

TRETHOWAN AND ANOR. v. PEDEN AND ORS.

1930.

Constitution Act, 1902 No. 32, s. 7A—Constitution (Legislative Council) Amendment Act, 1929 No. 28, s. 2—Constitution Statute (18 & 19 Vict. c. 54), s. 4—Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 5—Constitution, powers and procedure of Legislature—Alteration or repeal—Manner and form—Referendum—Statutory inhibition—Threatened violation by officers of Parliament and Ministers of the Crown—Injunction—Jurisdiction.

Dec. 15, 16,
17, 18, 23.

Street C.J.
Ferguson J.
James J.
Owen J.
Long
Innes J.

Sec. 4 of the Imperial Act (18 & 19 Vic. c. 54) conferring powers of self government upon New South Wales by means of representative Parliament empowers the Legislature to make laws altering or repealing the provisions of the Constitution in the same manner as any other laws for the good government of the Colony.

Sec. 5 of the Colonial Laws Validity Act, 1865, provides that every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full powers to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.

In 1929 Parliament amended the Constitution Act, 1902, by inserting a new section (s. 7A), providing *inter alia* as follows:—

7A. (1) The Legislative Council shall not be abolished nor, . . . shall its constitution or powers be altered except in the manner provided in this section.

(2) A Bill for any purpose within subsection one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.

(6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section . . ."

The present Parliament had passed a Bill repealing s. 7A of the Constitution Act, 1902, and also a Bill abolishing the Legislative Council. Neither Bill had been submitted to the electors for their approval.

On demurrer to the statement of claim in a suit brought by two members of the Legislative Council to restrain the presentation of either Bill for His Majesty's assent until the will of the electors had been ascertained:—

Held (Long Innes J., dissenting), that s. 7A of the Constitution Act, 1902, is a valid exercise of the powers conferred by s. 5 of the Colonial

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Laws Validity Act, and that consequently the manner and form prescribed by it must be observed in passing legislation for its repeal; that in enacting that a Bill for the repeal of that section should not be presented for His Majesty's assent until it had been approved by the electors, it altered the Constitution of New South Wales in respect to the powers and procedure of the Legislature and did so in the manner and form required by the law in force in this State at the time of its passing; and, consequently, that the Constitution of the State, as it exists to-day, requires that a specified manner and form shall be observed in passing legislation for the repeal of s. 7A of the Constitution Act.

Held, also, that the suit was one to prevent a threatened violation of the statutory inhibition contained in sub-ss. 2 and 6 of s. 7A of the Constitution Act, 1902; that therefore, the suit would lie; and that the plaintiffs had a sufficient interest to maintain it.

MOTION FOR INJUNCTION.

This was a motion to continue an injunction until the hearing of the suit which had been brought by the plaintiffs on behalf of themselves and all other members of the Legislative Council, except those who were defendants, to restrain the President of the Council and the Ministers of the Crown for this State from taking any steps to have certain Bills presented to the Governor for His Majesty's assent until the will of the electors of the State had been ascertained. The matter in the first instance came before *Long Innes, J.*, on an *ex parte* application for an interim injunction and was referred by him to the Court under the provisions of s. 6 of the Equity Act, 1901, and as the defendants, other than the President of the Council who did not appear, refused to give any undertaking his Honour granted an injunction until the matter could be heard by the Court.

The statement of claim so far as is material was in the following terms:—

1. The plaintiffs are members of the Legislative Council of New South Wales.

2. The plaintiffs as such members of the said Legislative Council are entitled to all the rights and privileges of such members and to sit and vote in the said Council and to have access and the use of Parliamentary premises including the use of the Parliamentary Library and to certain travelling privileges appurtenant to their offices as provided by s. 58 of

the Government Railways Act, 1912, as amended by other Acts.

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3. The defendant The Honourable Sir John Beverley Peden, K.C.M.G., M.L.C., is the President of the said Legislative Council.

4. The defendants other than (the President of the Council) are the Ministers of the Crown of the State of New South Wales. [Names and offices set out in detail.]

5. The Constitution (Legislative Council) Amendment Act, 1929, was duly passed and commenced on the 1st Oct., 1930.

6. A Bill in the words and figures following was passed by the Legislative Council on the 3rd Dec., 1930 :—

Be it enacted, etc.

1. This Act may be cited as the “ Constitution (Amendment) Act, 1930.”

2. The Constitution (Legislative Council) Amendment Act, 1929, and s. 7A of the Constitution Act, 1902, as amended by subsequent Acts, and the Constitution Further Amendment (Referendum) Act, 1930, are repealed.

7. The said Bill referred to in the preceding paragraph was passed by the Legislative Assembly on the 10th Dec., 1930.

8. The said Bill was initiated in the Legislative Council.

9. The said Bill has not been approved by the electors in accordance with s. 7A of the Constitution Act, 1902.

10. The defendant (Sir John Peden) as President of the Legislative Council is the officer appointed by the standing orders of such Council to present to the Governor for His Majesty's assent Bills initiated in such Council after the same have been finally passed by both Houses.

11. In contravention of s. 7A of the Constitution Act, 1902, the defendant (Sir John Peden) is threatening to present the Bill referred to in paras. 6 and 7 hereof to the Governor for His Majesty's assent although such Bill has not been approved by the electors in accordance with s. 7A of the Act of 1902.

12. A Bill in the words and figures following initiated in the Legislative Council was passed by the Council on the 9th Dec., 1930 :—

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Be it enacted, etc.

1. This Act may be cited as the "Constitution Further Amendment (Legislative Council Abolition) Act, 1930," and shall be read with the Constitution Act, 1902, as amended by subsequent Acts.

2. (1) The Legislative Council of N.S.W. is abolished.

(2) The seat of every member of the said Legislative Council shall, on and after the commencement of the Act, be vacant; and the office of member of the Legislative Council is abolished.

3 and 4 [consequential provisions.]

13. The defendants other than (Sir John Peden) claim to be entitled to have the Bill [paras. 6 and 7], and the Bill [para. 12] if and when the same shall have been passed by the Legislative Council and the Legislative Assembly presented to the Governor for His Majesty's assent without any prior approval of the electors and do not intend to submit the same or either of them to the electors for approval and threaten and intend to cause the same to be presented to the Governor for His Majesty's assent, without such prior approval of the electors.

14. The plaintiffs fear that unless the defendants are restrained as hereinafter claimed the plaintiffs will be seriously prejudiced and will be impaired in the security of their status, rights, and privileges.

The plaintiffs therefor claim—

- (a) That it may be declared that a Bill to abolish the Legislative Council or repeal or amend the provisions of s. 7A of the Constitution Act, 1902, cannot be presented to the Governor for His Majesty's assent until approved by the electors in accordance with such section.
- (b) That the defendant (Sir John Peden) may be restrained from presenting etc. the Bill [paras. 6 and 7] until the same has been approved etc. [as in prayer (a)].
- (c) That the defendants other than (Sir John Peden) their servants and agents may be restrained from presenting or endeavouring or causing to be presented, etc. . . .

the Bills [paras. 6 and 12] or either of them until the same have been respectively approved etc. [as in prayer (a)].

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The Bill referred to in paragraph 12 of the statement of claim had since the commencement of the suit been passed by the Legislative Assembly.

The defendants demurred *ore tenus* to the statement of claim upon the grounds substantially, that :—

1. The Legislature had full power to enact a Bill repealing s. 7A of The Constitution Act, 1902, without the necessity of a referendum prior to such repeal.

2. Sub-sec. 6 of s. 7A was void and inoperative, so far as it purported to prevent the Legislature from repealing that section without a referendum, upon the grounds (a) that as the Constitution of N.S.W. was in substance a flexible or uncontrolled constitution the Parliament of 1929 had no authority to shackle or control the present Parliament, and (b) that sub-s. 6 was repugnant to and inconsistent with s. 4 of the Imperial Statute (18 & 19 Vict. c. 54), which conferred a constitution on New South Wales, and with s. 5 of the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63).

3. No suit could be maintained for the prevention of free access to the King, or his representative, of the officers of Parliament, or the King's Ministers responsible to Parliament, with a view to the Royal assent being obtained to legislation of a public character proposed to be enacted by both Houses of Parliament.

4. The statement of claim disclosed no equity, no proprietary rights were involved, and the damage or injury alleged was incapable of supporting the suit.

5. There was no equitable right to restrain the King in Parliament or the responsible Ministers of the Crown or the officers of Parliament or either House thereof from passing an enactment whether *ultra vires* or not.

It was admitted by the defendants that, so long as s. 7A remained in the Constitution, the Legislature acted within its powers in requiring by s. 7A that a Bill for the abolition of the Legislative Council should be submitted to the electors for

1930. approval before being presented to the Governor, but it was submitted that the Legislature had repealed s. 7A, prior to proceeding with the Bill for the abolition of the Council.

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There was no appearance by or on behalf of the defendant, the President of the Legislative Council.

Dr. *Evatt* K.C. and *Kitto*, for the defendants, other than Sir John Peden, in support of the demurrer. The Constitution of New South Wales is flexible and uncontrolled. The Legislature of this State is a sovereign legislature. The essence of parliamentary sovereignty is that one Parliament cannot shackle the powers of a subsequent Parliament. Parliament cannot legislate on any subject in such a way that power to legislate thereafter on that subject is taken away: Blackstone's Commentaries, Vol. 1, p. 90; Dicey's Law and Custom of the Constitution, 8th Ed., p. 62; Allen, Law in the Making, 2nd Ed., pp. 276, 277.

Sec. 4 of the Constitution Statute (18 & 19 Vict. c. 54) is conclusive; it shows that while the restrictive legislative conditions imposed by ss. 15, 36 of the schedule to that Statute existed they must be observed, but that the conditions might be removed in the ordinary way by the Legislature. The Imperial grant of power contained in s. 4 still exists, and can only be divested by the Imperial Parliament. See the accompanying despatch, pars. 10, 11: N.S.W. Parliamentary Handbook, 13th Ed., p. 230. The two-thirds majority required by ss. 15, 36 abovementioned was repealed by 20 Vict. No. 10. Since 1857 no restriction had been imposed until 1929.

The Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63) was passed owing to a constitutional crisis in South Australia. Sec. 5 of that Act is a re-grant of full legislative power: it is a confirmatory, and not a restrictive statute.

The Commonwealth Constitution (63 & 64 Vict. c. 12), ss. 106, 107 preserves the N.S.W. Constitution, except so far as it is taken away by that Act, and it is a recognition of the State legislative sovereignty.

The Repeal Bill has nothing to do with "manner and form" within the meaning of s. 5 of the Colonial Laws Validity Act, 1865. If any outside body comes within the term

manner and form, the "manner and form" must be observed until it be altered, but "manner and form" may be altered in the ordinary manner. They referred to *McCawley v. The King* (26 C.L.R. 9, 48; [1920] A.C. 691, 708, 714); *Taylor v. Att.-Gen. of Queensland* (23 C.L.R. 457, 474-476). The State Legislature can impose conditions upon itself, and can also remove them.

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The proviso to s. 5 of the Colonial Laws Validity Act, 1865, itself contemplates the alteration by the Legislature as therein defined of the existing "manner and form": Professor Morgan, "Constitutional Law," Encyclopaedia Britannica, 14th Ed., Vol. 6; *McCawley v. The King* (26 C.L.R. at p. 57).

Sub-sec. 6 of s. 7A of the Constitution Act, 1902, is repugnant to both s. 4 of the Statute (18 & 19 Vict. c. 54) and s. 5 of the Colonial Laws Validity Act, 1865. The question whether a referendum is expedient is necessarily a question which must be determined from time to time. [They referred to *Russell v. The Queen* (7 A.C. 829, 835); *Hodge v. The Queen* (9 A.C. 117, 132); *Att.-Gen. for Ontario v. Att.-Gen. for Canada* ([1912] A.C. 571, 581); *Smith v. Oldham* (15 C.L.R. 355, 365); *Reg. v. Marais* ([1902] A.C. 51, 54); and *Union Steamship Co. of New Zealand v. The Commonwealth* (36 C.L.R. 130, 147).]

