[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

KELLY AND OTHERS;

Ex parte BERMAN.

H. C. of A. 1953.

SYDNEY, *Aug.* 11-14; *Dec.* 1.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Industrial Arbitration (Cth.)—Industrial organization—Office bearers—Election—Conduct thereof—Commonwealth electoral officer appointed by Industrial Registrar—Documents forwarded by electoral officer to wrong address—Documents given by householder to official of another union—Forwarded by that official to headquarters of that union—Householder directed by electoral officer to return documents to him—Non-compliance—Offence—Conviction of householder—Prohibition—Conciliation and Arbitration Act 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *ss.* 32, 70A, 83, 96M (6) (7), 119.

Pursuant to s. 96M of the *Conciliation and Arbitration Act* 1904-1952 the Industrial Registrar made arrangements for the conduct by a Commonwealth electoral officer of an election for a number of offices in the Victorian branch of the Australian Railways Union. Certain ballot papers and other documents enclosed in an envelope and intended for E. were forwarded by post to E. but, by inadvertence, the address shown was the address of B. The envelope was opened by B. who gave it and its contents to a shop steward of his union, the Amalgamated Engineering Union, who in turn gave the documents to another officer of his union by whom, after a photostat copy had been taken, they were forwarded to the Sydney office of his union. These facts were communicated to the electoral officer by B. and on the following day, being the day on which the documents were forwarded to Sydney, the electoral officer, in purported pursuance of s. 96M (6), caused a paper to be left at B.'s house directing and requiring him to return the documents to the electoral officer before a specified time and date. Not having complied therewith B. was found guilty of failing to comply with the electoral officer's direction. Upon the return of an order nisi for a writ of prohibition directed to certain judges of the Conciliation and Arbitration Court prohibiting further proceedings upon the conviction under s. 119 of the Act,

Held, by *Dixon* C.J., *Webb*, *Fullagar* and *Taylor* JJ. (*Kitto* J. dissenting), that even though B. was a "stranger" the Court of Conciliation and Arbitration had jurisdiction to make the order, therefore prohibition would not lie.

Per Dixon C.J.: The meaning of s. 119 (1) of the *Conciliation and Arbitration Act* 1904-1952 is that a charge preferred against a person for an offence against the Act may be heard by the Court of Conciliation and Arbitration which upon being satisfied of the charge may impose the penalty provided for the offence. It does not mean to make the actual guilt of the defendant a condition of the Court's power to hear the charge.

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ORDER NISI FOR PROHIBITION.

Pursuant to s. 96M of the *Conciliation and Arbitration Act* 1904-1952 the Industrial Registrar made arrangements with the Chief Electoral Officer for the Commonwealth for the conduct by the Commonwealth Electoral Officer for Victoria, Reginald Clive Nance, of an election in the Victorian branch of the Australian Railways Union for the offices of State President, State Vice-President, Assistant State Secretary, Industrial Officer and State Branch Council Representatives for Metropolitan Divisions and Country Divisions and delegates to the Australian Council. The Industrial Registrar, by letters respectively dated 13th April 1953 and 12th May 1953, advised Nance of the arrangements so made.

In an affidavit filed in the Commonwealth Court of Conciliation and Arbitration in connection with proceedings brought by Nance, as informant, under s. 119 of the *Conciliation and Arbitration Act* 1904-1952, Nance deposed: "I gave consideration as to what was the best method of conducting those elections in order to ascertain the authentic wishes of the members, provide the most effective safeguards and ensure that no irregularities would occur in or in connection with the elections and I decided that the best method was by a postal ballot." He further deposed that in the course of conducting the election by postal ballot envelopes containing election material had been and would continue to be posted to members. In evidence he said that he directed the secretary of the Victorian branch of the Australian Railways Union to supply him with lists of the names of financial members together with their postal addresses. Some 13,000 to 14,000 such names and addresses had been supplied. In response to a direction to that end he received from the Victorian Railways Commissioners particulars of residential addresses in respect of the names submitted by the secretary showing their work or official addresses. In the list supplied by the commissioners there appeared the name "E. C. Benaim", a financial member of the union, and shown as pitman, care of the workshops, Jolimont, with the postal address shown as "Workshops, Victorian Railways, Jolimont." Subsequently, the commissioners furnished Nance with a list of addresses in which the name of "E. C. Benaim" appeared against the address "17

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Sunbury Crescent, Surrey Hills." On Friday, 12th June 1953, Nance caused election material to be sent by post to E. C. Benaim, 17 Sunbury Crescent, Surrey Hills. The election material consisted of the outward envelope so addressed, directions as to voting, a business reply post envelope and three ballot papers for the position of president, vice-president and industrial officer; one ballot paper for the position of State councillors, Rolling Stock division; and one ballot paper for the position of delegates to the Australian Council. At about 4.45 o'clock p.m. on Tuesday, 16th June, Berman, until then unknown to Nance, accompanied by a solicitor sought an interview with Nance which was granted. Berman told Nance that he, Berman, resided at 17 Sunbury Crescent, Surrey Hills; he had received ballot papers for the Australian Railways Union's election; he was not and never had been a member of that union, but was a member of the Australian Engineering Union and was employed at the Jolimont Workshops. Berman produced for inspection by Nance a photostat copy of the outer envelope and the election material which was enclosed. The photostat copy disclosed that the outer envelope was addressed to "Mr. E. C. Benaim, 17 Sunbury Crescent, Surrey Hills." Nance asked Berman as to the then whereabouts of the outer envelope and ballot papers, to which Berman replied that he had been worried about it over the week-end and had handed them over to his shop steward. Nance produced the lists obtained from the commissioners and the secretary, and drew Berman's attention to the entries in respect of "E. C. Benaim" on those lists, and to the words and figures on the outer envelope: "If not delivered within 7 days, please return to the Commonwealth Electoral Officer, 85 Collins Street, Melbourne." Nance told Berman that the Commonwealth Electoral Officer was the proper person to whom to return the election material.

On 17th June 1953, Nance issued to Simon Clement Berman of 17 Sunbury Crescent, Surrey Hills, a direction in the following terms:—"Pursuant to section 96M (5) of the *Conciliation and Arbitration Act* 1904-1952, the Industrial Registrar has made arrangements with the Chief Electoral Officer for the Commonwealth for the conduct by the Commonwealth Electoral Officer for the State of Victoria of an election for State President, State Vice-President, State Assistant Secretary, Industrial Officer, State Councillors and Delegates to the Australian Council of the Victorian Branch of the Australian Railways Union.

Pursuant to section 96M (6) of the said Act, I direct and require you to deliver to me at my office 85 Collins Street, Melbourne, at

or before 12 noon on Friday 19th June 1953, the following election material :—

(1) Envelope addressed to Mr. E. C. Benaim, 17 Sunbury Crescent, Surrey Hills.

(2) The contents of the said envelope namely, (a) Printed Directions to Voter ; (b) Business Reply Post Envelope addressed to Commonwealth Electoral Officer for the State of Victoria ; (c) One (1) ballot paper containing the names of candidates for the offices of State President, State Vice-President and Industrial Officer ; (d) One (1) ballot paper containing the names of candidates for the offices of State Councillors, Rolling Stock Division ; and (e) One (1) ballot paper containing the names of candidates for the offices of Delegates to the Australian Council ; And in the event of your failure to furnish any of the said election material referred to above by the date set out Take Notice that you are directed and required to furnish such election material as herein directed."

