upon. The summons in this case does not comply with any of these provisions.

The applicant contends that the document constituting the summons was lodged with the Industrial Registrar and that it may therefore be regarded as an application lodged with the Industrial Registrar. The summons specifies the election in respect of which it is said that the application is made. The applicant made a statutory declaration on 4th August 1949 in which he described himself as " the applicant referred to in an application of even date herewith." There was no application of even date and the summons which is relied upon as an application bore date 5th August. The statutory declaration also contained a statement that the facts set out in an annexure thereto were the grounds referred to in the said application and were true to the best of the knowledge and belief of the deponent. The annexure (as it appears in the transcript placed before this Court) consists of forty-seven typed pages detailing incidents (some possibly significant, some obviously insignificant) occurring in connection with the challenged election from 30th May 1949 to 24th June 1949. It is not possible, except by a process of speculation, to ascertain the grounds upon which the applicant might rely in support of the summons.

Section 96B (1) is in the following terms :—" Where an application under the last preceding section is lodged with the Industrial Registrar, he shall—(a) if he is satisfied—(i) that there are reasonable grounds for an inquiry into the question whether there has been an irregularity in or in connexion with the election, which may have affected or may affect the result of the election ; and (ii) that the circumstances of the matter justify an inquiry by the Court under this Division, grant the application and refer the matter to the Court ; or (b) if he is not so satisfied, refuse the application and inform the applicant accordingly."

On 30th August 1949 the Industrial Registrar, in a document which recited the holding of the election, and the claim of Grace that irregularities had taken place in or in connection therewith, and stated that he had made an application pursuant to s. 96A of the Act for an inquiry, certified that he (the Industrial Registrar) was satisfied—" (1) That there are reasonable grounds for an inquiry into the question whether there has been an irregularity in or in connection with the election, which may have affected or may affect the result of the election ; and (2) That the circumstances of the matter justify an inquiry by the Court."

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He therefore granted the application and referred the matter to the court.

It is accordingly contended in these proceedings that there was an application made to the Industrial Registrar for an inquiry and that he duly referred the matter of the application to the court.

Section 96A (1) requires that a person desiring an inquiry into irregularities in connection with an election may lodge an application for an inquiry by the court into the matter. Section 96A (2) requires that the application shall be in writing in accordance with the prescribed form. It is quite plain that what is relied upon as an application in the present case was not in accordance with the prescribed form. This section also requires that the application shall be lodged with the Industrial Registrar. The issue of a summons calling persons before the court to show cause why a particular order should be made may be an application to the court, but it is not an application which is lodged with the Industrial Registrar for the Registrar to deal with as the Act requires. The summons does specify the election in respect of which the alleged application is made. It does not specify the irregularities relied upon or the facts relied upon and there is no statutory declaration declaring that "the facts stated in the application" are to the best of the applicant's knowledge and belief true.

Section 96B (1), which has been quoted, makes it clear that the application to which s. 96A refers is an application which is lodged with the Industrial Registrar and which is to be dealt with by him. It is the Industrial Registrar who is to grant the application or refuse the application. Accordingly a summons requiring persons to appear before the court cannot be regarded as satisfying the requirements of s. 96A. Section 96C provides that upon the reference of a matter to the court under s. 96B "the inquiry shall be deemed to have been instituted in the court." Thus the inquiry for which the Act provides is not an inquiry which is ordered by the court after hearing the parties. It is an inquiry which is instituted upon a reference by the Industrial Registrar made after consideration by him of an application which he has granted. Section 96B (6) provides that "An act or decision of the Industrial Registrar under this section shall not be subject to appeal to the court." An act or decision of the Industrial Registrar under the section includes an act or decision to grant or to refuse an application. This provision puts beyond doubt the fact that an inquiry is instituted, not as the result of an order of the court, but as the result of an unappealable decision of the Industrial Registrar

upon an application made to him and not upon an application made to the court.

Section 96D provides that where an inquiry has been instituted a judge shall fix a time and place for conducting the inquiry and that the judge may give necessary directions for the representation of persons at the inquiry. Thus at no time does the court order that an inquiry be made. When the inquiry has been instituted in the manner stated the court then is bound to fix a time and place for conducting the inquiry and may then exercise its power as it thinks proper.