The N.S.W. Parliament cannot limit its own powers of legislation for peace, order and good government of this State so as to prevent a subsequent Parliament from increasing, limiting or altering those powers.

The Repeal Bill does not come within s. 1 of the Australian States Constitution Act, 1907, and need not be reserved.

The rule is well established that no proceedings can be maintained to enjoin the Legislature from passing a particular measure on the ground of its being unconstitutional. This Court will not interfere to restrain officers of Parliament from approaching His Majesty the King in the exercise of legislative functions. [They referred to *Taylor v. Att.-Gen. of Queensland* (23 C.L.R. at p. 476); *Seward v. "Vera Cruz"* (10 A.C. 59); *Barker v. Edger* ([1898] A.C. at p. 754).]

There is no jurisdiction to restrain the Legislature from passing legislation: Ruling Case Law (America), Vol. 14, p. 433, par. 134.

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The whole of Parliamentary sovereignty is based on the right to approach H.M. the King, and to request legislation, and a correlative right of the King to be so approached and advised. [They referred to Stubbs, *Constitutional History of England*, Vol. 3, p. 481; May, *Parliamentary Practice*, 13th Ed., pp. 2, 18, 71, 95.] The King is a part of Parliament. It is a breach of privilege to interfere with an officer in discharge of his Parliamentary duties. This is a breach of the privilege of Parliament of access to the King. In substance, this is a suit to prevent the King from giving his consent to Bills. [They referred to May, *Parliamentary Practice*, 429, 430, 432-435, 439, 595-6, 672; Maitland's *Constitutional History of England*, p. 381; *The Commonwealth v. Colonial Combing, Spinning & Weaving Co. Ltd.* (31 C.L.R. 421, at 438, 439); *D'Emden v. Pedder* (1 C.L.R. 91, at 117); *Williams v. Att.-Gen. for N.S.W.* (16 C.L.R. 404, at 457); *In re London, Chatham & Dover Railway Arrangement Act* (L.R. 5 Ch. 671, at 678); Chitty, *Prerogatives of the Crown*, p. 2.]

No proprietary rights are involved. If the plaintiffs are not entitled to an injunction, they are not assisted in asking for a declaration of right: *David Jones Ltd. v. Leventhal* (40 C.L.R. 357); *Prescott Ltd. v. Perpetual Trustee Co. Ltd.* (28 S.R. 324).

Maughan K.C., Flannery K.C., E. M. Mitchell K.C., and Nicholas, for the plaintiffs. The real issue is whether sub-s. 6 of s. 7A of the Constitution Act, 1902, is *intra vires* of the Legislature of New South Wales. The question arises: can the constitution of this State be amended by providing for the compulsory reference to the people of measures affecting the constitution before they can be passed into law? If the answer is in the affirmative, the plaintiffs must succeed. The Legislature of N.S.W. has such plenary power; in fact, it has fuller power than the Imperial Parliament has.

The referendum has been recognised in the Commonwealth for thirty years: The Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), s. 128. It is competent for the State Legislature to embody in its constitution the system of a compulsory referendum, and it is not necessary to ask the Imperial Parliament to confer that power on the Legislature.

The Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63) is declaratory, and makes the position clear: it enables the Legislature to convert a flexible and uncontrolled constitution into a rigid and controlled constitution. All representative State legislatures are potentially rigid. In *McCawley v. The King* ([1920] A.C. 691, 711) Lord *Birkenhead*, L.C., was not dealing with the powers of the Queensland Legislature, but with the question whether it had in fact converted the constitution of that State into a controlled one. The judgment is the highest authority for the proposition that a constitution such as that of this State can be converted from a flexible to a rigid constitution.

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The rule that a sovereign Parliament cannot bind its successors has no application to a Colonial constitution: Responsible Government in the Dominions (A. Berriedale Keith), 2nd Ed., pp. 350, 352; Sovereignty of the British Dominions, 1929 (A. Berriedale Keith), pp. 198, 199.

A sovereign Legislature can surrender part of its legislative functions to another body. If the referendum be adopted, it becomes part of the constitution, and a new legislative body will be constituted, consisting of the King, the Houses of Parliament, and the people, speaking by referenda. They referred to Dicey, Law and Custom of the Constitution, 3rd Ed., pp. 64, 65. *Russell v. The Queen* (7 A.C. 829, 835) is not an authority to the contrary.

The meaning of the Constitution Statute, 1855 (18 & 19 Vict. c. 54) was made clear by the Colonial Laws Validity Act, 1865, and the latter Act is our real charter. Sec. 7A of the Constitution Act, 1902, is a law respecting the constitution and the powers of such Legislature within the meaning of s. 5 of the Colonial Laws Validity Act, 1865, and it is *intra vires* of the State Legislature: *McCawley v. The King* (26 C.L.R. 9, at 57); *Taylor v. Att.-Gen. of Queensland* (23 C.L.R. 457). Sec. 5 of the Colonial Laws Validity Act, interprets s. 4 of the Statute (18 & 19 Vict. c. 54), and is the real source of our legislative powers. Sec. 7A is repugnant to neither of the statutes last abovementioned. They referred also to s. 106 of the Commonwealth of Australia Constitution Act.

The plaintiffs are asking for an injunction to restrain the breach of a prohibitory statute. If the Executive have a doubt

1930. as to the validity of the statute, it is their duty to approach the
 TRETHOWAN AND ANOR. Court : *Eastern Trust Company v. McKenzie, Mann & Co.*
 v. *Ltd.* ([1915] A.C. 750, 759). Until the Court decides that the
 PEDEN statute is *ultra vires*, it must be obeyed by the Executive as
 AND ORS. well as all other persons.

The plaintiffs are competent to maintain the suit. Their rights are proprietary rights, and they have a status which they are entitled to protect.

[LONG INNES, J., referred to *Ashby v. White* (1 Bro. P.C. 62).]

The jurisdiction of the Court to interfere by injunction does not depend upon proprietary rights. The plaintiffs' right to an injunction depends upon status. The possession of rights, privileges, status and office of legislator is a sufficient ground to restrain an illegal act which purports to affect the rights of a person : *Taylor v. Att.-Gen. of Queensland* (1917 S.R. (Q.) 208, 221).

They referred also to *Osborne v. Amalgamated Society of Railway Servants* ([1911] 1 Ch. 540, at 562) ; and *Aslatt v. Corporation of Southampton* (16 Ch.D. 143).

Flannery K.C. followed. If s. 5 of the Colonial Laws Validity Act is interpreted in the ordinary manner, sub-s. 6 of s. 7A of the Constitution Act, 1902, as inserted by s. 2 of the Constitution (Legislative Council) Amendment Act, 1929, was within the competence of the Legislature of this State. The reason for the enactment of s. 5 of the Colonial Laws Validity Act was the ambiguity of s. 4 of the Statute (18 & 19 Vict. c. 54), and s. 5 was judicially interpreted in *McCawley v. The King* (26 C.L.R. at pp. 49, 51). Sec. 5 is the absolute charter of a Colonial legislature to deal with its own constitution. It was intended to be a restriction of any power previously conferred on Colonial legislatures. A written constitution can only be construed by referring to the terms of the instrument by which the legislative powers were created or restricted : *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (28 C.L.R. at 149, 150).

"Manner and form" cannot be restricted to the procedure in the Legislature ; it may include the obtaining of the consent of outside bodies. It was discussed in *McCawley v. The King*

(26 C.L.R. at 54, 57). "Manner and form" covers every step in the enactment of a law until the King's assent has been obtained. There is inherent power in the Legislature to depart from the manner it has already prescribed. "Manner and form" includes any essential condition prescribed by statute for observance in the enactment of a bill between its introduction and the time when it becomes law.

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The New South Wales Legislature is a subordinate, and not a sovereign legislature. The Imperial Parliament is a sovereign legislature, but it may bind its successors. He referred to the *Law Quarterly Review*, 1886, Vol. 2, at 435, 436. It is a fallacy to refer to the sovereignty of an Australian State; there is no analogy between the Imperial Parliament and the State Legislatures: *The Commonwealth v. The State of N.S.W.* (32 C.L.R. 200, at 210).

Sec. 7A is in a great measure a reproduction of s. 128 of the Commonwealth of Australia Constitution Act. Under s. 128 four elements constitute the law making authority, i.e., the House of Representatives, the Senate, the electors, and the King. Sec. 7A has set up a new legislative body; for the purposes of that section the electorate is part of the law making machinery. The test as to whether a new legislative body has been set up is whether that body is required to assent to the expediency of a particular measure. [He referred to *In re The Initiative and Referendum Act* ([1919] A.C. 935, at 942, 943.) The effect of the referendum is dealt with in Bryce's *American Constitution*. Approval by the electors is regarded as taking a part in a legislative act: "Where the people rule" (Hedges). *Taylor v. Att.-Gen. of Queensland* (23 C.L.R. at pp. 469, 470) supports the proposition that s. 7A effects a distribution of the legislative function among various bodies.

In the consideration whether the Constitution is flexible or controlled, it is not necessary to consider whether it is a unitary or a federal system: *McCawley v. The King* ([1920] A.C., at 703, 704).

Dr. *Evatt* K.C., in reply. The questions are now resolved into (1) What body or authority in New South Wales immediately after the enactment of s. 7A made up, and now makes up, the

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Legislature of N.S.W. within the description contained in s. 4 of the Statute (18 & 19 Vict. c. 54); (2) what is the representative legislature having the Colony under its jurisdiction, other than the Imperial Parliament, competent to make laws in this State within the description contained in ss. 1, 5 of the Colonial Laws Validity Act, 1865; (3) what is the Legislature of the State forming part of the Commonwealth of Australia within the meaning of the Australian States Constitution Act, 1907; and (4) what is the Parliament of N.S.W. within the meaning of ss. 51, 107, 108, 109, 111, 123, 124 of the Commonwealth of Australia Constitution Act, 1900? Sec. 7A itself answers the question who comprises the Legislature. Sec. 5 of the Colonial Laws Validity Act, 1865, confers on that body all its powers until that Act itself has been repealed.

In *Apollo Candle Co. v. Powell* (6 N.S.W.L.R. 47; 10 A.C. 282) the Privy Council treated the Statute (18 & 19 Vic. c. 54) as being in full force. The State Legislature has not power to repeal s. 4 of the Statute (18 & 19 Vict. c. 54): *Taylor v. Attorney-General of Queensland* (23 C.L.R. at 475, 476).

While the powers of the Legislature may be diminished by a law in respect to its powers made by itself, yet its own full power to make law in respect to its own powers, including the increase thereof, is continuously vested in the Legislature by the two Imperial enactments until it ceases to answer the description of the Legislature in those enactments; consequently, the Legislature itself cannot validly make laws inconsistent with the retention by it of a power to resume the exercise of its powers.

Sec. 7 of the Constitution Act, 1902, is the original s. 4 of the Statute (18 & 19 Vict. c. 54). If sub-s. 6 of s. 7A had been added as a proviso to s. 4 of 18 & 19 Vict. c. 54, it could not have stood as it is repugnant to both that section and to s. 5 of the Colonial Laws Validity Act.

It is not disputed that the State Legislature can incorporate the referendum as part of its Constitution, but it is submitted that the same Legislature may subsequently repeal such incorporation. The view expressed in Berriedale Keith's Responsible Government that "Dominion Constitutions are potentially rigid, and may be made rigid if safeguarded" as is pur-

ported to be done by sub-s. 6 of s. 7A, is based solely on s. 5 of the Colonial Laws Validity Act, and no reference is made to s. 4 of the Statute (18 & 19 Vict. c. 54). He referred to Berriedale Keith's *Sovereignty of the British Dominions*, 1929, p. 46.