Berman did not comply with that direction, and, upon the information of Nance, was summoned to appear before the Conciliation and Arbitration Court on 22nd June 1953 on a charge that he did so fail to comply.

The ballot closed at midnight on Friday 26th June 1953.

At the hearing of the summons Cuthbert Mark Southwell, employed by the Amalgamated Engineering Union as an organizer, said in evidence that at approximately 8.30 o'clock p.m. on Tuesday, 16th June 1953, at the union offices, 439 Collins Street, Melbourne, he received from the shop steward, Mick Polites, the envelope and other election material referred to above, and at 9.30 o'clock a.m. on 17th June 1953, sent them by registered post to the Federal Secretary, Commonwealth Council, at the head office of the union at Sydney. He received them back from Sydney by post at about 8.50 o'clock a.m. on Tuesday 23rd June 1953, and, by his counsel, were produced to counsel for the informant during the hearing in court about three quarters of an hour later, and a little later still were tendered in evidence.

In answer to a question Southwell said that if Berman had asked him to return those documents to him, Berman, he, Southwell, would not have done so. The case was being " handled " by the union's solicitor and Southwell said he thought that the solicitor would be the correct person to receive the papers. He said that Berman did not ask him to get the papers back.

After argument by counsel for the parties the court, by *Kelly* C.J., delivered judgment as follows : " We take the view that this is an offence of a serious nature and, in the circumstances surrounding

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the case, we fine the defendant £50." The court directed that the documents be handed over to the Commonwealth Crown Solicitor; refused to grant a stay of proceedings; and ordered the defendant to pay costs to be taxed by the Registrar.

Upon an application made on 24th June 1953, by Berman to the High Court *Fullagar* J. ordered the respondents to show cause before the Full High Court at Sydney on 11th August 1953, why they and each of them should not be prohibited from further proceeding with or upon the said conviction and order. The grounds therefor, as amended at the hearing, were: "That the Court of Conciliation and Arbitration had no jurisdiction to convict the prosecutor as hereinbefore recited and to impose the said penalty in that—(a) if s. 96M (6) were construed as authorizing the person conducting an election under s. 96M to give directions to a person who is neither a member of the organization in which the election is being held nor an official connected with such election, that sub-section would be beyond the legislative competence of the Commonwealth and invalid and void; (b) if s. 96M (6) were construed as authorizing the person conducting an election under s. 96M to give directions as to matters which could not be properly dealt with by rules made by or for the registered organization in which the election is being held that sub-section would be beyond the legislative competence of the Commonwealth and invalid and void; (c) s. 96M (6) upon its proper construction does not authorize the giving of the direction to the prosecutor and that such direction was not a valid and binding direction; (d) the direction given by the person conducting the election under s. 96M (6) was beyond the power conferred upon him by the said sub-section properly construed and was not a valid direction; (e) no offence was disclosed in the summons to the prosecutor to appear before the Court of Conciliation and Arbitration in that the said direction did not impose any obligation upon the prosecutor to comply with it; and (f) no offence was proved in the proceedings before the Court of Conciliation and Arbitration in that the said direction did not impose any obligation upon the prosecutor to comply with it".

At the hearing before the High Court the matter was heard with the matter entitled *The Queen* v. *Kirby, McIntyre and Morgan JJ.*, Judges of the Commonwealth Court of Conciliation and Arbitration, Respondents; *Ex parte the Amalgamated Engineering Union, Australian Section and Others*, Prosecutors (1); and the report of argument relates to both cases.

(1) (*Post*) p. 636.

The relevant statutory provisions are sufficiently stated in the judgments hereunder.

The appearances in the two matters were:

The Queen v. *Kelly and Others*; *Ex parte Berman.*

Sir *Garfield Barwick* Q.C. (with him *J. C. Moore*), for the prosecutor.

P. D. Phillips Q.C. (with him *O. J. Gillard* Q.C. and *M. McInerney*), for the respondents.

M. McInerney, for the Judges of the Court of Conciliation and Arbitration to admit service and submit to any order the High Court might make.

The Queen v. *Kirby and Others; Ex parte the Amalgamated Engineering Union, Australian Section and Others.*

M. Ashkanasy Q.C. (with him Sir *Garfield Barwick* Q.C. and *C. Turnbull*), for the prosecutors.

P. D. Phillips Q.C. (with him *B. P. Macfarlan* Q.C. and *J. R. Kerr*), for the respondents.

J. R. Kerr, for the Judges of the Court of Conciliation and Arbitration to admit service and submit to any order the High Court might make.

Sir *Garfield Barwick* Q.C. Both cases raise the question of the proper construction of s. 96M (6). In convicting in *Berman's Case* the Arbitration Court has necessarily placed upon s. 96M (6) an interpretation by which it would empower a person conducting an election to direct any member of the public, orally or in writing, to do or abstain from doing any act which the person conducting the election considers it necessary to be directed to ensure that no irregularity occurs. If that construction be correct, it is beyond power as being not incidental to what is the main power, namely, the settlement of disputes by conciliation and arbitration. Conversely, if it does not bear that construction, it is limited in construction in two respects; it is limited as to the quality or kind of direction which may be given, and it is limited as to the persons to whom directions may be given. Sub-section (6) has imported into the rules of the organization the officer conducting the election and that sub-section merely gives to him power to give such directions as may be considered necessary to ensure that there are

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not any irregularities in the conduct of an election under the rules; therefore it follows that the direction must be of a kind which could be made the subject matter of a rule of the organization. On the other hand, direction may only be given to members of the organization or to persons connected with the taking of the ballot or the conduct of the election, including officials and persons not necessarily members. In the *Federated Ironworkers' Association of Australia* v. *The Commonwealth* (1) the Court there appreciated that the extent to which the legislature could go in regulating the election of officers in organizations was to a fairly limited extent. If the section is construed, as it must be construed, to support the conviction it goes beyond what could possibly be regarded as incidental to the main power in this case, viz. the settlement of industrial disputes by conciliation and arbitration. The Court indicated in the *Federated Ironworkers' Case* (2) that the person conducting an election conducts it under the rules in the first place: see also *Williams* v. *Australian Railways Union* (3). This is the organization's election. The rules of the organization are subject to the control of the Arbitration Court by virtue of ss. 70 (2), 70A and 71 of the *Conciliation and Arbitration Act* 1904-1952. Section 96M (6) provides, in effect, only that it has imported a new returning officer into the rules, and has put him within the broad scope of the rules, and empowers him to do whatever may be necessary to avoid or overcome irregularities. While the organization remains registered the rules are consensual. By sub-s. (6) there is given to the person imported into the organization for the purpose of conducting an election, a power which is broadly within the rules, that is to say, he has to give such directions which might be made the subject of proper rules, to ensure that no irregularities occur in or in connection with the election. The directions themselves must be such as could be included in the rules of the organization, and they can only be given, therefore, to members of the organization, or to persons officially connected with the taking of the ballot because they are the persons to whom matters could be addressed under the rules. The adoption of that construction does not in any way at all weaken the sanctions for the taking of the ballot. The Act has provided for that in some detail and it is not desired to challenge the penal provisions. They, of course, are different in kind from s. 96M (6). On that construction, which is the only construction which can be given to s. 96M (6), and confine it within power, this particular summons and conviction, on their face, would be without

(1) (1951) 84 C.L.R. 265, at pp. 282, 283.