In *Grant's Case* (1) it was held that the Commonwealth Court of Conciliation and Arbitration had jurisdiction to decide whether the conditions of s. 96A (2) had been satisfied and that the court could, under s. 40 (*m*) of the Act, correct, amend or waive any error, defect or irregularity, whether in substance or in form. These powers can be exercised when a matter is before the court and may be used to correct an irregularity in an application which in reality is an application. But these powers of the court, extensive as they are, do not enable the court to act upon a reference by the Industrial Registrar which is not authorized by the statute. The whole foundation of proceedings by way of an inquiry into irregularities in an election is an application to the Registrar which is considered and dealt with by the Registrar without appeal and in pursuance of which the Registrar may refer the matter of the application to a court. In the present case there has been no such application. As I have already said, a summons requiring persons to attend before the court is not an application to the Industrial Registrar and this fact is not altered by the circumstance that the Registrar had satisfied himself upon the matters referred to in s. 96B (1). I am therefore of opinion that the reference to the court was made without authority and that the court has no jurisdiction to proceed with the matter upon the basis of the material at present before it, so that the order nisi should be made absolute upon this ground. But the order should not be made absolute against the Industrial Registrar, who is not professing to act and cannot act further in the matter of the alleged application.

McTIERNAN J. In my opinion the order nisi should be made absolute in respect of the court and discharged in respect of the Industrial Registrar.

I agree with the reasons of the Chief Justice.

(1) (1950) 81 C.L.R. 27.

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WEBB J. This application is based on two grounds:—(1) that the amending Act of 1949 did not apply to this election; and, if it did, then (2) that there was no application for an inquiry under that Act and no jurisdiction in the Industrial Registrar or the court.

As to (1): the remedy provided by the amending Act would be inadequate if persons claiming to be officials of registered unions when the Act was assented to were beyond its range. But nothing in the terms of the Act and no principle of construction of statutes warrant such a restricted view. The first ground fails.

As to (2): there was no application under s. 96A (2) of the amending Act. The summons was not substantially in accordance with Form 46 as required by reg. 133A. It was in fact a summons to appear before the court to show cause why an order should not be made by the court. It bore no resemblance to an application in Form 46. There was then no application which the Industrial Registrar could have granted and nothing he could have referred to the court that could constitute proceedings before the court; so the court could not treat the reference by the Industrial Registrar, and could not, and did not treat the summons and supporting documents as proceedings within s. 40 of the principal Act. Nor was there any order by the court. Foundation for the application of ss. 32 and 40 of the principal Act was lacking. The Industrial Registrar and the court were without jurisdiction and their acts without protection. *Grant's Case* (1) does not apply: *Belmore Property Co. (Pty.) Ltd.* v. *Allen* (2) applies. In *Grant's Case* (1) the applicant was for some reason able to anticipate the form to be prescribed and so fully complied with it. Further the court made an order in pursuance of the reference. The second ground succeeds.

The order should be made absolute except as against the Industrial Registrar.

FULLAGAR J. Order nisi for prohibition against proceeding further with an inquiry under Division 3 of Part VI. of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. The Industrial Registrar has purported to refer a matter to the court under s. 96B (1) of the Act. The jurisdiction of the court is denied on two grounds.

The first ground is that the election in question was completed before the coming into operation of the *Commonwealth Conciliation and Arbitration Act* 1949, which inserted Division 3 of Part VI. in the principal Act, and that Division 3 of Part VI. does not apply to or in respect of elections which were completed before it became

(1) (1950) 81 C.L.R. 27. (2) (1950) 80 C.L.R. 191.

law. What constitutes the "completion" of an election may in some cases be a matter of controversy, but in the present case it was common ground that the election was completed before the commencement of the Act of 1949. The question, therefore, is whether Division 3 of Part VI. applies to elections which were completed before it came into operation. The argument for the applicant was that to construe s. 96A as applying to or in respect of elections which had been completed before it became law would be to give to the statute a retrospective effect, that there was a presumption that a statute was not intended to have a retrospective effect, and that there was nothing in Division 3 of Part VI. to indicate affirmatively that this statute was intended to have such an effect.

In *Maxwell* on the *Interpretation of Statutes*, 8th ed., (1945) p. 189, it is said that "it is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication." This statement of the rule was approved by *Kennedy* L.J. in *West* v. *Gwynne* (1). But in the same case *Cozens-Hardy* M.R. (2) said: "'Retrospective operation' is an inaccurate term. Almost every statute affects rights which would have been in existence but for the statute." And (3) *Buckley* L.J. (in a passage adopted by *Isaacs* J. in *South Australian Land Mortgage & Agency Coy. Ltd.* v. *The King* (4) said: "Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective." A little later his Lordship said: "There is, so to speak, a presumption that an Act speaks only as to the future. But there is no presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament do, in fact, interfere with existing rights."