By s. 9 of the Statute (18 & 19 Vict. c. 54) the word "Legislature" includes "any future legislature" which may be established. If, therefore, the referendum can be incorporated as a constituent part of the legislature, it must be for all purposes. There can only be one legislature in being at the one time, and the referendum cannot be a constituent element merely for one law, and not for all others. Sub-sec. 6 of s. 7A did not make the electors part of the Legislature of N.S.W. *In re The Initiative and Referendum Act* ([1919] A.C. 935, at 945) suggests that the Legislature may not be able to create a new legislative power. He referred to *McCawley v. The King* ([1920] A.C. 691, at 714); Anson's *Law and Custom of the Constitution*, 4th Ed., Vol. 1, Pt. II., 7, 8; Dicey's *Law of the Constitution*, 8th Ed., 107, 108.

This is not a question of procedure; it is an attempt to obtain an injunction against persons within the walls of the Houses of Parliament. The King is a portion of the legislature, and is within the walls of Parliament. There is no suggestion of interference with privilege of members. The Court has no power to interfere by injunction: *Bradlaugh v. Gossett* (12 Q.B.D. 271, 276).

There is no question of interference with proprietary rights of the plaintiffs, nor of protection of their status. In *Taylor v. Attorney-General of Queensland* an injunction was asked to restrain the taking of a referendum outside of Parliament.

Maughan, K.C., in reply on cases. *Bradlaugh v. Gossett* (12 Q.B.D. 271) applies to what happens physically within the precincts of Parliament House. An injunction was refused in *The King v. Macfarlane* (32 C.L.R. 518) because the defendants were acting in accordance with the law. *Apollo Candle Co. v. Powell* (10 A.C. 212) must be read in the light of the first ten lines of p. 51 of *McCawley v. The King* (26 C.L.R. 9) in view of the adoption by the Privy Council of the judgment of *Isaacs and Rich, JJ.*, in the report of *McCawley v. The King* ([1920] A.C. 691, at 701).

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1930. We desire to reserve the right in the event of an appeal, to
 TRETHOWAN challenge the correctness of the decision of the High Court in
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Cur. adv. vult.

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STREET, C.J. In 1929 the Parliament of this State amended the Constitution Act, 1902, by inserting after s. 7 a new section, called s. 7A, in these terms :—

7A. (1) The Legislative Council shall not be abolished nor, subject to the provisions of subsection six of this section, shall its constitution or powers be altered except in the manner provided in this section.

(2) A Bill for any purpose within subsection one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.

(3) On a day not sooner than two months after the passage of the Bill through both Houses of the Legislature the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly.

Such day shall be appointed by the Legislature.

(4) When the Bill is submitted to the electors the vote shall be taken in such manner as the Legislature prescribes.

(5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent.

(6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal or amendment of any of the following sections of this Act, namely, sections thirteen, fourteen, fifteen, eighteen, nineteen, twenty, twenty-one, and twenty-two.

This amending section was reserved for the Royal assent, and it afterwards received it.

The effect of it so far as the abolition of the Legislative Council is concerned is to provide (1) that no Bill for the

abolition of that body shall be presented to the Governor for His Majesty's assent until it has been approved by the electors on a referendum, and (2) that no Bill for the repeal or the amendment of the section shall be presented to the Governor for His Majesty's assent until it also has been submitted to the electors for their approval.

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A referendum, that is to say a direct vote of the whole of the electors upon any particular matter or any particular measure, is unknown to the British Constitution, but in other parts of the civilized world it is a well recognized method of ascertaining the will of the people on any question that may be submitted to them. It is not only provided for in the Commonwealth of Australia Constitution Act as part of the prescribed manner for effecting alterations in the Constitution, but on one previous occasion, at least, in New South Wales it has been prescribed by the Legislature as a means of ascertaining the wishes of the people on a question of public importance.

In pursuance of the provision in s. 7A that any Bill altering the constitution or powers of the Legislative Council should be referred to the electors for their approval an Act was passed early in this year providing for a reference to them of a Bill to alter the constitution of the Council, but before it was given effect to the Parliament which had passed it came to an end. A new Parliament is now in existence and a Bill has been passed through both Houses repealing s. 7A of the Constitution Act, 1902. In addition, a Bill abolishing the Council was before Parliament when this suit was instituted, and it has since been passed through it. Neither Bill has been submitted to the electors for their approval as required by that section, and this suit has been brought by two of the members of the Council, on behalf of themselves and all other members except those who are defendants, against the President of the Council and the Ministers of the Crown for this State seeking to restrain them from taking any steps to have either Bill presented to the Governor for His Majesty's assent until the will of the electors has been ascertained. The matter having come before *Long Innes J.* on an *ex parte* application for an interim injunction he referred the matter to this Court, under the powers contained in the Equity Act, and as the defendants,

1930. other than the President of the Council who did not appear,
TRETHOWAN refused to give any undertaking he granted an injunction until
AND ANOR. the matter could be heard by this Court. It now comes
v. before us on a motion to continue that injunction, and the
PEDEN statement of claim has been demurred to, *ore tenus*, by Dr.
AND ORS. Evatt who appears for the defendants other than the Presi-
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The principal submission upon which the demurrer is based is that sub-s. 6 of s. 7A is void and inoperative, so far as it purports to prevent the Legislature from repealing the section without a referendum, upon the grounds (1) that as the Constitution of New South Wales is in substance a flexible or uncontrolled constitution the Parliament of 1929 had no authority to shackle or control the present Parliament, and (2) that sub-s. 6 is repugnant to and inconsistent with s. 4 of the Imperial Statute, 18 & 19 Vict. c. 54, which conferred a constitution on New South Wales, and with s. 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63).

It is conceded that the Legislature acted within its powers in requiring that a Bill for the abolition of the Legislative Council should be submitted to the electors for approval before being presented to the Governor, but it is said that in going on to provide that a Bill for the repeal of that enactment should also be submitted to a referendum before it could take effect it overstepped them. It is true that a sovereign legislature such as that of the Imperial Parliament cannot bind its successors. "That Parliament" says Professor Keith in his book on *The Sovereignty of the British Dominions* (p.197) "has no superior and it cannot bind itself." The reason why it cannot enact unchangeable enactments is, as is pointed out in *Dicey's Law of the Constitution* (8th Ed., p. 61), that a sovereign power while retaining its sovereign character cannot control its own powers by any particular enactment; but, though the constitution of New South Wales is, within limits, an uncontrolled constitution, its Legislature is not a sovereign Legislature. It is a subordinate Legislature. It is supreme within its own proper sphere of operations but that is limited, and the source, and the only source, from which it derives its authority and its efficacy is the grant of power conferred upon

it by the Imperial Parliament. In order therefore to examine the propositions submitted by Dr. Evatt it becomes necessary to consider shortly the origin and the terms of the New South Wales constitution and the powers of alteration and amendment conferred upon the New South Wales Legislature. The power of self-government by means of a representative Parliament consisting of two houses was conferred upon New South Wales by the Imperial Act, 18 & 19 Vict. c. 54. Sec. 4 of that Act is in these terms : " It shall be lawful for the Legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved Bill in the same manner as any other laws for the good government of the said Colony subject however to the conditions imposed by the said reserved Bill on the alteration of the provisions thereof in certain particulars until and unless the said conditions shall be repealed or altered by the authority of the said Legislature."

An early instance of the exercise of the power to alter the provisions of the Constitution is to be found in the local Act, 20 Vict. No. 10, which was passed through Parliament in the ordinary manner and which repealed the enactment in s. 39 of the Constitution requiring the concurrence of two-thirds of the members of the Assembly and of the Council on the second and third readings of any Bill to alter the Constitution.

Dr. Evatt has submitted that the power of alteration and repeal conferred by s. 4 of the Act, 18 & 19 Vict. c. 54, is so full and complete as to exclude any right in any Parliament in New South Wales to impose any binding terms upon a succeeding Parliament as a condition of exercising its powers, but s. 4 is not the only enactment which has to be considered in examining the extent of the power conferred upon the Parliament of New South Wales to amend its own constitution, powers, or procedure. It is a matter of historical knowledge that after the establishment of self-governing constitutions in Colonial Legislatures doubts arose as to the interpretation of the instruments creating them. Narrow constructions were placed upon these by Colonial Judges and causes of friction multiplied, with the result that in 1864 the Imperial law officers of the day advised that an attempt should be made finally to solve the difficulties by explanatory legislation. Accordingly, the Colonial Laws Validity Act, 1865, (28 & 29 Vict. c. 63) was

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passed. It has been variously described by different writers and Judges. Professor Dicey called it "the charter of colonial independence" (Law of the Constitution, 8th Ed., p. 101); Professor Keith has spoken of it as "for long the Magna Charta of colonial autonomy" (Sovereignty of the British Dominions, p. 45); Isaacs J. and Rich J. in *McCawley's Case* (26 C.L.R. 9, at p. 51) speaking of s. 5 said that so far as its language extended it was an "absolute charter"; and Lord Birkenhead L.C., in the same case on appeal to the Privy Council, ([1920] A.C. 691, at p. 709), said that in Imperial history it was "*clarum et venerabile nomen.*" In its title it is more modestly and more simply described as "An Act to remove doubts as to the validity of colonial laws." In *Taylor v. Attorney-General of Queensland* (23 C.L.R. 457) Isaacs J., as he then was, spoke of it (at p. 474) as a standing general power of all representative legislatures, outside and irrespective of their own separate constitutions. I am not going through the provisions of that Act in detail. For the purposes of my judgment I only need to refer to s. 5. It deals with two subject matters, Judicature and Legislature. In their joint judgment in *McCawley's Case*—a judgment with which Lord Birkenhead L.C. said that the members of the Judicial Committee of the Privy Council, who sat on the appeal to that tribunal, found themselves in almost complete agreement—Isaacs J. and Rich J. said (at p. 50) that according to all recognized rules of construction it works an implied repeal of every prior enactment with which it is inconsistent, and (at p. 51) they said: "At the moment therefore of the passing of the Colonial Laws Validity Act section 5 was, so far as its language extends, an absolute charter no matter what the British Legislature had previously said." It is to it then that we must look to find the extent and the limits of the powers of the New South Wales Legislature in connection with the two subject matters with which it deals. In *McCawley's Case* the Courts had to deal with questions relating to the Judicature. In this case we are dealing with the powers of Parliament and I propose therefore to read only so much of s. 5 as relates to them. These are the words: "And every Representative Legislature shall in respect to the Colony under its jurisdiction have and be deemed at all times to have had

full power to make laws respecting the constitution powers and procedure of such Legislature Provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament Letters Patent Order in Council or Colonial law for the time being in force in the said Colony." Full power is given to make laws respecting the constitution, powers and procedure of Parliament. Wider words could not be used, and in exercising the powers conferred only two conditions are necessary as is pointed out by *Isaacs J.* and *Rich J.* in *McCawley's Case*. They say this (p. 54): "They are: (1) the law must, as to subject matter, answer the description, and (2) it must have been passed in 'manner and form' as required by the law of the colony relating to the passing of laws. If no special provision as to the manner and form of passing a particular class of law exists, then the ordinary method may be followed; but if as to any given class of law a specific method is prescribed, it must be followed. For instance, if a certain majority is required, or if reservation for the King's assent is prescribed, such a condition is essential to a valid exercise of the power."

It is admitted, as I have already pointed out, that the last Parliament had power to require that a proposal for the abolition of the Legislative Council should first be submitted to the electors for their approval on a referendum before it could become operative, but it is said that it had no power to go further and to bind subsequent Parliaments by requiring that any proposal for the repeal of the enactment providing for a reference to the electors should also be submitted to a referendum before becoming operative. That is the concrete question that arises for consideration in this case. Can one Parliament, by providing that a proposal to remove a restriction which it has imposed shall not be carried into effect without complying with conditions which it lays down, bind a succeeding Parliament so as to prevent it from removing the restriction by an Act passed in the ordinary way. The question is not free from difficulty, and my mind has fluctuated during the course of the argument, but upon consideration I have come to the conclusion that the answer should be in the affirmative.