(2) (1951) 84 C.L.R. 265.

(3) (1953) V.L.R. 145.

jurisdiction, because the jurisdiction at best was only to convict, on that construction, a member of the organization or an official of the election for failing to comply with a direction. The only construction which can be given to s. 96M (6) and allow it to be valid is a construction which will not support the conviction. *Re the Union Case*: The Arbitration Court had no jurisdiction under s. 29 (*c*) of the *Conciliation and Arbitration Act* 1904-1952 to enjoin the continuance of a contravention of the Act, namely, the failure to comply with the directions under sub-ss. (6) and (7) of s. 96M. Sub-section (7) of s. 96M makes a specific offence. The direction really constitutes a series of directions to do a thing at a specific time. It purports to be a direction to do a thing on a given day and then on each succeeding day, but each direction is to do a thing on a day. It is not a thing which is to be done over a period, it is on a specific day a specific thing and the failure to do it is made an offence, in respect of which power to convict the party is given by s. 119. Section 29 (*c*) does not enable the court to make what is in substance a mandatory order which would contain within itself a new order. In this form of direction where there is a series of days there is a contravention each day and in no sense a continuance of the original contravention from day to day. The order of the Arbitration Court does not really enjoin the continuance.

[DIXON C.J. referred to *Carr* v. *J. A. Berriman Pty. Ltd.* (1).]

When, as in this case, the court makes an order enjoining the continuance of a contravention which relates to a past date it is really directing a performance not on that date but on another date, on a matter which was the subject of the direction. That is really giving a new direction, and giving it a new date, and not in any sense enjoining the continuance of that contravention, which has passed. In relation to s. 96M, s. 29 (*c*) does not warrant any order which is in its nature and substance mandatory: see also s. 96H.

M. Ashkanasy Q.C.: *Re the Union Case.* The Arbitration Court did not have any jurisdiction to make an order under s. 96M to enforce purported directions which were clearly not directions at all. The only interpretation of s. 96M which would validate the direction in the circumstances is that the person conducting the elections may, in complete disregard of the rules and of his own absolute discretion, give directions or make inquiries which could be enforced by imprisonment, not by way

(1) (1953) 89 C.L.R. 327.

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of remedying irregularities or overcoming procedural defects, but at his virtually unfettered discretion, and if that is the interpretation of s. 96M (6) then that section is *ultra vires*. The only way in which the Arbitration Court could have decided to make this order is by a construction of s. 96M (6) which is to the effect that the person conducting the election has power to do it his own way in disregard of the rules and which goes far beyond anything approved by this Court in the *Federated Ironworkers' Case* (1), which, therefore, as indicated by that case, would be unconstitutional. The statutory authority under s. 29 (*c*) does not enable the enforcement of s. 96M (6) but only the enforcement of directions given under s. 96M (6). This Court should, in the absence of reasons by the court below, determine the matter upon the material placed before it by the prosecutors and which is not contested by the respondents. There was not any offence punishable under s. 96M (7) which could be prosecuted under s. 119, and which could be made the subject of an order under s. 29 (*c*). Unless there was an offence and a contravention of the Act within the meaning of s. 29 (*c*) there was no jurisdiction. On their face the directions are not such as could be within s. 96M. The condition precedent of their being directions was not complied with. As to whether they are or are not directions within s. 96M is a matter for this Court to decide. The court below misconstrued s. 96M (6) in a sense which involved it in an excess of jurisdiction. The evidence by the person conducting the election shows that he had not contemplated any contested election; that he was following a precedent in seeking the information as a precaution in the routine conduct of the election; that the only aspect of irregularity which he could envisage was that the rules did not make any provision for him to conduct the election, and that was his idea of what constituted an irregularity; and that he did not find any procedural defects in the rules. This is an original proceeding and, in fact, it is not an appeal. The evidence referred to above is relied upon in this proceeding on the point that there is not any jurisdiction.

[DIXON C.J. referred to *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (2).]

The seeking of information in the conduct of an election, whether rightly or wrongly, is one thing; giving a direction under s. 96M, notwithstanding the rules, in order to ensure that irregularities do not occur, and to remedy procedural defects in the rules, requires as a condition precedent that he must consider that it is necessary

(1) (1951) 84 C.L.R. 265.

(2) (1951) 82 C.L.R., at pp. 212-214.

in order to ensure that. The effect of the appointment of a person to conduct the election is that he takes over the functions of the person who under the rules would conduct the election, and, so far as it is necessary for or incidental to the conduct of the election, takes over the records from the general secretary. The electoral officer could have obtained answers to all the questions at the organization's office: see *Ahearn* v. *McKeon* (1). It is impossible to give any weight to the electoral officer's evidence, by affidavit, that he gave the directions in order to ensure that no irregularities occurred in or in connection with the election and to remedy procedural defects in the rules of the organization which appeared to him to exist. In cross-examination he said there were not any procedural defects and that he understood by irregularities the fact that no provision was made for him to conduct the election. Upon that basis the evidence clearly established no attempted exercise of the power under s. 96M (6) (*Denver Chemical Manufacturing Co.* v. *Commissioner of Taxation (N.S.W.)* (2); *Estate & Trust Agencies* (1927) *Ltd.* v. *Singapore Improvement Trust* (3); *Nakkuda Ali* v. *M. F. De S. Jayaratne* (4)). The nature of a direction which may be given under s. 96M (6) is such as could be the subject of an organization rule. Only a valid direction can give rise to an offence under sub-s. (7) of s. 96M. The contravention which is required by s. 29 (*c*) in this case is the offence created by s. 96M (7), and therefore can only be a contravention within the meaning of s. 29 (*c*) if what is the subject of the order under s. 29 (*c*) would be an offence under sub-s. (7) of s. 96M. Therefore it is based upon a valid direction under s. 96M (7). All that the person conducting the election is permitted to do is to conduct the election in accordance with the rules and under the rules, with the added provision in sub-s. (6) of s. 96M that he may take any action necessary to prevent any irregularities or to fill any *lacunae* in the rules. It is the duty of the officials to make the records available to the electoral officer because he is substituted for the person conducting the election. The rules are to be construed as if they referred not only to the person normally conducting the election but also to a person conducting the election under s. 96M: see *Federated Ironworkers' Case* (5). The mere fact that injunction power is now granted to the Arbitration Court alters in no way the nature of that remedy. What was said in *Graziers' Association of New South Wales* v. *Labor Daily Ltd.* (6) still applies.

(1) (1951) 72 C.A.R. 93.
(2) (1949) 79 C.L.R. 296, at p. 312.
(3) (1937) A.C. 898, at p. 917.
(4) (1951) A.C. 66, at pp. 76-77.
(5) (1951) 84 C.L.R., at pp. 274, 276-283.
(6) (1930) 44 C.L.R. 1, at p. 10.