True retrospective legislation is rare. A good example is to be found in the *Land Tax Assessment Act* 1930 (Act No. 1 of 1930) which was passed in consequence of the decision of this Court in *Clark Tait & Co.* v. *Federal Commissioner of Land Tax* (5). The argument against the prosecutors here does not involve giving to the statute a true retrospective operation. The prosecutors, however, really rely on what is, I think, a subsidiary or derivative rule of construction, which was stated by *Cockburn* C.J. in *R.* v. *Ipswich Union* (6). His Lordship said: "It is a general rule that,

(1) (1911) 2 Ch. 1, at p. 15.
(2) (1911) 2 Ch., at p. 11.
(3) (1911) 2 Ch., at pp. 11-12.
(4) (1922) 30 C.L.R., at pp. 546, 547.
(5) (1929) 43 C.L.R. 1.
(6) (1877) 2 Q.B.D. 269, at p. 270.

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where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply" (i.e. to apply *only*) "to a state of facts coming into existence after the Act." It is perhaps only stating the same rule in other words when it is said that a statute is prima facie to be construed as not affecting vested rights.

Such rules are doubtless of value in a case of real ambiguity. As *Wright* J. said in *Re Athlumney*; *Ex parte Wilson* (1), "if the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." But, where the natural meaning of language used is reasonably plain, they can seldom, if ever, afford a reason for departing from that natural meaning. And where, as here, the statute is "remedial" in the sense that it is enacted to provide a means of overcoming what the legislature regards as an evil or an injustice, they can, in my opinion, have no force. In *The Ironsides* (2), the statute gave jurisdiction to the High Court of Admiralty in certain cases of breach of contract in which the injured party had formerly no practicable remedy. It was argued that the statute did not apply where the cause of action arose before its commencement. But Dr. *Lushington* said (3): "It does not in any degree alter the contract of the ship-owners: it only gives an additional remedy for a breach of the contract: it takes away no vested right, for I think it is a misnomer to call the prior state of things a vested right. I cannot conceive that a power to commit a breach of contract without making compensation, a power to commit injustice with impunity, can be truly denominated a vested right." The present case seems to me to be entirely analogous to that case. Analogous too, I think, is the case of *Westbury-on-Severn* v. *Barrow-in-Furness* (4), where *Cleasby* B. said:—"In reality the legislation is designed to remove difficulties of proof rather than to introduce a law intrinsically better . . . There is as much reason for applying such legislation to the past as to the future." The statute in the present case is not designed to remove difficulties of proof, but it is designed to give a practicable remedy for an evil, and the same considerations must apply.

The natural meaning of the language of s. 96A (1) seems to me to comprehend elections which have been completed at its commencement, and I can see no reason for excluding such elections from its scope. There would, indeed, I think, have been a good

(1) (1898) 2 Q.B.D. 547, at p. 552.
(2) (1862) Lush. 458 [167 E.R. 205].
(3) (1862) Lush., at p. 466 [167 E.R., at p. 210].
(4) (1878) 3 Ex. D. 88, at p. 94.

reason for excluding such elections if sub-s. (2) (*b*) of s. 96A had been construed as the applicant in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Grant* (1) invited this Court to construe it. According to that construction an application under sub-s. (1) must have been made before the completion of an election unless and until a regulation was passed prescribing a time after completion within which it could be made. On this view the section, at the moment of its commencement, *could not* be applied to an election then completed, and it could hardly be held that its operation in this respect could be altered by the making of a regulation. In *Ex parte Grant* (1), however, I expressly rejected this construction, and I do not understand any of my learned brothers to have accepted it. On the construction which I adopted, an application could be made at any time unless and until a limitation of time were imposed by regulation.

In my opinion, s. 96A authorized the making of applications in respect of elections completed at the date of its commencement.

The other ground argued for the prosecutors was based on s. 96A (2) (*a*) and (*c*). It was said that the court had no jurisdiction to enter upon an inquiry under Division 3 of Part VI. of the Act except upon a reference by the Registrar, and that the Registrar had no power to "refer" a matter except upon an application which complied with the requirements of s. 96A (2). In the present case, it was said, there had been no application "in writing in accordance with the prescribed form" or "specifying the election in respect of which the application was made or the irregularity which was claimed to have occurred or stating the facts relied on in support of the application." The argument really, I think, was that no application at all had been made to the Registrar under s. 96A (2).

