

## McDONALD v. CAIN.

FULL COURT (Gavan Duffy, Martin and O'Bryan JJ.). APRIL 27-29, MAY 28, 1953.

*Constitutional law—Bill to alter electoral districts of Legislative Assembly—Whether an alteration of the Constitution—Whether absolute majority of each House of Parliament required to pass bill—Presentation of bill for royal assent—Whether Supreme Court has jurisdiction to make declaration that it was contrary to law to obtain royal assent—The Constitution Act (18 & 19 Vict., c. 55, sch. 1), secs. LX, LXI, sch. D, Pt. III—The Constitution Act Amendment Act 1928 (No. 3660), sec. 17—Constitution (Reform) Act 1937 (No. 4533), sec. 4—Parliamentary Salaries and Allowances Act 1948 (No. 5296), sec. 3.*

A bill which provided for the appointment of commissioners to re-divide the electoral districts of the Legislative Assembly of the State of Victoria was passed by Parliament, but in the Legislative Council by fewer than an absolute majority of the members of that House. The plaintiffs were members of the Legislative Assembly and electors of the districts which they represented, and if the bill became law the constituency which each of them represented would be altered and each of them would have his name placed on a different electoral roll. The plaintiffs brought actions against Ministers of the Crown and members of the Executive Council of the State of Victoria and against the clerk of Parliaments, seeking declarations that it was contrary to law for the defendants to present the bill to the Governor for the royal assent inasmuch as it had not been passed by an absolute majority of the members of both Houses of Parliament.

*Held*, (1) the plaintiffs had a sufficient interest to bring the action; (2) the Supreme Court had jurisdiction to make the declarations sought; (3) the bill did not require to be passed by an absolute majority of the members of both Houses of the Parliament, and the action failed.

## SUMMONSES FOR INTERLOCUTORY INJUNCTIONS.

The plaintiff John Gladstone Black McDonald was the member of the Legislative Assembly of the State of Victoria for the electoral district of Shepparton and a duly enrolled elector of such district, and the plaintiff K. Dodgshun was the member of the Assembly for the electoral district of Rainbow and was duly enrolled as an elector of such district. The defendants, John Cain, L. W. Galvin, P. L. Coleman, William Slater, W. P. Barry, C. P. Stoneham, Thomas Hayes, A. M. Fraser, A. E. Shepherd, R. W. Holt, Samuel Merrifield, J. W. Galbally, J. H. Smith, and F. R. Scully, were the Ministers of the Crown for the State of Victoria and the members of the Executive Council of the State of Victoria, who together with the Governor of Victoria constitute the Governor in Council. The plaintiffs brought an action against the defendants claiming:—

(a) A declaration that it is contrary to law for each of the defendants to endeavour to cause or to procure the Governor to give Her Majesty's assent to a bill which was passed by the Legislative Assembly of the State of Victoria on the 31st March 1953 and by the Legislative Council of the State of Victoria on the 9th April 1953 being a bill for an Act to be known as the *Electoral Districts Act 1953* and being a bill by which an alteration would be made in the constitution of the said Legislative Assembly inasmuch as the said bill has not been passed with the concurrence of an absolute majority of the whole number of members of the Legislative Council and of the Legislative Assembly respectively.

(b) A declaration that it is contrary to law for any of the defendants to present the said bill to the Governor for Her Majesty's assent and/or to endeavour to cause or procure the said bill to be presented to the

Governor for Her Majesty's assent inasmuch as the said bill has not been passed with the concurrence of an absolute majority of the whole number of members of the Legislative Council and of the Legislative Assembly respectively.

The plaintiffs also brought an action against the clerk of the Parliaments claiming a declaration that it was unlawful for the defendant to present the bill to the Governor for royal assent.

The plaintiffs, having obtained interim injunctions restraining the defendants in each action from endeavouring to obtain the royal assent to the bill, took out motions for continuance of the injunction until the trial of the action. By consent, the motions were referred to the Full Court and the hearing thereof treated as the trial of the actions. It appeared in evidence that the total number of members of the Legislative Council was thirty-four and the bill passed its second and third readings in the Council by a majority of seventeen members to sixteen, which was not an absolute majority of the whole number of the members of the Legislative Council.

*Coppel Q.C., Phillips Q.C., D. I. Menzies Q.C., and Aitkin*, for the plaintiffs, in support of the motions—The bill comes within sec. LX of The Constitution Act in that it attempts to alter the constitution of the Legislative Assembly. It does not fall within any of the exceptions contained in sec. LXI of The Constitution Act. If it is said that it is within that section as being a bill altering electoral districts, the bill does no more than appoint commissioners for the purpose and their findings may not be accepted by Parliament; the bill in itself makes no alteration. The bill will affect payment of salaries and allowances of the Speaker, members and ministers in the Legislative Assembly, which will have the effect of altering the constitution of the Assembly. It will also result in altering schedule D of The Constitution Act or any provision substituted therefor—see *Constitution (Reform) Act 1937*, sec. 4. Section LXI of The Constitution Act does not cover any alteration to these matters. Accordingly there must have been an absolute majority in each House before the bill can be presented for the royal assent, and as it did not have this majority it may not be so presented.