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The principles of the granting of an injunction were laid down in *Ramsay* v. *Aberfoyle Manufacturing Co. (Australia) Pty. Ltd.* (1). Attention is drawn to the nature of the penal sections which apply to a breach of an order made under s. 29 (*c*). Enforcement under s. 96M (7) is the statutory provision and it contains a provision which is convenient and adequate and as effective as anything which could be obtained by way of injunction: see *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (2). What is being attempted is to turn a direction by the electoral officer under s. 96M (6) into an order of the court so that in addition to liability under s. 96M (7) there would be a liability under s. 29A (4). That would be entirely contrary to all the principles upon which a court of equity could grant an injunction. By providing in s. 29 (*c*) a power to grant an injunction Parliament meant that the remedy of the injunction was to be applied in accordance with the recognized principles applicable to the granting of injunctions. In *Berman's Case* the true inference to be drawn from the construction of s. 96M (6) shows that the Arbitration Court had a view of that section which was within power. The respondents are not concerned necessarily to establish that it was the true view of s. 96M but it was a view which would not have been *ultra vires*. In positive form the law which would have justified the fine would be: "Where an election in an organization was being conducted pursuant to the provisions of s. 96M (1)-(5), any person, whether a member of the organization or not, who, not being entitled to vote, has control of a ballot paper for such election and who refuses or fails to return the same to the electoral officer conducting the election after the electoral officer shall have demanded the return of the same, shall be guilty of an offence". If the Commonwealth Parliament may direct its mind to the problem of securing authentic elections, it can, in order to achieve that purpose, by law impose a duty upon a person, who is not a voter and who has possession or control of a ballot paper, to return it to the electoral officer. The legal statutory power of the officers is to give directions to bring about a full and free vote, to give directions to procure that and to endeavour to exclude attempts to prevent it. That must be interpreted in a common sense way. The power must not be treated as without limits. On the other hand, the kind of circumstances which may arise cannot be fully anticipated without experience. It is not, as suggested, the duty of the Arbitration

(1) (1935) 54 C.L.R. 230.

(2) (1951) 82 C.L.R. 208.

Court to try to draw distinctions between substantive rules and procedural rules for the purpose of delimiting the authority of the electoral officer (*Federated Ironworkers' Case* (1)).

[DIXON C.J. referred to *Federated Ironworkers' Case* (2).]

The *Federated Ironworkers' Case* (3) does not really assert that the constitutional power is narrow. The word " fail " in the expression " refuse or fail " in s. 96M (7) does not and cannot mean non-compliance with or non-performance of the directions. If " fail " as used in that expression meant every and any non-performance there would hardly be any point in the word " refuse " at all, because every failure, every refusal, would also be a failure in that sense. Parliament was primarily concerned with deliberate, voluntary opposition, and divided that opposition into two forms, expressed opposition—refusal; unexpressed opposition—failure. The paraphrase of " fail " is " wilfully fails " or " deliberately fails ". It may well mean " being capable, being able to, deliberately did not ". A wide view of sub-s. (6) of s. 96M should be taken in so far as the directions which may be given are concerned. The Arbitration Court has a jurisdiction to go wrong about the meaning of s. 96M (6).

[TAYLOR J. referred to *R.* v. *Connell*; *Ex parte the Hetton Bellbird Collieries Ltd.* (4).]

Section 75 (v.) has the effect when the tribunal is an officer of the Commonwealth of giving a constitutional jurisdiction to this Court on the subject matter of prohibition.

[TAYLOR J. referred to the *Federated Ironworkers' Case* (5).]

Berman's Case and the *Union's Case* are very different because the jurisdictional basis of s. 29 (*c*) is very different from that in the case of s. 119. The form of s. 29 (*c*) is a conferring of jurisdiction, and the question then arises whether every integer in the grant is a jurisdictional element the absence of which will admit prohibition or whether some or only one of the integers constitute jurisdictional factors upon which the jurisdiction depends. The argument need not be abstract because to some extent it is covered by *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (6). Apart from s. 32, it is a natural construction to be put on s. 29 (*c*) that it means to give the Arbitration Court authority to inquire into contraventions of the Act, decide whether they exist and then enjoin them.

(1) (1951) 84 C.L.R., at p. 283.
(2) (1951) 84 C.L.R., at pp. 270, 271.
(3) (1951) 84 C.L.R. 265.
(4) (1944) 69 C.L.R. 407.
(5) (1951) 84 C.L.R., at p. 266.
(6) (1951) 82 C.L.R., at pp. 233, 235, 247-250, 260-265.

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Whether the conduct will amount to a contravention of the Act depends on a whole series of questions, some of which are matters of law, some of which are matters of fact, and some are of mixed law and fact.

Cur. adv. vult.

Dec. 1.

The following written judgments were delivered :—

DIXON C.J. This is an order nisi for a writ of prohibition directed to certain judges of the Commonwealth Court of Conciliation and Arbitration prohibiting further proceedings upon a conviction under s. 119 of the *Conciliation and Arbitration Act* 1904-1952. There is nothing before us to show whether an information as contemplated by sub-s. (2) of s. 119 was ever laid and if so whether it was in writing. But the order of the court was drawn up and it refers to a summons and recites that it had been proved to the satisfaction of the court that the defendant had been guilty of the offence charged in the summons. It proceeds to order that pursuant to s. 96M (7) of the Act the defendant be fined £50. An order for costs follows in favour of the party described as the informant. The defendant is the prosecutor before this Court seeking prohibition.

The summons which the order recites calls upon the defendant to appear before the Court of Conciliation and Arbitration to answer a charge of the informant that the defendant did fail to comply with a direction given by the informant pursuant to s. 96M (6) of the Act. The summons then proceeds to state the direction with particularity.

Sub-section (1) of s. 119 is the provision under which the court assumed jurisdiction to make the order. It is in the following terms :—"A person who has committed an offence against this Act may be charged accordingly before the court and the court may impose the penalty provided by this Act in respect of that offence".

No doubt the meaning of sub-s. (1) is that a charge preferred against a person for an offence against the Act may be heard by the Court of Conciliation and Arbitration which upon being satisfied of the charge may impose the penalty provided for the offence. It does not mean to make the actual guilt of the defendant a condition of the court's power to hear the charge as might be the result of a literal adherence to its actual language. As the statutory authority which the court exercised lies in s. 119 it may fairly be said that the application for the prerogative writ of prohibition

is governed by the meaning affixed to that provision. The validity of the section is not impugned.

The charge against the defendant was that he committed an offence against the Act, namely, against s. 96M (7), and the court heard the charge and decided that it was proved. As the remedy sought is prohibition the merits of the case are immaterial. It is not to the point to show that in fact the defendant did not commit the offence or that the evidence before the Court of Conciliation and Arbitration disclosed that he did not commit one. Section 32 (1) (*c*) of the Act expressly provides against an appeal to this Court. The validity of that provision is not impugned and no appeal is attempted. All we are concerned with on prohibition is the jurisdiction of the Court of Conciliation and Arbitration to hear the charge and to make such an order upon it. What is said for the prosecutor in an endeavour to meet this position is that the offence "charged in the summons", to use the language by which it is identified in the order it is sought to prohibit, is no offence at all under s. 96M (7) because the directions particularized are outside the section. This means that the directions were not warranted by s. 96M (6). It is said, not only are they not warranted by s. 96M (6) when properly construed, but to construe the provision otherwise would be to take it beyond the legislative power of the Commonwealth and render it void.