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As the law stands to-day the Constitution of the State requires that before the Legislative Council can be abolished the will of the electors shall be obtained on a referendum, and it also requires that any Bill for the repeal of that provision shall be similarly submitted to the electors for their approval before it can become law. The Constitution therefore requires not only that a specified manner and form shall be observed in passing legislation abolishing the Legislative Council, but also that the same manner and form shall be observed in repealing that requirement. What is there that is *ultra vires* in this? It is indisputable that if it had seen fit to do so the Imperial Parliament might have put similar restrictions to those contained in sub-s. 6 of s. 7A into the originating document which conferred a constitution upon New South Wales, and in fact the South Africa Act, by which a constitution was conferred on the Union of South Africa, prescribes a special procedure for the repeal of some of its provisions. In the Constitution of New South Wales as originally framed no such restriction is to be found, but under s. 5 of the Colonial Laws Validity Act the Legislature is to be deemed to have full power to make laws respecting its constitution powers and procedure, provided that such laws are passed in such manner and form as may from time to time be required by any Imperial Act or local Act for the time being in force. How far, in the exercise of that power, Parliament could go in the direction of providing that laws should no longer be mutable but in future should be deemed to be immutable, one need not consider. The suggestion of extravagant possibilities does not in my opinion serve any useful purpose. Dr. Evatt has submitted that the effect of sub-s. 6 is to shackle and control the present Parliament in the exercise of the powers conferred upon it by s. 5 of the Colonial Laws Validity Act, but in truth all that sub-s. 6 of s. 7A does is to provide a special procedure for any Bill introduced into Parliament for the purpose of doing away with the restrictions imposed by the earlier subsections of that section. Parliament in its wisdom might well think that there were possible changes of so important and so far reaching a character that a special procedure ought to be followed before they could become law, and it might also think that in respect of some of such changes

the need for hastening slowly was such that the provision for a special manner of procedure should not be liable to be repealed by a simple Act passed in the ordinary way. In this Court we are concerned only with the legal aspect of the matter. It is not for us, sitting here, to canvass the wisdom or the expediency of any legislative proposals for the alteration of the Constitution, but a proposal of so far reaching and so momentous a character as that for the substitution of a unicameral system for the bicameral system, which has been in force in New South Wales ever since the privilege of self government was conferred upon it, and it was left (to use the language of Lord *Birkenhead* L.C.) to work out its own constitutional salvation, is one which Parliament might not unreasonably consider of such importance that a special form of procedure should be made compulsory and that it should not be left to be determined by the passage of an Act in the ordinary way through both Houses. A provision of this kind introduced into the Constitution as a safeguard against hasty changes in the composition of the Legislature acts, no doubt, as a check upon Parliament, but I do not think that it can be said to be an illegal shackle upon it in the free exercise of its powers. Parliament is given full power to make laws repealing its constitution, its powers, and its procedure, providing only that the manner and form required by law are observed. The insistence upon the observance of a special form of procedure before the provisions of s. 7A can be repealed or altered is a matter of manner and form, and I think that in requiring that this shall be done the Parliament of 1929 was not acting in excess of its full power to make laws respecting its constitution, powers and procedure.

It could not be contended that Parliament has not the power to insist on a specified majority in each House as a condition of a Bill providing for a change in its constitution, and I do not think that it could be successfully contended that if it did impose such a condition it would not also have the power to insist that the enactment imposing it should not be repealed without the consent of a similar majority ; and I can see no difference in principle between a condition of that kind and a condition requiring a direct reference to the people by a recog-

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1930. nized method of ascertaining their opinion on questions of great public importance.

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Under the Constitution of New South Wales, as it exists to-day, a special manner and form are prescribed which are to be observed in passing a law for the repeal of s. 7A of the Constitution Act, and a Bill introduced into Parliament for that purpose and passed through both Houses cannot lawfully be presented to the Governor unless that procedure has been followed. Assuming therefore that a suit of this kind will lie and that the plaintiffs are entitled to maintain it, about which I shall have something to say presently, I think that they are entitled to the declaration asked for in the first prayer of the statement of claim, that is to say a declaration that a Bill to abolish the Legislative Council or to repeal or amend the provisions of s. 7A of the Constitution Act of 1902 cannot be presented to the Governor for His Majesty's assent until approved by the electors in accordance with that section.

The next ground relied upon by Dr. Evatt in support of his submission that sub-s. 6 of s. 7A so far as it purports to prevent the Legislature from repealing s. 7A without a referendum is void and inoperative is that it is repugnant to and inconsistent with s. 4 of the Imperial Act (18 & 19 Vict. c. 54), conferring a constitution upon New South Wales, and with s. 5 of the Colonial Laws Validity Act. As, however, for the reasons that I have given sub-s. 6 of s. 7A is, in my opinion, a valid exercise of the powers conferred upon the Legislature of New South Wales by those Imperial Acts it follows also, in my opinion, that there is no inconsistency or repugnancy, and I need say no more about that aspect of the matter.

Then comes the next question of importance, that is to say whether this suit is one which the Court has jurisdiction to entertain. Dr. Evatt put his submission in this way. No suit, he said, can be maintained in the King's Courts which has for its object the prevention of the free access to the King or his representative of the officers of Parliament, or the King's Ministers responsible to Parliament, with a view to the Royal assent being obtained to legislation of a public character proposed to be enacted by both Houses of Parliament. He further submitted that there is no equitable right to restrain the King in Parliament, or the responsible Ministers of the

Crown, or the officers of either House of Parliament, from passing, or taking part in passing, an enactment, whether *ultra vires* or not. These propositions within limits may be sound, but I do not think that we need consider them closely, because, in my opinion, what the plaintiffs are seeking to do in this suit does not come within them. Dr. Evatt also submitted that the judiciary has no control over the Legislature, and that it cannot enjoin it from passing an unconstitutional Act. Again, I am inclined to agree, but I do not agree with his further submission that this is an entirely novel attempt to interfere with legislative officers in carrying out their duties. The plaintiffs are not seeking in any way to interfere with the proceedings of either House of Parliament, nor are they seeking to interfere with legislative officers in carrying out their duties. What they are seeking to do is to prevent what they allege is a threatened violation of the statutory inhibition contained in sub-s. 2 of s. 7A of the Constitution Act. That subsection provides that a Bill for any purpose within sub-s. 1 shall not be presented to the Governor for His Majesty's assent until it has been approved by the electors, and by sub-s. 6 its provisions are extended to any Bill for the repeal or amendment of the section. Dr. Evatt's submission is that the judiciary cannot interfere between Parliament and the King, and that the plaintiffs' only remedy if an unconstitutional law is passed is to apply to the Court, after it has been passed, to have it declared invalid. The plaintiffs on the other hand point out, with truth, that it is the duty of the Crown, and of every branch of the Executive, as well as of every citizen, to abide by and to obey the law, and they say that all that they are asking is that they may be protected against a threatened breach of a statutory mandate by which they will be injuriously affected. Under the law as it stands to-day, as now declared by this Court, there is a valid statutory prohibition against the presentation to the Governor of a Bill to repeal s. 7A until it has been approved by the electors. To grant the relief asked for will not in my opinion amount to an interference with the internal affairs of either House of Parliament or with any of the privileges of Parliament, and I think, therefore, upon the whole, that the suit is one which will lie at the instance of a proper plaintiff having a sufficient interest to maintain it.

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1930. On this point I entertain no doubt but that the plaintiffs, who
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may be deprived of their parliamentary privileges, temporarily at all events, if the threatened breach of the law is committed, have a sufficient interest to entitle them to approach the Court.

For these reasons, I think that the demurrer fails, and unless the defendants, for whom Dr. Evatt appears, are prepared to give an undertaking that pending the hearing of the suit they will not take any steps to have the Bills—for both Bills stand on the same footing—presented to the Governor, unless they have been approved by the electors, I think that the injunction must be continued until the hearing or until further order. I think, too, that the defendants, other than Sir John Peden, must pay the costs of the motion.

FERGUSON, J. This is a motion to continue an injunction restraining the presentation to His Excellency the Governor for Royal assent of a Bill which was passed through both Houses of Parliament to repeal s. 7A of the Constitution Act. Sec. 7A was introduced into the Act by an amending Act passed by the last Parliament. It provides, amongst other things, that a Bill to abolish the Legislative Council shall not be presented to the Governor for His Majesty's assent until it has been approved by the electors upon a referendum. Sub-sec. 6 of the section adds this provision: "(6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section." In other words, no Bill for the repeal or amendment of the section may be presented to the Governor for Royal assent until it has been submitted to the electors and approved by them.

It is contended by those of the defendants who are opposing this motion that it was not competent for Parliament to pass that subsection, and that, therefore, it is not law. A Bill to repeal the whole section has passed through both Houses in the present Parliament. If the defendants' contention is sound, the Bill awaits only his Majesty's assent before becoming law, and it is the duty of the President of the Legislative Council to present it to His Excellency for that purpose. There is no dispute as to the power of Parliament to pass the repealing Bill; the only question for our consideration on this

part of the case is as to the stages through which it must pass before it can lawfully be presented for His Majesty's assent.

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Reliance is placed by the defendants upon the principle that Parliament cannot by legislation shackle its own legislative power, or that of its successors. Dicey, in his "Introduction to the Study of the Law of the Constitution," says: "That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors" is certain, but the endeavour has always ended in failure. (7th Ed., p. 62.) There seems to be no doubt as to the soundness of the general proposition, at least as applied to a sovereign Legislature such as that of Great Britain; but even in that case it is essential to bear in mind exactly what the proposition means. It does not mean, as I understand it, that it is beyond the power of the King, with the assent of the Lords and Commons, to pass an Act to-day which it is impossible for the King, with the assent of the Lords and Commons, to repeal to-morrow. To-morrow there may be no Lords and Commons, or rather, those two estates may not compose the Parliament of to-morrow. What I conceive to be the true rule is that the sovereign Legislature of to-day, however constituted, cannot pass a law which the equally sovereign Legislature of to-morrow, however it may be constituted, cannot repeal.

There may be a question how far that rule applies to a Legislature which is not a sovereign Legislature, but which derives its authority and its very existence from the authority of the Imperial Parliament. That question, in its general terms, may be left for the consideration of those whose duty it is to study the Constitution as a whole; all that we are now called upon to consider is the more restricted question whether under the law in force in New South Wales the Parliament of New South Wales, with the assent of his Majesty had power to make the provisions contained in sub-s. (6) part of the Constitution of the State, and as such, binding upon itself and its successors.

We have at our hand an example of a subordinate Legislature which can pass laws so as to restrict the law-making power of its successors. The Constitution of our Commonwealth contains certain restrictions upon the power of the

1930. Legislature to amend the Constitution. Those restrictions, while they remain in the Constitution, are absolutely binding on the Legislature. They may be removed, but only by the method prescribed in the Constitution itself. By adopting that method, the Legislature may either remove them, relax them, or add new restrictions which in their turn would bind succeeding Legislatures just as effectively as the present Legislature is itself bound by the restrictions in the Constitution to-day.

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We are not an independent State, and our Legislature is not a sovereign Legislature. Whatever power it may have, it is power which it must have derived in some way or other from the Imperial Parliament. Beyond question, it would have been competent for the Imperial Parliament, when it bestowed a constitution on New South Wales, to include in it the very provision we are now considering. Without doing that, it might, by the express terms of the covering Act, have given the Colonial Legislature itself power to amend the constitution by inserting that provision. Or again, it might have conferred the power of amendment in such wide terms as to include a power to make this amendment. In either of those cases, once the provision was enacted it would become an unchallengeable part of the constitution, and it would not be competent for the Colonial Legislature to pass any law in conflict with it.