What actually happened was that on 5th August 1949 a summons was filed in the office of the Court of Conciliation and Arbitration in Sydney on behalf of Claude Bernard Grace. The summons was addressed to the New South Wales Branch of the Federated Clerks' Union and to Thomas James Bond, and it required them to show cause why an inquiry should not be held by the court into irregularities in connection with an election in the Branch, the result of which was declared on or about 27th June 1949. It also required those to whom it was addressed to show cause why certain orders should not be made for the avoidance of the election held and the holding of a new election "on the grounds appearing in and by the statutory declaration of Claude

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Bernard Grace made and sworn the 4th day of August 1949." At the same time or a few days later a statutory declaration by Claude Bernard Grace was filed. It was in the following terms :— "I am the applicant referred to in an application of even date herewith issued out of the Commonwealth Court of Conciliation and Arbitration, New South Wales Registry. The facts set out in the annexure hereto and marked with the letter 'A' are the grounds referred to in the said application and are true to the best of my knowledge and belief." A later statutory declaration by Grace, made on 11th August 1949, set forth the names of the elected and defeated candidates and the number of votes cast for each. The "annexure" to the earlier statutory declaration was a document of some forty-five pages in the form of a sort of diary running from 30th May to 24th June 1949. I am not prepared to say that there cannot be collected from odd parts of it allegations of material irregularities, but the great bulk of it is a mass of irrelevancies. The Registrar apparently found allegations of irregularities in it, because on 11th August 1949 he signed an instrument referring the matter to the court and issued a summons returnable on 7th December before *Dunphy* J. Whether this summons was the same as that which had been filed on 5th August does not appear. It was served on the union and on Bond, and on 7th December I gather that the parties appeared before *Dunphy* J., who indicated that he would not require the respondents to the summons to proceed until particulars of the irregularities alleged had been delivered to them. Particulars were delivered on or about 20th December, and on 11th May 1950 the Registrar notified the parties that the matter would be listed for hearing by *Dunphy* J. on 30th May. On 26th May the prosecutors obtained from *Williams* J. the order nisi for prohibition which is now under consideration.

It seems evident that the Registrar (possibly at the request of Grace or his solicitors) treated the "summons" which was filed on 5th August as an "application" by Grace under s. 96A for an inquiry. The summons was in writing and it did purport to seek (*inter alia*) an inquiry into irregularities in connection with an election which was specified. But it was certainly not in the prescribed form: its form bore not the remotest resemblance to the prescribed form: its form and its substance were alike misconceived. And neither it nor any of the accompanying documents "specified" any irregularity which was claimed to have occurred. It stated no facts, and the facts stated in the annexure to the statutory declaration were, to a very large extent, irrelevant.

There was, in my opinion, a very substantial failure to comply with the requirements of s. 96A (2). The question then arises whether such a non-compliance justifies a writ of prohibition to the Court. It will do so, if, but not unless, substantial compliance with s. 96A (2) (*a*) is a condition of the Registrar's power to refer the matter to the court under s. 96B (1). The question which thus arises is the question which arose in three cases on which Mr. *Ashkanasy* relied. Those three cases are *McIntosh* v. *Simpkins* (1), *Alderson* v. *Palliser* (2) and *Ridley* v. *Whipp* (3). The question may be stated as being whether substantial compliance with the requirements of s. 96A (2) is a condition precedent to the power of the Registrar to refer a matter, or whether s. 96A (2) merely prescribes certain rules of a procedural character, compliance with which is required but the enforcement of which lies in the hands of the Registrar and the Arbitration Court, who alone have the task of deciding whether there has been compliance, and, if there has not, what consequences are to follow. In the former case, prohibition will lie, because, unless there is substantial compliance with s. 96A (2), the Registrar cannot lawfully refer the matter, and the court cannot acquire jurisdiction to make the inquiry. In the latter case prohibition will not lie: see generally per Lord *Esher* M.R. in *R.* v. *Commissioners for Special Purposes of the Income Tax* (4)—a passage quoted by *Isaacs* J. in *R.* v. *Deputy Industrial Registrar*; *Ex parte J. C. Williamson Ltd.* (5). On any view, of course, what is required is substantial compliance with the statute or rules, not "literal and technical" compliance (see *McIntosh* v. *Simpkins* (6) per *Collins* L.J.). But I have already expressed my view that in the present case there was substantial and serious non-compliance with s. 96A (2).