Section 96M empowers the Industrial Registrar, when the conditions laid down are fulfilled, to take one or other of certain courses for the conduct of an election for an office in an organization registered under Part VI of the Act or in a branch of such an organization. One course is to make arrangements with the Chief Electoral Officer for the Commonwealth for the conduct of the election by a Commonwealth Electoral Officer. In pursuance of this provision the Industrial Registrar made arrangements for the conduct by the Commonwealth Electoral Officer for the State of Victoria of an election for a number of offices in the Victorian Branch of the Australian Railways Union. Nance, named in the order of the Court of Conciliation and Arbitration as the informant, is the Commonwealth Electoral Officer for the State of Victoria and it is he who gave the directions upon which the conviction was founded. Sub-section (6) of s. 96M is expressed to enable a person conducting such an election to take such action and give such directions as he considers necessary in order to ensure that no irregularities occur in or in connection with the election or to remedy any procedural defects in the rules of the organization or branch. What is meant by ensuring that no irregularities occur may be

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seen from the definition of "irregularity" in s. 4. The word is defined "in relation to an election for an office, to include a breach of the rules of an organization or of a branch of an organization, and any act, omission or other means whereby the full and free recording of votes by all persons entitled to record votes, and by no other persons, or a correct ascertainment or declaration of the results of the voting is, or is attempted to be, prevented or hindered". Sub-section (7) of s. 96M, the sub-section against which the prosecutor in prohibition has been found to have offended, provides among other things that a person shall not refuse or fail to comply with a direction given under sub-s. (6). He was found guilty of failing to comply with Nance's direction.

It is now necessary to state the facts. They are to be gathered from the record of the proceedings before the Court of Conciliation and Arbitration which the parties have chosen to use upon the application to this Court instead of independent evidence of the facts strictly relevant to the existence or non-existence of jurisdiction in the Arbitration Court.

The prosecutor in prohibition is named Simeon Clement Berman. It appears that he was a member of the Amalgamated Engineering Union and that he is employed by the Victorian Railways Commissioners. He lives at No. 17 Sunbury Crescent, Surrey Hills, Victoria. Apparently there is an E. C. Benaim, who is also employed by the Victorian Railways Commissioners and is a member of the Australian Railways Union. Nance, the Commonwealth Electoral Registrar for Victoria, obtained lists from the Australian Railways Union of their members and he obtained from the Victorian Railways Commissioners lists of the residential addresses of their employees named in the former lists. Probably by some confusion Berman's address was put down as Benaim's. At all events there was despatched by post in an envelope addressed "E. C. Benaim, 17 Sunbury Crescent, Surrey Hills" two ballot papers some printed directions to voters and a reply post envelope. The missive was posted on Friday, 12th June 1953. It was received by Berman at his address the following day, Saturday, 13th June. Having opened it, Berman gave it to a shop steward of the Amalgamated Engineering Union, which is his union. The shop steward in turn gave it to Southwell, another officer of the same union, on Tuesday, 16th June, at about 8.30 p.m. The prosecutor Berman had given it to the shop steward at some time before Monday, 15th June. Southwell sent the material to the office of his union in Sydney, posting it about 9.30 a.m. on Wednesday, 17th June. In the meantime a photostat copy of the ballot papers had been made by

someone. On Tuesday, 16th June, at about 4.45 p.m. Berman, accompanied by his solicitor, visited Nance at the Electoral Office. They told Nance that Berman had received the ballot papers by post and had handed them to the shop steward of the Amalgamated Engineering Union and they showed him the photostat copy of the ballot papers. On 17th June Nance caused a paper to be left at Berman's house, 17 Sunbury Crescent, Surrey Hills. It was served on somebody, apparently an inmate, some time after 6 p.m. on that day. The paper contained a direction signed by Nance expressed in the following terms :—

" Pursuant to Section 96M (6) of the said Act I direct and require you to deliver to me at my office, 85 Collins Street, Melbourne, at or before 12 Noon on Friday 19th June, 1953 the following election material :

(1) Envelope addressed Mr. E. C. Benaim, 17 Sunbury Crescent, Surrey Hills.

(2) The contents of the said envelope namely—(a) Printed Directions to Voter. (b) Business Reply Post Envelope addressed to Commonwealth Electoral Officer for the State of Victoria. (c) One (1) ballot paper containing the names of candidates for the Office of State President, State Vice-President and Industrial Officer. (d) One (1) ballot paper containing the names of candidates for the offices of Delegates to the Australian Council.

And in the event of your failure to furnish any of the said election material referred to above by the date set out Take Notice that you are directed and required to furnish such election material on each day thereafter until the election material is furnished by you as herein directed ".

By the time this document was served the ballot paper and the other electoral material as it is called were in Sydney and were out of the possession of the prosecutor Berman. Counsel who appeared to show cause against the order nisi for prohibition conceded that because what a direction given under sub-s. (6) required to be done was not in fact done, it did not necessarily follow that the offence under s. 96M (7) (*a*) of failing to comply with a direction had been committed. Compliance must in some way be within the power or capacity of the person directed before he could be held to have failed to comply. At the time when the direction was given to Berman the papers were not in his actual possession or legal control. He had not in fact regained them before the expiration of the time limited for compliance. They were in fact in Sydney. It is not easy in these circumstances to see on what ground it was held that Berman had committed the offence. It

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is said that he made no effort to obtain the ballot papers from Sydney and that though the time limited for compliance was short it was long enough for them to arrive in Melbourne, if they had been promptly despatched. In this, so it is contended, there is enough ground for saying he " failed " to comply. It is a contention that may explain the conviction but it cannot justify it.

However it is not necessary to justify it. For, as has already been said, it is not an appeal that is before this Court but an application for prohibition on the ground, not that the decision of the Court of Conciliation and Arbitration was wrong, but that it had no jurisdiction to give the decision.

The reason assigned for denying the jurisdiction is that the direction given was not, and could not be, valid. It is addressed to a person who is neither a member nor an officer nor an employee of the Australian Railways Union, and one who is not acting for or at the instance of the electoral officer conducting the election or any agent of his. It relates, so it is said, to a matter outside the procedure of carrying out the election, the things to be done in the process ; it relates to the surrender by a stranger of documents accidentally falling into his hands, albeit documents relevant to the voting. To construe s. 96M (6) so that strangers in this sense are covered and matter of such a character may be dealt with by a direction is impossible without giving it a general operation which would place it outside constitutional power. That is the argument. It may be conceded at once that the general words in sub-s. (6) " give such directions as he considers necessary in order to insure " &c. cannot be given the wide operation which their literal meaning might admit. The officer's opinion or judgment cannot be the measure of the authority. The directions must objectively be reasonably incidental to conducting the election in a way that may ensure that no irregularities in the defined sense occur. Such a restrictive interpretation is warranted by s. 15A of the *Acts Interpretation Act* 1901-1950. But here the test involved in the restriction is satisfied. There comes by error into the hands of a stranger a ballot paper or papers which are thus exposed to improper use. They belong to the officer. Surely that is enough foundation for a direction to return them. To restrict the application of the provision to a particular category of persons or a defined description of events or matters is to take a course which the text of the section does not support and which the constitutional power does not require. In *Federated Ironworkers' Association* v. *The Commonwealth* (1) the grounds for upholding the validity of s. 96M

(1) (1951) 84 C.L.R. 265.

were explained and consistently with these grounds the provision may be construed as extending to directions reasonably incidental to carrying out the election with the end in view of preventing irregularities as defined. It will not be often that complete strangers to the proceedings will become amenable to directions, but that is not because by implication they are excluded in their character of strangers but because the circumstances will be special that would make a direction affecting them reasonably incidental to carrying out the purpose described.