There is, therefore, no general principle of law which makes it inherently impossible for the Legislature to possess the power to pass an enactment in the form of sub-s. 6. What we have to consider is whether the authority conferred on it by the Imperial Parliament is wide enough to include such a power.

I do not think that question is answered by showing the extravagant results that might follow if the Parliament, having passed an Act, has power to provide that any Bill repealing it is not to become law until it has been submitted to a referendum. It has been urged upon us that Parliament might with equal force claim the right to provide that the repealing Bill should be submitted to Tattersall's Club, or that three years should elapse after its introduction before it should finally become law. But under any reading of the consti-

tution it is conceded that the Legislature might do things quite as drastic. It might lawfully abolish one House of Parliament, or possibly both, create a third House, or thirty, extend the franchise to every man, woman and child in the State old enough to hold a pencil, restrict it so that nobody should have a vote or sit in Parliament except young women between fifteen and eighteen, or provide that after the next dissolution there should be no further election for twenty years. If any such Act were passed by both Houses, and received the Royal assent, it would be part of the law of the land. All that means is that there is nothing in the constitution forbidding the Legislature to do insane things. One would not expect to find such a provision there. The constitution of every free civilised community is based on the assumption that the body to which it commits the power of making its laws may be trusted to bring to the exercise of that power a reasonable degree of sanity. If at any time that trust should prove to be misplaced, then the State would be in very evil case, and would be hard put to it to find a way of escaping disaster.

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The Imperial Statute which originally conferred a constitution upon New South Wales, 18 & 19 Vict. c. 54 contained this provision in s. 4 :

4. It shall be lawful for the Legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved Bill in the same manner as any other laws for the good government of the said colony, subject to certain conditions which we need not now consider. Certain doubts having afterwards arisen in this and other colonies as to the powers of the Legislatures created by that Act and other Imperial Acts and orders in council it was sought to remove these doubts by the Colonial Laws Validity Act, 28 & 29 Vict. c. 63. Sec. 5 of that Act, so far as it is material, is in these terms :

5. . . . And every Representative Legislature shall in respect to the Colony under its jurisdiction have and be deemed at all times to have had full power to make laws respecting the constitution, powers and procedure of such

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Legislature Provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Orders in Council, or colonial law for the time being in force in the said Colony.

In order to appreciate the exact nature of the power thus conferred I turn to the concrete position as it presented itself in New South Wales immediately after the Act was passed. The Legislature then consisted of the Governor and the two Houses of Parliament. It made laws by means of Bills passed through both Houses and then assented to by the Governor on behalf of Her Majesty, or by Her Majesty herself. The effect of the Act was that that law-making machinery was put in the hands of the Legislature, with the fullest power of remodelling it, by altering either its own structure or its mode of operation. Either, or both, might be changed, and changed, and changed again. But at any moment the change could be made in one way, and one way only, that is, by passing a new law, a law which must be enacted by the Legislature as then constituted, and in the method prescribed by the law at that moment in force.

Thus the first change after the passing of the Act could be made only by a Bill passed by both Houses and assented to by or on behalf of the Sovereign. By an Act so passed the whole structure might have been rebuilt from the very foundation. Three houses might have been substituted for two, and some other entirely new method of passing laws might have been adopted. From the moment of passing that Act, it would have been the law of New South Wales, and the only law on the subject in force in New South Wales. It might again have been altered, but not by the two Houses. The alteration could be made only by the newly constituted Parliament of three Houses, and by that Parliament only in the method prescribed by the new law.

I cannot find in the Constitution or in the Imperial Acts any restrictions upon the extent of the alterations which the Legislature may make in the procedure by which its laws are to be enacted. There is certainly no limit to the authority of the Imperial Parliament to make such alterations, if it

again chose to undertake the task of regulating our constitution ; there is no limit to the authority which it has power to confer upon the State Legislature ; and what is there to suggest that it intended to withhold or did withhold from our Legislature any fraction of that authority ? What is there to suggest, for example, that New South Wales was not to have the right, if it chose, to adopt as part of its legislative machinery such a referendum as that which is provided for in our Commonwealth Constitution ?

It would be difficult to find any stronger repudiation of such a suggestion than the language of the Judicial Committee in *McCawley v. The King* ([1920] A.C. 706) : “ Consistently with the genius of the British people, what was given was given completely and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation.”

When the Legislature of 1929, by a Bill passed through both Houses and assented to by His Majesty, enacted that a Bill for the repeal of s. 7A should not be presented to the Governor for His Majesty’s assent until it had been approved by the electors, it intended to alter, and did alter the Constitution in that respect. It did what the Colonial Laws Validity Act expressly authorised it to do. It altered the powers or the procedure of the Legislature. It did it in the manner and form required by the law for the time being in force in the State. From that moment that provision has been part of the Constitution, and is the law of New South Wales to-day.

It may be altered, the Legislature has full power to alter it by repealing sub-s. (6). But that repeal to be effective, can, in my opinion, be brought about only in the manner prescribed by the law in force to-day, that is, by a bill which, after passing through both Houses, is approved by the electors before being presented for the Royal assent.

With regard to the jurisdiction of the Court to entertain the suit, and the right of the plaintiffs to present it, I have nothing to add to what has been said by the learned Chief Justice. I agree that the demurrer must be overruled.

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JAMES, J. I concur in the judgment delivered by his Honour the Chief Justice.

OWEN, J. In this suit the plaintiffs sue on behalf of themselves and all the other members of the Legislative Council who are not defendants. The defendants are Sir John Beverley Peden, the President of the Legislative Council, the gentlemen who are the Ministers of the Crown, and the Attorney-General for the State. We are informed that the Attorney-General, as such, has been made a defendant in order to represent the public.

On December 11th instant, Mr. Justice *Long Innes* granted injunctions until December 15th, (a) restraining the defendant Sir John Beverley Peden from presenting to the Governor, for his Majesty's assent, the Bill which is mentioned in paragraphs 6 and 7 of the statement of claim, and (b) restraining the defendants other than the defendant Sir John Beverley Peden from presenting or endeavouring or causing or procuring to be presented to the Governor for his Majesty's assent the Bills mentioned in paragraphs 6 and 12 of the statement of claim, or either of them.

Special leave was granted by his Honour to serve short notice of motion for December 15th to continue these injunctions until the hearing, or further order. This notice of motion was served on all the defendants, and has been heard before the Full Court. Sir John Beverley Peden has not been represented before us, and I assume that he submits himself to such order as the Court may think fit to make.

Counsel for the defendants, other than Sir John Beverley Peden demurred *ore tenus* to the statement of claim and therefore all relevant facts therein stated must be taken to be admitted.

[His Honour stated the facts as alleged in the statement of claim, and continued :] The case has been argued before us with great ability and at great length by counsel for the parties interested, and we have been referred to, and we have had placed before us many authorities and also opinions expressed by writers on constitutional questions, but, in the view which

I take of the matters we are called upon to decide, it is unnecessary to refer to the greater part of these.

It has been said in argument that the Parliament of this State is a sovereign power, and that Parliament cannot make laws relating to the Constitution which bind the same or a subsequent Parliament ; in other words, that Parliament, as a sovereign power, can repeal any Act relating to the Constitution already in force. With these contentions I agree, but subject to important limitations. The Parliament of this State is given sovereign powers within and controlled by the terms of the written Constitution then in existence. Parliament, if it keeps within the powers conferred upon it by the written constitution then in force, can repeal any Act passed by the same or an earlier Parliament relating to the constitution.

To my mind, the first and the all important step to take is to determine what are the powers conferred on the State Parliament so far as the constitution is concerned. By that, I mean to determine the effect and the scope of the constitution as originally granted, the powers conferred by that constitution, and the alterations (if any) made by subsequent Imperial legislation.

The original constitution was conferred on New South Wales by the Imperial Act, 18 & 19 Vict. c. 54, and by s. 9 the word "Legislature" was defined as including as well the Legislature to be constituted under the said reserved Bill (that is the Bill set out in the Schedule to the Act) and this Act as any future Legislature which may be established in the said Colony under the powers in the said Bill and this Act contained.

By clause 1 of the reserved Bill a Legislative Council and a Legislative Assembly were constituted, and it was provided that Her Majesty should have power by and with the advice and consent of the said Council and Assembly to make laws for the peace, welfare and good government of the said Colony in all cases whatsoever. In the Imperial Act itself was inserted power to alter or repeal the provisions of the reserved Bill by s. 4, which has been so much debated before us. That section made it lawful for the Legislature of New South Wales to make laws altering or repealing all or any of the provisions

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1930. of the reserved Bill in the same manner as any other laws for
 TRETHOWAN the good government of the Colony, subject however to the
 AND ANOR. conditions imposed by the provisions of the reserved Bill on
 v. the alterations of the provisions thereof in certain particulars
 PEDEN until and unless the said conditions should be repealed or al-
 AND ORS. tered by the authority of the Legislature.
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Stopping there for a moment, it is obvious that, when the Imperial Legislature conferred the original constitution on New South Wales, the constitution so conferred was not rigid or controlled. Sec. 4, so long as the Legislature observed its provisions, permitted alterations in, and even a repeal of the whole of the constitution, and such alterations or repeal could be effected by the Legislature making laws in the same manner as any others for the good government of the Colony.

Between 1855 and 1865 doubts had been entertained respecting the validity of laws enacted or purporting to have been enacted by Legislatures of certain Colonies and respecting the powers of such Legislatures and the Imperial Parliament considered it expedient that such doubts should be removed. Accordingly, the Act, 28 & 29 Vict. c. 63, was passed by the Imperial Parliament, and it is conceded that this Act applies to the Legislature of New South Wales as it existed in 1929 and at the present time.

Sec. 5 of that Act is the second provision in the Imperial Acts which has been discussed at great length before us. The material provisions are as follows: Every Representative Legislature shall, in respect to the Colony under its jurisdiction, have and be deemed at all times to have had full power to make laws respecting the constitution, powers and procedure of such Legislature Provided that such laws shall have been passed *in such manner and form as may from time to time be required by any Act of Parliament . . . or colonial law for the time being in force in the said Colony.*

It is clear that Parliament, as constituted in 1929, and at the present time was and is a representative Legislature within the meaning of s. 5, and that section states in unmistakable language the wide powers possessed by each Parliament to make laws, *but* the exercise of those powers is, according to the words used in the section, subject to the proviso that such

laws must be passed *in such manner and form* as may from **1930.**
time to time be required by any Act of Parliament for the time
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In 1902 the New South Wales Acts relating to the Constitution were consolidated by the Act No. 32 of 1902, and, for all purposes material to what is before us, the 1902 Act contained the Constitution as it existed when Parliament passed the Act No. 28 of 1929.

That Act in terms amended the Constitution Act, 1902, as amended by subsequent Acts, and inserted a new clause 7A. Sec. 7A, sub-s. (1), provides that the Legislative Council shall not be abolished, nor subject to the provisions of sub-s. (6) shall its constitution or powers be altered except *in the manner* provided in that section. It is noticeable that Parliament considered that the provisions in sub-ss. 2, 3, 4, and 5 were regarded by it as "the manner" of passing legislation contemplated by s. 7A. Sub-sec. (2) states that a Bill for any purposes within sub-s. (1) *shall not be presented* to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with s. 7A. Sub-secs. (3) and (4) provide for the submission to the electors of the Bill, and sub-s. (5) directs that the Bill shall be presented to the Governor for His Majesty's assent if a majority of the electors voting approve the Bill. Then comes sub-s. (6) which, it is contended, was either beyond the power of the then Parliament to enact or which the present Parliament can repeal in the ordinary way—that is, without first submitting the repealing Bill to the electors for their approval. This subsection extends the provisions of s. 7A to any Bill for the repeal or amendment of the section.