In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Grant* (7) I was disposed to take the view that s. 96A (2) did impose conditions of jurisdiction. If this were so, the time limit imposed by s. 96A (2) (*b*) could not be a matter for final determination by the Registrar or the Arbitration Court, such cases as *R.* v. *Deputy Industrial Registrar*; *Ex parte J. C. Williamson Ltd.* (8) and *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (9) could have no application, and prohibition would lie. I did not find it necessary to express a concluded opinion on the point because, on the construction which I placed upon s. 96A (2) (*b*), the application had been lodged

(1) (1901) 1 Q.B. 487.
(2) (1901) 2 K.B. 833.
(3) (1916) 22 C.L.R. 381.
(4) (1888) 21 Q.B.D., at pp. 319-320.
(5) (1912) 15 C.L.R., at pp. 583-584.
(6) (1901) 1 K.B., at p. 491.
(7) (1950) 81 C.L.R. 27.
(8) (1912) 15 C.L.R. 576.
(9) (1937) 59 C.L.R. 369.

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with the Registrar within the time allowed. *Latham* C.J., with whom *Williams* and *Webb* JJ. agreed, took the view that s. 96A (2) (*b*) did not impose a condition of jurisdiction. *Latham* C.J. (1) said:—"The Arbitration Court had jurisdiction to determine whether the application was in due time. Even if that decision be wrong it does not afford any ground for prohibition." It cannot be that pars. (*a*) and (*c*) of s. 96A (2) provide conditions of jurisdiction while par. (*b*) does not. I think, therefore, that the point is covered by authority, and that we are bound to say that s. 96A (2) does not lay down conditions of jurisdiction. It is not that I reluctantly follow a view with which I strongly disagree. On the contrary, I am not at all sure that the view which I was disposed to take in *Ex parte Grant* (2) was the correct view: anyhow, I think it is just the kind of question which one is glad to find covered by authority. The differences of opinion which may legitimately be entertained in such a case are well illustrated by the dissent of *Isaacs* J. in *Ridley* v. *Whipp* (3).

In my opinion, the proper conclusion in this case is that, although there has been substantial non-compliance with s. 96A (2) (*b*), prohibition does not lie. It is for the Arbitration Court to determine what consequences are to follow from that non-compliance. It is open, I think, to the Arbitration Court to hold that there has been a waiver by reason of what took place on 7th December 1949, so that it is no longer possible for the union and Mr. Bond to maintain that the inquiry cannot, or should not, be allowed to continue.

The order nisi should be discharged.

KITTO J. I agree with the reasons for judgment of the Chief Justice.

I would add, in relation to the question whether an application for an inquiry was lodged with the Industrial Registrar, that even if the form of summons as originally lodged with the Industrial Registrar were construed as incorporating by reference the facts stated in the annexure to the statutory declaration, and even if, on that footing, the form of summons were to be regarded as specifying not only the election in question but also the irregularities claimed to have occurred and as stating the facts relied on, the position of the respondents in these proceedings would not be improved.

On the construction most favourable to the respondents the form of summons when lodged with the Industrial Registrar could

(1) (1950) 81 C.L.R., at p. 50.
(2) (1950) 81 C.L.R. 27.
(3) (1916) 22 C.L.R. 381.

not amount to an application to him for anything more than the issue of a summons by which a judge's order for an inquiry was sought. But, as the Chief Justice has pointed out, it is the Industrial Registrar to whom the Act has given the authority to grant or refuse an inquiry. The statutory foundation for an inquiry is absent if no application has been lodged with the Industrial Registrar by which he himself is asked to grant an inquiry; and no such application can be said to have been lodged in this case.

I therefore agree that the order proposed by the Chief Justice should be made.

Order absolute against the respondents the Commonwealth Court of Conciliation and Arbitration, Dunphy J., and C. B. Grace. Respondent Grace to pay costs of the prosecutors.

Solicitors for the prosecutors, *Crichton-Smith, Taylor & Scott,* Sydney.

Solicitors for the respondents and intervener, *K. C. Waugh,* Crown Solicitor for the Commonwealth; *Eric Campbell, Omant & Melville,* Sydney.

E. F. H.