The ground for denying the jurisdiction of the Court of Conciliation to make the order complained of fails and the order nisi for a prerogative writ of prohibition should be discharged.

WEBB J. I would discharge the order nisi for prohibition.

A union's rules must at all times be such as to ensure that no irregularities can occur at the union's elections. If the rules do not so ensure then registration of the union may be refused, or the registrar of the Conciliation and Arbitration Court may alter the rules: see s. 70A of the *Conciliation and Arbitration Act* 1904-1952. The definition of "Irregularity" in s. 4 applies to these statutory provisions. Further s. 83 requires "defects in the rules", including election rules, to be remedied at the risk of cancellation of the registration of the union. For rules to comply with these statutory requirements they must also provide for the giving of directions necessary to prevent irregularities. Ordinarily such directions can be given only to members, officers, agents or servants of the union. But if a person not connected with the union obtains possession, whether by mistake or otherwise, of union property, say, ballot boxes or voting papers, a demand for their return to the union can properly be made, and if refused legal proceedings can be taken by the union for their recovery; and in some circumstances even criminal proceedings might be instituted. Then, assuming, but without deciding, that a person conducting an election under s. 96M has no more authority over persons unconnected with the union than a union returning officer has, still he can always lawfully demand the return of union property from any person not having the right to retain it; and it amounts to the same thing to direct that person to return it to the union. However the result is that a refusal or failure to comply with the direction is an offence under s. 96M (7). The consequences of non-compliance with a direction are in this way different from those obtaining when the direction is given by a union returning officer. But this is not remarkable. After all in the opinion of the proper

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authority the particular election warrants government intervention in its conduct, and penal sanctions are not unusual in the event of failure to observe directions by a government official acting under statutory authority.

FULLAGAR J. In this case I have had the advantage of reading the judgment prepared by the Chief Justice, and I find it sufficient to say that I agree with it.

KITTO J. One Berman was brought before the Commonwealth Court of Conciliation and Arbitration by a summons which called upon him to answer a charge by one Nance(in the summons called the informant) that on 19th June 1953 he did fail to comply with a direction given by the informant pursuant to s. 96M (6) of the *Conciliation and Arbitration Act* 1904-1952, namely, a direction to the defendant dated 17th June 1953 to deliver to the informant at his office at 84 Collins Street Melbourne at or before 12 noon on Friday 19th June 1953 certain election material. The election material was described as (1) an envelope addressed to Mr. E. C. Benaim, 17 Sunbury Crescent, Surrey Hills, and (2) the contents of the said envelope, namely, printed directions to voter, business reply paid envelope addressed to the Commonwealth Electoral Officer for the State of Victoria, and three ballot papers. Berman was convicted and fined £50, and he was ordered to pay the costs of the proceedings. He now applies to this Court to grant prohibition in respect of the Arbitration Court's order, upon grounds which deny the jurisdiction of that court to make the order in the circumstances of the case.

The only source of such power as the Arbitration Court has to entertain criminal proceedings is to be found in s. 119 of the *Conciliation and Arbitration Act* 1904-1952. This section in effect provides, in sub-s. (1), that if a person is charged before the Arbitration Court with an offence against the Act that court may decide the charge, and in the event of a conviction may impose the appropriate penalty. Sub-section (2) provides that proceedings before the court under the section may be instituted by summons upon information, without indictment. Presumably the validity of a summons under this provision depends upon its having been preceded by an information containing allegations sufficient to disclose the offence against the Act which is charged in the summons: cf. *Ridley* v. *Whipp* (1). Moreover, the summons itself must charge against the defendant what is truly an offence against the Act:

(1) (1916) 22 C.L.R. 381.

see *De Faro* v. *Rankin* (1). As was said in that case: "He is entitled to be charged, and to know what is the charge against him, and to have sufficient time given him to prepare his defence and cross-examine witnesses, and to an adjournment for that purpose, if necessary" (2).

In the present case the defendant does not rely upon any ground which requires us to consider the information, but he does contend, as appears from the order nisi as amended at the hearing, that the direction relied upon by the prosecution was not authorized by s. 96M (6), and that accordingly no offence was alleged in the summons or proved in the proceedings. The relevant offence itself is created by sub-s. (7) which, so far as material, provides that "A person shall not . . . fail to comply with a direction given under the last preceding sub-section". Sub-section (6) provides for the giving of directions by a person who is conducting, under the special provisions of s. 96M, an election for an office in an organization of employers or employees registered under the Act or a branch of such an organization. The sub-section authorizes such a person, notwithstanding anything in the rules of the organization or branch, to take such action and give such directions as he considers necessary in order to insure that no irregularities occur in or in connection with the election or to remedy any procedural defects in the rules which appear to him to exist. In order, therefore, that the summons against Berman should charge an offence under the section, it had to allege, *inter alia*, a direction which was of a character within the contemplation of sub-s. (6), and which was considered by the informant to be necessary in order to ensure that no irregularities should occur in or in connection with the election. (It could not have been to remedy any procedural defect in the rules.) If the summons was sufficient, the jurisdiction of the Arbitration Court to convict and sentence the defendant depended upon its making findings of fact, first that such a direction as this was given, and secondly that the defendant failed to comply with it.

In order to see how the matter stands in relation to these requirements, it is necessary first to appreciate the setting as well as the terms of sub-s. (6). The first five sub-sections of s. 96M together provide a means whereby the committee of management of an organization or branch, or a prescribed number of the members of an organization or branch, may bring it about that an election for an office is conducted, not by a person ascertained in accordance with the rules, but by a government official, and to do so with a

(1) (1899) 25 V.L.R. 170. (2) (1899) 25 V.L.R., at p. 173.

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view to ensuring that no irregularity occurs. Sub-section (6) is plainly ancillary to all this. It confers a power of giving directions upon the person conducting the election, describing him as such. It prescribes, as a limit to the power, that directions given must be such as that officer considers necessary in order to ensure that his conduct of the election is not vitiated by irregularities or hampered by procedural defects in the rules. And, finally, provisions are made in sub-s. (7) (*b*) and s. 96N with respect to such conduct relating to elections under s. 96M as the Parliament has seen fit to forbid generally.