It is said that the Parliament existing in 1929 had no power under the Constitution as it then stood to make any law which will prevent that Parliament or any subsequent Parliament from repealing or amending that law in the ordinary way—that is, by a Bill which has passed both Houses of Parliament and has been assented to by the King. If that be so, sub-s. (6) of s. 7A, which appears to stand in the way of the defendants represented by Dr. Evatt and Mr. Kitto, must be treated as having no force in law, and the plaintiffs must fail. If on the

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other hand that subsection is a law validly enacted, the plaintiffs are entitled to the relief they claim unless there be other reasons why the Court must or should refuse to grant this relief.

In order to answer the question as to what was or was not within the powers of the 1929 Parliament, the Court must, I am satisfied, construe the *written* constitution as it existed at the time s. 7A was enacted. Whatever powers that Parliament had must be found within the four corners of that constitution. Outside that written constitution that Parliament had and the present Parliament has no powers of making laws respecting the constitution, powers and procedure of the Legislature. The British Parliament may well be said to have an inherent power to legislate on such matters, and the British Constitution may or may not be flexible and uncontrolled or uncontrollable. In the case of the Parliament of New South Wales, the powers are limited by the charter of the constitution, either as granted by the Imperial Parliament or as altered by effective legislation.

A statute or statutes respecting the constitution, powers and procedure of a Legislature like any other written instrument "must be so construed that the grammatical and ordinary sense of the words is adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther" : *per* Lord Wensleydale, *Grey v. Pearson* (6 H.L.C. at p. 106), approved by the Privy Council in *Victoria City v. Bishop of Vancouver Island* ([1921] 2 A.C. at p. 387). "Whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument, and, inasmuch as there may be inaccuracy or inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language

of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made" *per* Lord *Halsbury*, *Leader v. Duffey* (13 A.C. at p. 301). If one carefully reads the original constitution as conferred by the Imperial Act (18 & 19 Vict. c. 54) together with the Colonial Laws (Validity) Act (28 & 29 Vict. c. 63), and those are the only relevant Statutes relating to the constitution to which we have been referred on this point—there is clearly no inaccuracy, such as Lord *Halsbury* referred to, to be found in those instruments. Is there any repugnancy or inconsistency to be found? It is said that s. 4 of the Act 18 & 19 Vict. c. 54, and s. 5 of the Colonial Laws (Validity) Act are in some way repugnant to or inconsistent with one another. Both sections are still in force and must be taken together and construed as existing portions of the written constitution, but one must bear in mind that the Colonial Laws (Validity) Act with its s. 5 is the later Act, and if there be any repugnancy or inconsistency, to use the words of *Isaacs J.* and *Rich J.* in *McCawley v. The King* (26 C.L.R. at pp. 50, 51), the later Act completely passed is fatal to the earlier one.

When I come to the construction of the material Statutes in this case, I confess that I find great assistance from the judgment of *Isaacs J.* and *Rich J.* in *McCawley v. The King* (26 C.L.R. 9), and I am justified in doing so by the terms of the approval given to that judgment by the Lord Chancellor in the same case on appeal ([1920] A.C. at p. 701). I take that judgment to be a clear and unmistakeable statement as to the powers of the Queensland Legislature at the date when the Act sought to be impeached in that case was enacted and from it, as I said, I have gained great assistance.

In that case the constitutional powers of the Queensland Legislature were reviewed and considered. Clause 22 of the Order-in-Council which is substantially and for all material purposes similar to s. 4 of the Imperial Act 18 & 19 Vict. c. 54 was considered side by side with s. 5 of the Colonial Laws (Validity) Act. The history of the latter Act is given and is as stated in that judgment, this Act was intended obviously to end for ever all doubts as to matters with which it dealt. So far as the language of s. 5 of that Act extends it is an absolute

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1930. charter, no matter what the British Legislature had previously said. That section refers to two subject matters, **TRETHOWAN AND ANOR.** (1) Colonial Judicature, and (2) the Colonial Legislature, and *v.* as to each "full power" is given to make laws *but* the "full power" is to be exercised subject to any legal requirement as to "manner and form." Only two conditions are necessary : **PEDEN AND ORS.** (1) the law must as to subject matter answer the description, and (2) the law must have been passed in the "manner and form" as required by the law of the Colony relating to the passing of laws. If no special provision as to the "manner and form" of passing a particular class of law exists, then the ordinary method may be followed, but if to any given class of law a specific method is prescribed it must be followed. These are quotations from the judicial opinions of these two Judges. As I have pointed out, this judgment received the emphatic approval of the Lord Chancellor, and we are justified in accepting it as a valuable statement of the position and powers of the Legislature under s. 5 of the Colonial Laws (Validity) Act or the combined effect of that section and s. 4 of the earlier Imperial Act. *Owen J.*

The Imperial Parliament had full power (a) to grant any form of Constitution to a Colony including a power to remodel that Constitution without restrictions or conditions, and (b) to make provision in the Constitution for the repeal of or alteration to laws, subject, as to "manner and form," to a condition that the "manner and form" if prescribed by law must be followed. The latter is, according to my view, what the Imperial Parliament has done by s. 5 of the Colonial Laws (Validity) Act, and I am satisfied that Parliament in 1929 had power, if it thought fit, to make laws as to the "manner and form" in which subsequent legislation of this nature should be passed. The language of s. 5 is plain and unambiguous, it is not controlled by any other portion of the written Constitution, nor can I see any reason for not construing the expressions used in the grammatical and ordinary sense. Does s. 7A fall within the class of laws which is covered by s. 5? It clearly does; it certainly is a law respecting the powers of the Legislature; it affects materially the powers then existing. I think it is also a law respecting the constitution of the Legislature; it introduces an element (the vote of the people) into

the Constitution itself. Sec. 7A, therefore, is a type of law to which the Imperial Parliament referred when using the language of s. 5. It follows that s. 7A was validly enacted. Does it then prescribe the "manner and form" in which the proposed laws must be passed? As to that point, as I understand, Dr. Evatt conceded that sub-s. 6 of s. 7A, if validly enacted, made a submission to the electors, part of the "manner and form" required by law, and I am satisfied he was right in making this concession. The section itself uses the expression "*in the manner provided in this section.*" The Commonwealth Constitution Act (like the Colonial Laws (Validity) Act, an Imperial Statute) uses the word "manner" when referring to an alteration of the Commonwealth Constitution. Chapter VIII., Alteration of the Constitution, s. 128 enacts that the Constitution shall not be altered except in "*the following manner,*" and in that section provision is included for submission to the electors. The submission, therefore, of a Bill by way of referendum is part of "*the manner and form*" in which a Bill becomes an Act.

If that be the right view to take, the defendants are threatening or intending to commit or assist in committing an act which by s. 7A is prohibited, and the next question is, are the plaintiffs entitled to relief at the hands of this Court?

The plaintiffs and the other members of the Legislative Council (on whose behalf the plaintiffs sue) hold, as members of that Council, high office in the State with important duties to perform and privileges to enjoy. Sec. 7A was enacted in order to extend some measure of protection to or to safeguard the Legislative Council and its members. It is clear to my mind that the presentation of these Bills, passed by both Houses, to the Governor for His Majesty's assent must or may endanger the continuance of the office, duties and privileges of the members of the Council as members of that body. Therefore, the presentation of the Bills in question to the Governor without having first obtained the approval of the electors is not only in direct contravention of the terms of the section but must necessarily prejudice the plaintiffs.

It was contended that either this Court has no jurisdiction, or in its discretion this Court ought not to grant the injunctions

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claimed in the present suit. It was said in somewhat general terms that the King's Courts either could not interfere or always had abstained from interfering with action by Parliament, and that the presentation of these Bills by the President of the Legislative Council was in reality part of the process whereby Parliament makes laws. It was pressed upon us that, inasmuch as the King's Courts cannot or will not interfere to prevent the Legislative Council or the Legislative Assembly from entertaining or passing Bills, the Courts have no jurisdiction to stay or will refrain from staying the formal act of presenting the Bills to the Governor for His Majesty's assent. For these propositions *Bradlaugh v. Gossett* (12 Q.B.D. 271) was relied upon. Two matters were decided in that case : (a) that a Court of law has no right to inquire into the propriety of a resolution of the House of Commons restraining a member from doing within the walls of the House itself something which by the general law of the land he has a right to do, and (b) an action will not lie against the Sergeant-at-Arms of the House of Commons for excluding a member of the House in obedience to a resolution of the House directing him to do so, nor will an injunction be granted to restrain that officer from using necessary force to carry out the order of the House. The headnote briefly states the reasons for this decision—that this being a matter relating to the internal management of the procedure of the House of Commons, the Court has no power to interfere. Lord *Coleridge*, at pp. 274, 275, says : “ Cases may be put, cases have been put, in which, did they ever arise, it would be the plain duty of the Court at all hazards to declare a resolution (of either House of Parliament) illegal and no protection to those who acted under it. Such cases might by possibility occasion unseemly conflicts between the Courts and the Houses (of Parliament). But while I do not deny that as a matter of reasoning such things might happen, it is consoling to reflect that they have scarce ever happened in the long centuries of our history, and that in the present state of things it is but barely possible that they should ever happen again. Alongside, however, of these propositions, for the soundness of which I should be prepared most earnestly to contend, there is another proposition equally true, equally well established, which seems to me decisive of the case before us. What is

said or done within the walls of Parliament cannot be inquired into in a court of law." *Stephen, J.*, at p. 278, puts it thus: "I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its own internal proceedings," and again at p. 286, he says: "No precedent has been or can be produced in which any Court has ever interfered with the internal affairs of either House of Parliament, though the cases are no doubt numerous in which the Courts have declared the limits of their powers outside of their respective Houses."

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In my opinion, that case has no application to what is under consideration by us. If these Bills had been presented for and had obtained the Royal assent, this Court clearly would have had jurisdiction to declare that the Acts so constituted were invalid, and to grant the plaintiffs some form of relief. It is true that Sir John Beverley Peden is an officer of the Legislative Council whose duty it is to present these Bills to the Governor, but an injunction to prevent him from so doing in direct contravention of an Act duly passed by Parliament is, in no sense, an interference with the rights, powers and privileges of Parliament. Sec. 7A, sub-ss. (2) and (6) prohibits in the plainest terms the presentation (*i.e.*, by the appropriate officer of Parliament) to the Governor for His Majesty's assent. The threatened presentation in the present case is by statute made illegal, and the Court must have, and I am satisfied has, power in a proper case to restrain the committing of such an illegal Act. If the Court has that power, I am satisfied that the Court ought not, in a case such as this, to refrain from exercising it. The injury to and the loss sustained by the plaintiffs cannot be estimated in damages; even if adequate damages could be assessed, the Court would have no right to compel the plaintiffs to barter their office, rights and privileges for a monetary compensation, and the only adequate relief that can be granted is by way of injunction.

For these reasons, I think that the demurrer *ore tenus* should be overruled, and the injunctions already granted should be continued until the hearing of the suit or further order. If the defendants, who have been represented before us are

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prepared to give undertakings sufficient to protect the plaintiffs I, personally, would prefer that this course should be adopted rather than that injunctions should be granted against a high officer of Parliament and the Ministers of the Crown.

LONG INNES J. On the 16th July, 1855, an Imperial Act, the Constitution Statute of 1855 (18 & 19 Vict. c. 54), received the Royal assent.

That Act was a special Act passed for the purpose of conferring a Constitution on New South Wales. It recited that the Legislative Council of the Colony of New South Wales, duly constituted, had in the year 1853 passed a Bill intituled "An Act to confer a Constitution on New South Wales and to grant a Civil List to Her Majesty," which had been reserved by the Governor of the said Colony for the signification of Her Majesty's pleasure thereon, and that it was expedient that Her Majesty should be authorized to assent to the said reserved Bill with certain amendments, and that a copy of the said Bill so amended was set forth in the Schedule to the Act.