It seems to me that in such a context as is thus provided the sense which the word "directions" naturally bears is confined to instructions to act in a manner directly affecting the working of the electoral machinery. I should think it clear that if a direction is to be within sub-s. (6), not only must it be considered by the electoral officer to be necessary for one of the purposes mentioned in that sub-section, but the act or omission which it commands must be in its own nature relevant to the prevention of irregularities or by the curing of procedural defects in the rules. But even an instruction which fulfils these two conditions may travel beyond anything which I should understand to be authorized by a provision the manifest purpose of which is to equip an electoral officer with a power to give directions for the purpose of ensuring the proper and efficient conduct of the election he is holding. Suppose, for example, that a ballot paper is missing while an election is incomplete, and the officer conducting the election orders a person to forsake his own affairs, search diligently for the ballot paper, and deliver it when found to the officer. I assume that the condition as to the officer's considering the order necessary is satisfied; and there can be no doubt that the order is relevant to the prevention of irregularities. Whether this order is a direction authorized by sub-s. (6) appears to me not to be answered by the consideration that the ballot paper is liable to be used in a manner constituting an irregularity in the conduct of the election. I am strongly of opinion that the answer to it must depend upon the circumstances of the case. I do not see any sound reason for accepting the argument addressed to us to the effect that the person directed must be either a member of the organization or branch, or a person connected with the taking of the ballot. But suppose he is a stranger picked haphazard from the street; or a person chosen only for his special knowledge of a class of persons a member of which is suspected of having taken the ballot paper; or a person known to have had the ballot paper in his possession or control, but also

known to have parted with it in such circumstances that he has no more opportunity of getting it again than a stranger would have; or one known to have had the ballot paper but also known to have parted with it in circumstances which give him more than the ordinary person's chance, but still not a certainty, that he will be able to get it back if he sets himself to do so; or one who has lodged the ballot paper with another who is under a legal obligation to give it back on demand but has repudiated his obligation; or one who, though never having had the ballot paper, is in a position to get it if he expends a substantial amount of time or money in attempting to do so. What is the criterion for deciding whether in these varying sets of circumstances the order is an authorized direction? The question cannot, I think, be put aside with a suggestion that any of the persons I have described might be able to ignore the order with safety, relying, if prosecuted under sub-s. (7), upon securing a decision that by his non-compliance he did not "fail" to comply, either because "fail" implies a *mens rea*, or because it postulates the existence of a greater opportunity to comply than he in fact possessed. The answer in my opinion is that not only must the instruction have a relevance to the prevention of irregularities, but the course of conduct which in the circumstances is necessary for compliance with it must be confined to acts or abstentions directly assisting the electoral process. This seems to me to be involved in the word "directions" as used in the context of a provision which is enacted by way of supplement to the powers and facilities otherwise available to an officer conducting an election for the satisfactory conduct thereof.

In each of the illustrations I have given, the instruction, if binding, would necessitate the pursuit of a course of action outside and disconnected from the carrying on of the election. That course of action would be attended by differing degrees of likelihood that the ballot paper would be recovered, and the point which I have sought to emphasize by giving so many illustrations is that, while the ultimate aim in each case would be relevant to the purpose of conducting the election without irregularity, what the person receiving the instruction would have to do in order to comply with it would be in varying degrees remote from the carrying on of the election, and, in any ordinary use of language, would fall altogether outside the notion of directions to be given by an electoral officer in the course and for the purposes, not of an election but of the conduct of an election.

Now, the summons against Berman did not allege anything at all concerning the circumstances in which the purported direction

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was given. For all that appeared from the summons, Berman might never have had anything to do with the election materials referred to. Even if the view I have expressed as to the meaning of "directions" in sub-s. (6) is not to be accepted, unless we ought to hold that there is no limit whatever to the circumstances in which an instruction given by a person conducting an election to deliver missing electoral materials to him may constitute a direction authorized by that sub-section, it seems undeniable that Berman was not charged by the summons with any offence known to the law. If the proceedings against him had been taken in one of the courts ordinarily concerned with the administration of the criminal law this might not have mattered, because Berman, being before the court though not on a properly framed charge, could have been then and there charged afresh with an offence adequately stated: *Reg.* v. *Hughes* (1); *O'Donnell* v. *Chambers* (2); *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (3). But s. 119 makes it clear that the Arbitration Court had no jurisdiction to deal with him at all in the absence of a charge made whether by summons issued upon information, or by indictment. The absence of a proper charge could not be regarded as a mere error, defect or irregularity which the Arbitration Court could waive under s. 40 (*m*), and in any case, as it is evident that the point was at no stage present to their Honours' minds, they cannot be supposed to have purported to waive it. It is no answer that the summons might have been amended under s. 21A of the *Crimes Act* 1914-1950 (Cth.), for, as will appear in a moment, there was no amendment which the prosecution could have framed consistently with the case it intended to present.

In this situation, I am of opinion that the Arbitration Court had no jurisdiction to convict and fine Berman on the summons issued against him, and I should not regard the provisions of s. 32 as affording any ground for witholding prohibition. I do not doubt that, although a provision of a Commonwealth statute cannot derogate from this Court's jurisdiction to grant prohibition under s. 75 (v.) of the Constitution, speaking generally s. 32 is effectual to validate an order of the Arbitration Court made without jurisdiction, and by so doing to render the remedy of prohibition inapplicable, provided that the order is reasonably capable of reference to a power of that court and relates to the subject matter of its jurisdiction and amounts to a bona-fide attempt to exercise an authority possessed by that court: *R.* v. *Murray*; *Ex parte*

(1) (1879) 4 Q.B.D. 614.
(2) (1905) V.L.R. 43.
(3) (1938) 59 C.L.R., at pp. 379, 380, 393.

Proctor (1); *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (2). But the section cannot have this effect unless a law giving antecedent authority to the court to make the order would have been within the scope of the legislative power which supports the validity of the grant of jurisdiction in fact made (3). Giving the fullest weight to the considerations which satisfied this Court of the validity of s. 96M (5) and (6) in the *Federated Ironworkers' Case* (4), I cannot think that a law would be within power which purported to make it a punishable offence for a person to fail to comply with an instruction of an officer conducting an election under s. 96M to deliver specified election material to that officer, whatever might be the circumstances of the case and, therefore, whatever might have to be done in order to comply. Acceptance of the validity of s. 96M (6) and (7) and s. 119, considered as operating in combination, makes it necessary, in my opinion, to place upon the word "directions" some such limitation as that which I have suggested that the context itself requires. Moreover, s. 119 stipulates that where there is no indictment there must be a summons issued upon information; and I should regard that section as meaning that it is essential to a valid conviction under its provisions that a charge shall be made by means of such a summons in the absence of an indictment: see *R.* v. *Murray*; *Ex parte Proctor* (5); *R.* v. *Metal Trades Employers' Association* (6). Accordingly I would not regard s. 32 as having any application in this case.

Although this would suffice to dispose of the application, I think it necessary to add that a careful consideration of the transcript record of the proceedings before the Arbitration Court, which the parties have concurred in placing before us, satisfies me not only that there was no offence charged in the summons but that the Arbitration Court did not in fact make all the findings which were essential to its jurisdiction to convict and fine the defendant. It clearly did not find that the circumstances concerning the defendant and the election materials at the time when the purported direction was given were such as to make that document a direction within the meaning which I have ascribed to the word as used in sub-s. (6). Nor does it appear to have found that the circumstances were such as to make it possible for the electoral officer, if he had correctly understood the sub-section, to consider such a direction necessary

(1) (1949) 77 C.L.R. 387, at pp. 398-399.
(2) (1951) 82 C.L.R., at pp. 247-250.
(3) (1949) 77 C.L.R., at p. 399; (1951) 82 C.L.R., at p. 248.
(4) (1951) 84 C.L.R. 265.
(5) (1949) 77 C.L.R., at p. 400.
(6) (1951) 82 C.L.R., at p. 248.

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in order to ensure that no irregularities should occur. The word "necessary" in sub-s. (6) is no doubt satisfied by a reasonable necessity; but in my opinion, even if "directions" has a wider meaning than I have adopted, it is not open to an officer conducting an election to regard a direction to deliver a ballot paper to him as a direction which is necessary in order to preclude an irregularity, unless he believes that the person to whom he gives the direction actually has the ballot paper or can certainly get it within the stipulated time. If the officer believes only that the person possibly, or even probably, may be able to get the ballot paper in time to comply, I should not think that he could properly consider the direction actually necessary; at most he may consider that after-events may, though also they may not, show that it was worth while to give a direction on the chance that compliance will turn out to be possible. In this case, the officer gave evidence before the Arbitration Court, but, significantly or not, he was not asked to say whether he considered it necessary to give the direction to Berman in order to ensure that no irregularity should occur: he made it clear that he acted on the advice of his legal advisers; but what his own state of mind was remained at the close of the case unproved.

I have said that the Arbitration Court made no finding on these matters, because it is abundantly clear on the transcript record that neither of them was recognized by their Honours or by prosecuting counsel as arising for consideration. This may have been in part because they directed their attention in no small degree to matters which could not be regarded, on any view of the material provisions of the Act, as relevant to the question whether the defendant had done what the summons charged him with doing. Their Honours applied their minds to such questions as, why it was that, when the defendant received the election material through the post, in a letter addressed in handwriting to E. C. Benaim but at the defendant's own home address, he did not comply with a printed request on the envelope to return it to the Commonwealth Electoral Officer if not delivered within seven days; whether the defendant thought or could reasonably think, when he received the envelope, that it was intended for him; whether there was an illegality under the *Post and Telegraph Act* 1901-1950 in his opening the envelope; whether his conduct in handing the documents to a shop steward of his own union was justifiable, or was such that he was "called upon for some explanation"; what was his state of mind when he handed them over to the shop steward; what was said by Southwell, the union organizer to whom the shop

steward handed the papers, in a letter to union officials in Sydney (although evidence sought to be led by counsel for the defendant as to what the shop steward said to Southwell when handing the papers to him had been excluded from evidence); whether the defendant ought to go into the witness-box; and whether the defendant, after receiving the direction, took any steps, or might have taken more active steps, to get the documents back so as to be able to comply with the direction. Perhaps in the end their Honours directed themselves to put all such considerations aside; but at best it would seem that all they considered had to be established in order that the defendant should be convicted was that if he had set about getting the papers back as soon as he received the direction he would probably have succeeded.

That the defendant had handed the papers to Polites, the shop steward, before he got the direction, was explicitly accepted as a fact by prosecuting counsel, and by the end of the case no one could have been in any doubt about it. It is equally clear that Polites gave the papers to Southwell, and Southwell sent them by registered post to Sydney, whence they were returned after the case had been opened in the Arbitration Court. Southwell went into the witness-box and he was asked in cross-examination: "And if Berman had asked you this morning to return those documents to him, would you have done so?" His answer was: "I would have returned them to our (i.e., the union's) solicitors". Not content with this answer, counsel said: "Will you kindly answer my question. If Berman had asked you to return those documents, would you have done so?" And he got the answer: "No". Then followed an explanation that the case was being handled by the solicitors, and the witness felt that they would be the correct people to receive the papers. Counsel proceeded to ask: "Assume that the request had been made last Thursday, would you have put the same arrangements in train?" Southwell replied that there was then no solicitor operating for the union, and was pressed to say whether, if he had been asked to arrange for the return of the documents on the Thursday, he would have arranged to have returned from Sydney. The answer, as it appears in the record before us, was: "Yes, I possibly would have done so". This, we are told, is abbreviated, and I am content to deal with the matter as if the witness had stopped at "Yes". This was the sum and substance of the material upon which counsel for the informant solemnly invited the Arbitration Court to feel satisfied beyond a reasonable doubt that the situation existing between the defendant and those who had the papers at the time when

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he received the direction was such that he should be convicted of failing to comply. "The point", counsel for the prosecution said to the court, "is that the defendant simply did not ask him (Southwell) to do it"—i.e., to have the documents brought back from Sydney. Not unnaturally, the defendant's counsel interjected, "He was not under a duty to do it". To this statement, obviously correct as I should consider it to be, the reply was made: "Of course he was under a duty to do it, because he was under a duty to return that document by 12 noon, and he failed to comply with the direction".

Unfortunately the learned judges gave no reasons for their decision. I am far from assuming that they accepted all the views, some of them quite surprising, which prosecuting counsel placed before them. The only point in making the foregoing brief references to the transcript is to illustrate the fact that the whole tendency of the proceedings was to divert attention from what appears to me to be the vital significance of two features of the case: first, the established fact that the defendant did not have the electoral materials in question in his immediate control when he got the so-called direction or at any time thereafter—which meant, in the circumstances, that the document called upon him to embark upon a course of action not touching in any direct way the actual conduct of the election; and secondly that, since the success of any efforts the defendant might make to recover the materials must have depended entirely upon the willingness or unwillingness of other persons to accede to his requests, the informant, while he might well have considered his direction worth giving in the hope that the mere giving of it might lead to someone returning the papers, could not have considered that there was in fact a necessity, in order to ensure that an irregularity should not occur, to give the direction to Berman. Their Honours may be assumed to have formed an opinion that Berman would probably have succeeded if he had made sufficiently vigorous efforts to get the papers back; but much more than that was needed to justify a conviction.

I have refrained from discussing in detail the proceedings which took place before the Arbitration Court, because we do not sit in this case as a court of appeal. On the Act as it stands, the effect of prosecuting in the Arbitration Court instead of in the ordinary criminal courts is that the accused person, if he is convicted, cannot obtain any form of judicial redress for any error of fact or law which may have occurred in the proceedings, unless grounds exist for the exercise of the High Court's constitutional jurisdiction to grant prohibition. I have said enough to indicate my opinion

that, if we go behind the formal order of the Arbitration Court, there is in the record of the proceedings enough to warrant prohibition. But the formal order by itself gives ample ground. It recites, as the foundation for what it proceeds to do, that it has been proved to the satisfaction of the Court that the defendant has been guilty of the offence charged in the summons. In my opinion, no offence was charged in the summons, and for that reason, if for no other, prohibition should go.

TAYLOR J. As has already been said the prosecutor was convicted in proceedings instituted pursuant to s. 119 of the *Conciliation and Arbitration Act* 1904-1952 of failing on 19th June, 1953, to comply with a specified direction given by the informant, a Commonwealth Electoral Officer, pursuant to s. 96M (6) of the Act. In those proceedings it was clearly within the jurisdiction of the court to determine whether or not the giving of that direction by the Commonwealth Electoral Officer was, in the circumstances of the case, authorized by s. 96M (6) and also whether or not the prosecutor had, as alleged, failed to comply with it. For the reasons appearing in the judgment of *Dixon* C.J., with which I am in substantial agreement, neither of these issues can be reviewed in this application for prohibition. I do not, however, wish to appear to say that prohibition could not issue in respect of a conviction for failure to comply with a direction purporting to have been given in pursuance of s. 96M (6) where on no reasonable hypothesis could such a direction be held to be authorized by the section. But this is not such a case and accordingly I agree that the order nisi should be discharged.

Order nisi for a writ of prohibition discharged with costs.

Solicitor for the prosecutor, *J. M. Lazarus*, Melbourne, by *Sullivan Bros.*

Solicitor for the respondents, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.