Sec. 4 provided: "It shall be lawful for the Legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved Bill in the same manner as any other laws for the good government of the said Colony subject however to the conditions imposed by the said reserved Bill on the alteration of the provisions thereof in certain particulars until and unless the said conditions shall be repealed or altered by the authority of the said Legislature."

Sec. 8 provided that the said reserved Bill so amended, and being first assented to by Her Majesty in Council, should take effect in the said Colony from a certain date; and the Interpretation section, s. 9, so far as material, provided that "In the construction of this Act . . . the word 'Legislature' shall include as well the Legislature to be constituted under the said reserved Bill and this Act as any future Legislature which may be established in the said Colony under the powers in the said reserved Bill and this Act contained."

The reserved Bill in question in due course became an Act of the Legislature of New South Wales, and is now replaced by the Constitution Act, 1902, which has been frequently amended

On the 29th June, 1865, another Imperial Act, styled The Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), also received the Royal assent.

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Much time and attention has been devoted in this case to a consideration of the meaning and effect of s. 5 of that later Statute, but for my part I think it is unnecessary to discuss that question, being of opinion that the case can be determined on the construction and effect of the earlier Imperial Statute, the Act 18 & 19 Vict. c. 54.

It is unnecessary to advert in any detail to the circumstances which led to the enactment of the Colonial Laws Validity Act, 1865, and which have been stated in considerable detail by *Isaacs* and *Rich* JJ. in their joint judgment in *McCawley v. The King* (26 C.L.R. 9, at pp. 48 to 50), and by Lord *Birkenhead* L.C., when delivering the judgment of the Judicial Committee of the Privy Council in the same case on appeal ([1920] A.C. 691, at 709). It is sufficient for present purposes to say that it was a general Act passed in respect of all British Dominions and Colonies overseas, with certain exceptions immaterial to be here stated, in which there should exist a Legislature as therein defined; and its object, as its title implies and preamble states, was to remove doubts which had arisen and been entertained respecting the validity of divers laws enacted or purporting to have been enacted by the Legislatures of certain Colonies, principally those in regard to which Imperial Acts had not theretofore been passed and whose Constitutions and powers of legislation depended upon various Orders in Council.

It was enabling, confirmatory, and as Lord *Birkenhead* L.C. said in *McCawley v. The King* ([1920] A.C. 691, at 709) "explanatory legislation." In my opinion, however, neither from its express words nor by necessary or proper implication, can it be regarded as a repealing, or restrictive, enactment.

In all probability the powers conferred by the Colonial Laws Validity Act, 1865, upon the Colonial Legislatures in question, or which, as therein stated, must be deemed to have been previously conferred upon all Colonial Legislatures, are co-extensive with and equal to those previously conferred upon the Legislature of New South Wales by the Act, 18 & 19 Vict. c. 54;

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but if they are less than those previously conferred, there is nothing in the later Act which suggests that those wider powers are to be limited or restricted to those mentioned in such later Act. In *McCawley v. The King* (26 C.L.R. 9, at p. 50) *Isaacs* and *Rich* JJ. refer to s. 5 of the Colonial Laws Validity Act, 1865, as "the cure of the evil" which they had already mentioned; it is true that they say (at p. 50) that the Colonial Laws Validity Act impliedly repeals every prior enactment with which it is inconsistent; but they did not say, and I do not think they meant to imply, that it is inconsistent with the Act 18 & 19 Vict. c. 54; and, as I read their judgment, neither they, nor Lord *Birkenhead*, suggested that that section had a restrictive or limiting operation in regard to the Act 18 & 19 Vict. c. 54, which was not under consideration in the case in question, and in respect to which no one had ever suggested that doubts had arisen or could arise.

It is also true that in the case in question *Isaacs* and *Rich* JJ. (at p. 51) said: "At the moment, therefore, of the passing of the Colonial Laws Validity Act, 1865, s. 5 was, so far as its language extends, an absolute Charter, no matter what the British Legislature had previously said." But they did not say it was "the absolute Charter," nor "an exhaustive Charter," but only "so far as its language extends, an absolute Charter." If its language does not extend so far as the language of 18 & 19 Vict. c. 54, there is, in my opinion, no warrant either on principle or authority for holding that the previous Act, so far as it conferred wider powers on the Legislature of New South Wales than were confirmed by the later Act, was repealed either expressly or by necessary implication by that later Act, and the wider powers, whatever their extent, still exist.

The former being a special Act, and the latter a general Act, the maxim *Generalia specialibus non derogant* applies. I may add that in *Powell v. Apollo Candle Company Ltd.* (10 A.C. 232) the Judicial Committee of the Privy Council, some twenty years after the passing of the Colonial Laws Validity Act, 1865, treated the Act 18 & 19 Vict. c. 54, as being still in full power.

That powers derived from two independent Imperial sources or grants may exist side by side cannot, I think, be disputed.

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In my opinion, therefore, all the powers conferred by the Act 18 & 19 Vict. c. 54 upon the Legislature of New South Wales, as therein defined, still exist and may be exercised and are unaffected by s. 5 of the Colonial Laws Validity Act, 1865.

It is scarcely necessary to cite authorities for the proposition that it is not within the competence of the Legislature of New South Wales to denude itself of those powers except so far as it is permitted so to do by the Imperial Act itself. I may, however, in this connection state that in *Cooper v. Commissioner of Income Tax* (4 C.L.R. 1304, at 1314), in a judgment with which *Isaacs J.* concurred, *Sir Samuel Griffith C.J.* said: "The powers of the Queensland legislature, like those of the other Australian States, are derived from the grant contained in the Order in Council by which it was established. No doubt the Queensland legislature had power by virtue of paragraph II. of the Order in Council to make laws 'in all cases whatsoever.' But these words must be read with the rest of the Order in Council." A little later he added: "The re-enactment of the provisions of paragraph II. in the Act of 1867 did not make any difference in this respect. The powers of the legislature still depended upon the Order in Council, and not upon its own restatement of those powers. *If, for instance, they had purported to limit these powers, the original powers would still have continued, and might have been exercised.*" The italics are my own.

Again in *McCawley v. The King* ([1920] A.C. 691, at 714) Lord *Birkenhead L.C.* said: "No attempt has been made in the judgments below, or in the arguments placed before the Board, to deal with the point made by *Isaacs* and *Rich JJ.* that if ss. 15 and 16 of the Constitution Act of 1867 are to be construed as depriving the Legislature of the power to legislate upon the subject of the Judicature they are in conflict with the Imperial Act, already referred to, which gives such power in the plainest possible language."

It remains to apply these principles to the facts of the present case. In 1929 the Legislature of this State, purporting to exercise the powers granted to it by the Imperial Legislature,

1930. but whether based on the Act 18 & 19 Vict. c. 54 or the Colonial Laws Validity Act, 1865, does not appear, enacted the Constitution (Legislative Council) Amendment Act, 1929.

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Sec. 2 of that Act is in the following terms :—

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“(2) The Constitution Act, 1902, as amended by subsequent Acts is amended by inserting next after section seven the following new section ” :—

[His Honour stated the terms of s. 7A (1) (2) (3) (4) (5), and continued :] Stopping there for the moment, I may remark that it is not, and cannot be, contended that so much of the section in question, omitting the words in sub-s. (1) “ subject to the provisions of subsection six of this section,” was beyond the competence of the State Legislature, or was not within the ambit of the powers granted to the State Legislature by s. 4 of the Act 18 & 19 Vict. c. 54, which in the clearest terms provides that “ It shall be lawful for the Legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved Bill in the same manner as any other laws for the good government of the said Colony ” ; or that it was not covered by the confirmation of such powers contained in s. 5 of the Colonial Laws Validity Act, 1865. Sec. 7A, however, does not stop at sub-s. 5. Sub-sec. 6 is in the following terms :—

“(6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal or amendment of any of the following sections of this Act, namely, sections thirteen, fourteen, fifteen, eighteen, nineteen, twenty, twenty-one, and twenty-two.”

It is on the first part of sub-s. (6)—“ The provisions of this section shall extend to any Bill for the repeal or amendment of this section ”—that the present controversy has centred.

It is not disputed that if that portion of sub-s. (6) of s. 7A of the Constitution Act, 1902, is inconsistent with, or repugnant to, any provisions contained in either the Act 18 & 19 Vict. c. 54 or the Colonial Laws Validity Act, 1865, it was for that reason beyond the competence of the State Legislature to enact and is null and of no effect.

Dr. Evatt, on behalf of the defendants, other than Sir John Peden, contends that that portion of sub-s. (6) is inconsistent with, and repugnant to, the powers conferred upon the Legislature of New South Wales by s. 4 of the Act 18 & 19 Vict. c. 54, and again conferred upon, or confirmed to, the same Legislature by s. 5 of the Colonial Laws Validity Act, 1865; and that it is, therefore, null and void.

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The plaintiffs, by their counsel, on the other hand contend that it is within the ambit of those powers and was, therefore, within the competence of the State Legislature; they further contend that it is the present law obtaining in this State, and that it is not within the competence of the State Legislature to repeal it except in the manner thereby prescribed. They contend that the Legislature of New South Wales was by the relevant Imperial Statutes given plenary power, subject to observing the prescribed forms, to alter the constitution, powers, and procedure of such Legislature; that those powers include the power to convert a flexible into a rigid, or an uncontrolled into a controlled, Constitution; that it is competent for the Legislature of New South Wales to embody in its Constitution the system of compulsory referendum; and that all Dominion Constitutions are potentially rigid.

While it is not necessary, in my opinion, in this case to express a concluded opinion on any of those questions other than the first, I may perhaps say that it could not, I think, be successfully contended that, having regard to the extremely wide powers granted to the State Legislature of altering its Constitution, it is not within its competence to add a third, or fourth, or any number of additional constituent elements to the Constitution; or that it is not within its competence to embody in the Constitution the system of compulsory referendum.

It may also be true to say that *all* Dominion Constitutions are potentially rigid; so much may, at any rate, be assumed without materially assisting in the determination of the present problem, which is, not whether the Constitution of New South Wales is potentially rigid, but whether it has in fact been validly made rigid. A person, endeavouring to ascertain whether the victim of some unfortunate accident is still living, is not, I

1930. imagine, materially assisted by being reminded that all men are potentially dead. It may also be true to say that, when a Legislature has, within its powers, enacted that either its Constitution, or any other law, shall not be altered without the assent of a majority of the electors, or of any other outside body, to be ascertained in a prescribed manner, *quoad* that Constitution or law the general body of electors, or other outside body, forms part of the Legislature while that law remains unrepealed. I desire to stress, however, in this connection the words "within its powers."

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But, however this may be, the short answer, in my opinion, to the fundamental argument of the plaintiffs' counsel in this case is that the Legislature of New South Wales is not a sovereign, but a subordinate, Legislature; its powers of altering its Constitution, though ample, are still confined to those comprised within the limits of the Imperial grant; and it is neither within its powers to exceed those powers on the one hand, nor to limit them on the other. In this connection I may perhaps again refer to what was said by Sir *Samuel Griffith* C.J. with the concurrence of *Isaacs* J. (as he then was), in *Cooper v. Commissioner of Income Tax* (4 C.L.R. 1304, at 1314), in the passage already quoted, when, with reference to the powers of the Queensland Legislature, he said: "The powers of the Legislature still depended upon the Order in Council, and not upon its own restatement of them. *If, for instance, they had purported to limit those powers, the original powers would still have continued, and might have been exercised.*"

In that case the Chief Justice was referring to a repeal by the State Legislature of its own restatement of the powers granted by the Imperial Legislature; but when once it is admitted, as it is here and must be, that it is not within the competence of a State Legislature to make a law repugnant to an Act of the Imperial Parliament dealing with the same subject matter and intended to apply to that State, the principle stated by him applies.

The concluding words of that excerpt from that judgment have peculiar application in the present case, where it appears that two branches of the Legislature of this State have assumed the continuance of the powers conferred upon it by the relevant

Imperial legislation, and are in the process of exercising one of such powers, and where the exercise of such power is sought to be restrained in the present proceedings.

The problem under consideration in this case is not, in my view, to be determined by a discussion of abstract propositions, but by the application of well-settled legal principles, and ultimately, as was pointed out by Dr. Evatt, as a mere question of construction.

Sec. 4 of the Act 18 & 19 Vict. c. 54 provides that "It shall be lawful for the Legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved Bill in the same manner as any other laws for the good government of the said Colony." It is to my mind clear, and is in fact not disputed, that those powers continue and may be exercised from time to time by the body answering the description for the time being of "the Legislature of New South Wales."

The power to alter is plenary, in a sense, because unlimited and capable of exercise from time to time, as occasion arises and whenever the Legislature so wishes ; but co-extensive and concurrent with the power to alter is the correlative right to repeal, which is also plenary in the same sense and for the same reasons. It is not, in my opinion, within the competence of the donee of the one power so granted to exercise it in such a way as to debar himself from exercising the other, and so in effect repeal in part the Imperial Statute which enacts that the same donee shall have and retain the other. In other words, both powers being equal and both plenary, in the sense mentioned, neither can be so exercised as to limit, restrict, override, or destroy the other.

It is the grant of this power to repeal, as well as to alter, the Constitution for the time being, as often as, and whenever occasion may arise and the Legislature wish, which expresses, to my mind, in the clearest and most definite terms, if I may be permitted to plagiarize the language of Lord Birkenhead in *McCawley v. The King* ([1920] A.C. 691, at 714), that the effect of the Imperial legislation is that, within the limits of the powers conferred upon it, the Legislature of New South Wales, as described in the Imperial Acts, not only is, but, whilst it

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The interpretation section of that Act, s. 9, provides that "In the construction of this Act . . . the word 'Legislature' shall include as well the Legislature to be constituted under the said reserved Bill and this Act as any future Legislature which may be established in the said Colony under the powers in the said reserved Bill and this Act contained."

While it may be true, as I have already said, that, when a Legislature has, *within its powers*, enacted that its Constitution shall not be altered without the assent of a majority of the electors, to be ascertained in a prescribed manner, the general body of electors may be regarded as forming part of the Legislature so far as regards that particular branch of its legislative activities; I am of opinion, dealing with the question as one of construction, that such a Legislature *ad hoc* does not conform to the term "Legislature" as used in s. 4 of the Act 18 & 19 Vict. c. 54. I do not think, for instance, that, if the Legislature had enacted that the totalisator should not be introduced on the racecourse without the consent of the bookmakers, to be ascertained in a prescribed manner, or that the control of racing should be entrusted to the Australian Jockey Club, and had further enacted that a Bill to repeal that legislation should not be introduced or presented for Royal assent without the consent of the bookmakers or Jockey Club as the case might be, the bookmakers on the one hand, or the Jockey Club on the other, could properly be regarded as part of the Legislature mentioned in s. 4 of 18 & 19 Vict. c. 54; see *Russell v. The Queen* (7 A.C. 829, 835); *Hodge v. The Queen* (9 A.C. 117, 132).

In my opinion the Legislature, which by that section is given power to alter or repeal the Constitution of this State "in the same manner as any other laws for the good government of the said Colony" (now State), is the same Legislature which has power to enact, alter, or repeal "any other laws for the good government of the said Colony"; and is in fact the same Legislature as the representative Legislature mentioned in s. 5 of the Colonial Laws Validity Act, 1865, which, on my construction of s. 1 of that Act, is the authority, other than the

Imperial Parliament or Her Majesty in Council, which is competent to make laws for the State of New South Wales and which comprises a legislative body of which one half are elected by inhabitants of the State ; and which again is the same body as " The Parliament " of New South Wales referred to in the Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12), ss. 9, 15, 25, 51 (37), 107, 108, 111, 123, and 124 ; and " the Legislature " of New South Wales referred to in s. 1 of the Australian States Constitution Act, 1907, in the term " the Legislature of any State forming part of the Commonwealth of Australia."

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I conceive that it would be within the competence of the Legislature mentioned in s. 4 of the Act 18 & 19 Vict. c. 54 to so alter its Constitution, by embodying therein the system of compulsory referendum for all legislative purposes, as to constitute the general body of electors a constituent part of the Legislature for the future ; in that event the Legislature so altered would by virtue of s. 9 of that Act be the Legislature referred to in s. 4 ; but this the Legislature has not done by the Constitution (Legislative Council) Amendment Act, 1929.

The Legislature of 1929 has, therefore, in my opinion, attempted to restrict the powers of repeal conferred upon it by s. 4 of the Act 18 & 19 Vict. c. 54 by making it a condition to the exercise of those powers that an outside body shall first assent thereto.

This, in my opinion, it had no power to do, and it follows that, in my view, the original powers still continue and may be exercised. I am of opinion, therefore, that the material part of sub-s. 6 of s. 7A of the Constitution Act, 1902, is repugnant to and inconsistent with s. 4 of the Act 18 & 19 Vict. c. 54; was beyond the competence of the Legislature to enact, and is null and void ; and that the demurrer should be allowed.

I have based this opinion on the provisions of 18 & 19 Vict. c. 54 ; which, for the reasons already stated, I regard as still in force. I may, however, add that, in my opinion, the conclusion already stated is entirely consistent with s. 5 of the Colonial Laws Validity Act, 1865. No assistance is afforded to the plaintiffs' case by the proviso to that section, the material part of which is as follows : " Provided that such

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laws shall have been passed in such manner and form as may from time to time be required by any . . . Colonial law for the time being in force." Such "Colonial law for the time being in force" must necessarily mean a valid Colonial law; to assume the validity of sub-s. 6 of s. 7A is, in my view, and with great respect to those who think otherwise, merely to beg the question—which is whether that subsection be valid or invalid.

Nor does "full power to make laws respecting the constitution, powers and procedure of such Legislature" involve a power to act in excess of those powers. "Full power to make laws" necessarily involves equally full power to unmake or repeal them; and sub-s. 6 of s. 7A purports to shackle or control that full power, because it makes the exercise of that power dependent upon the approval of an outside body which does not form part of the Legislature itself. By whatever road, therefore, I arrive at the same conclusion.

As the majority of the Court, however, takes the contrary view, there remains for consideration Dr. Evatt's further contention that this Court either has no power to grant the injunctions prayed in this suit, or alternatively, if it has such power, should not exercise it.

The contention was based on two grounds: first, that the plaintiffs were not competent, in other words, had no rights of a nature which would entitle them to equitable relief of this nature; and secondly, that, in any event, this Court either could not, or should not, interfere by injunction to prevent both Houses of the Legislature communicating, through the prescribed channel, with His Majesty's representative, the Governor, for the purpose on the one side of giving, and on the other of receiving, the advice of such Houses with regard to legislation in the making.

As regards the first point, I feel no difficulty. In *Ashby v. White* (1 Bro. P.C. 62) it was held by the House of Lords that the wrongful refusal of the vote of an ordinary elector at a Parliamentary election constituted an actionable trespass, sounding in damages, even though the persons for whom he wished to vote were elected.

And in *Bradlaugh v. Gossett* (12 Q.B.D. 271, at 285, 286) *Stephen J.* said: "The right of the burgesses of Northampton

to be represented in parliament, and the right of their duly-elected representative to sit and vote in parliament and to enjoy the other rights incidental to his position upon the terms provided by law are in the most emphatic sense legal rights, legal rights of the highest importance, and in the strictest sense of the words."

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In the present case the plaintiffs are suing, not on their own behalf merely, but on behalf also of all other the members of the Legislative Council of New South Wales, who are not defendants to the action. The case involves the rights, therefore, of the whole of one of the two Houses of Parliament to take its share in the process of legislation. Without further elaborating the matter, I may say that I have no doubt that the plaintiffs are competent.

The second ground is one of far greater difficulty.

It was held in *Bradlaugh v. Gossett* (*supra*) that the Court of Queen's Bench had no power to interfere in regard to a matter relating to the internal procedure of the House of Commons ; and in *In re London, Chatham and Dover Railway Arrangement Act* ; *Ex parte Hartridge and Allender* (L.R. 5 Ch. 671, 679) Sir Charles Selwyn L.J. pointed out that this Court does not assume the power to interfere with the proceedings of Parliament. One reason at least, however, for the absence of power in the one case, and for the abstention from the assumption of power in the other, is, I think, to be found in the judgment of Stephen, J., in *Bradlaugh v. Gossett* (12 Q.B.D. 271, 286), where, dealing with the rights of a duly elected member of the House of Commons, some of which he pointed out were to be exercised out of Parliament, in which case they would be protected by the Courts, and others of which could only be exercised, if at all, within the walls of the House of Commons, he said, with reference to the latter : " In my opinion the House stands with relation to such rights and to the resolutions which affect their exercise, in precisely the same relation as we the judges of this Court stand in to the laws which regulate the rights of which we are the guardians, and to the judgments which apply them to particular cases ; that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever, to guide their

1930. conduct by the law as they understand it. If they misunderstand it, or (I apologize for the supposition) wilfully disregard it, they resemble mistaken or unjust judges.”

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In the present case there exists as part of the statute law of this State, an Act which the majority of this Court has, in the judgments just delivered, held to be valid. I can hardly believe it possible that under these circumstances the defendants, His Majesty's Ministers of State, whose duty it is to uphold and administer the law, but who have no right to declare it, a function which belongs solely to the Judiciary, will continue to refuse to give that undertaking, which so far they have to my great regret and astonishment refused to give, namely, that they will regard that Act as binding until this case is finally determined.

If, however, contrary to my expectation and hope, that undertaking is not given, we must assume that the defendants represented by Dr. Evatt do not intend to obey the law as declared by this Court, and it will, therefore, become necessary to determine whether in this case the Court has jurisdiction, and, if so, should exercise it.

Although the suit takes the form of an action *in personam*, it is, to my mind, in substance a suit the object of which is to prevent the two Houses of the Legislature from communicating to the third element thereof, His Majesty, their advice in regard to legislation in the process of making; it also, incidentally, prays in effect that this Court should interfere with the internal affairs of Parliament. In *Bradlaugh v. Gossett* (12 Q.B.D. 271, at 286) *Stephen J.* said: “No precedent has been or can be produced in which any Court has ever interfered with the internal affairs of either House of Parliament.” To grant the injunctions in question, will, therefore, not only create a precedent, from which the Court need not shrink, but—what constitutes in my view a far graver objection—will, in all probability, constitute an infringement of the privileges of Parliament, and may provoke a most undesirable conflict between Parliament and the Judiciary.

On the other hand, what is the alternative ?

Without elaborating the unfortunate consequences which may ensue, one can easily see that they might lead to inconveniences of a most serious character to say the least of them.

These being the alternatives, and being of opinion that the Court has the necessary jurisdiction, I am of opinion that, on the balance of convenience—or rather inconvenience—the Court, being forced to a choice between two evils, should choose the lesser of the two, and grant the injunctions now prayed.

I may add that personally I think it is a matter for regret that the defendant, the learned President of the Legislative Council, has not thought proper to be represented during these proceedings, if only for the purpose of informing the Court whether, in the event of the decision of the Court being in favour of the plaintiffs, he would give that undertaking which would relieve the Court of the embarrassment of granting an injunction against himself as President of the Legislative Council. I think, however, that we should assume, in his favour, the explanation to be that he must have taken the view that the occasion would never arise.

*Motion by consent turned into motion
for decree. Decree as asked in para.
1 of prayer of statement of claim.
Injunctions as asked in 2nd and 3rd
prayers. Defendants other than Sir
John Peden to pay costs up to and
including this hearing.*

Solicitors for the plaintiffs : *Allen, Allen & Hemsley.*

Solicitors for the defendants : *J. V. Tillet* (Crown Solicitor)

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