*Winneke Q.C. S.-G., Gowans Q.C., and Pape*, for the defendants, to oppose—The Court has no jurisdiction to make the declaration sought. Under The Constitution Act and the *Constitution (Reform) Act 1937* it is for the Legislative Council to determine whether or not the second and third readings of the bill were passed by an absolute majority of the Council. [He referred to sec. IX of The Constitution Act.] Furthermore if the Court were to make the declaration it would interfere with the powers, privileges and immunities of the Council to control its own proceedings and would be a contempt of Parliament. Neither of the plaintiffs has any right in himself to seek the declaration. Section 4 of the *Constitution (Reform) Act 1937* has been substituted for the proviso to sec. LX of The Constitution Act, but retains the exceptions mentioned in sec. LX, and the bill comes within those exceptions. The bill does not alter The Constitution Act, but only effects amendments of *The Constitution Act Amendment Act 1928* and the *Electoral Districts Act 1944*. As the law stands today the only restrictions on the power of Parliament to vary the constitution of the Legislative Assembly are those contained in sec. 4 of the *Constitution (Reform) Act 1937*. Accordingly the passage of the bill through Parliament was valid.

*D. I. Menzies Q.C.*, in reply.

*Cur. adv. vult.*

GAVAN DUFFY J. read the following judgment: These are two actions by the same plaintiffs, Mr. McDonald and Mr. Dodgshun, two members of the Victorian Legislative Assembly, the defendant in action No. 553 of 1953 being Mr. McLachlan, the clerk of Parliaments, and in action 1953 No. 554 the Premier and the thirteen Ministers of the Crown in the State of Victoria.

In action 1953 No. 554 plaintiffs seek two declarations:—

(1) A declaration that it is contrary to law for each of the defendants to cause or to procure the Governor to give Her Majesty's consent to a bill which was passed by the Legislative Assembly of the State of Victoria on the 31st March 1953 and by the Legislative Council of the State of Victoria on the 9th April 1953, being a bill for an Act to be known as the *Electoral Districts Act* 1953 and being a bill by which an alteration would be made in the constitution of the said Legislative Assembly inasmuch as the bill has not been passed with the concurrence of an absolute majority of the whole number of members of the Legislative Council and of the Legislative Assembly respectively.

(2) A declaration that it is contrary to law for any of the defendants to present the said bill to the Governor for Her Majesty's assent inasmuch as the said bill has not been passed with the concurrence of an absolute majority of the whole number of the members of the Legislative Council and of the Legislative Assembly respectively.

In action 1953 No. 553 the plaintiffs seek the following declaration:—

A declaration that it is unlawful and contrary to The Constitution Act for the defendant being the clerk of the Parliaments to present to the Governor for Her Majesty's assent a bill which was passed by the Legislative Assembly of the State of Victoria on the 31st March 1953 and the Legislative Council of the State of Victoria on the 9th April 1953 being a bill for an Act to be known as the *Electoral Districts Act* 1953 and being a bill by which an alteration would be made in the constitution of the said Legislative Assembly inasmuch as the second and third readings of the said bill have not been passed with the concurrence of an absolute majority of the whole number of members of the Legislative Council and of the Legislative Assembly respectively.

On the 17th April 1953 Sholl J. made orders restraining the defendant in action 1953 No. 553 from presenting or endeavouring to present to the Governor for Her Majesty's assent the bill in question until the hearing of a motion for the continuance of the injunction to be made on the 23rd April 1953 and restraining the defendants in action 1953 No. 554 from procuring or endeavouring to cause or procure the Governor to signify Her Majesty's assent to the bill in question until the hearing of a motion for the continuance of the injunction to be made on the 23rd April 1953.

The motions for continuance of the injunctions, being referred to the Full Court, came before us on the 27th April 1953 and it was agreed that the two motions should be heard together, that the hearing of the motions should be treated as the trials of the actions and that the sole relief sought was the declaration set out in each of the respective writs.

The facts as appearing from the affidavits are that the plaintiffs are members of the Legislative Assembly, Mr. McDonald being the member for the electoral district of Shepparton and Mr. Dodgshun for the electoral district of Rainbow, and are electors for those districts respectively; that the bill in question passed its second and third readings in the Legislative Council but in neither case by an absolute majority of the whole members thereof; that after the bill had passed its second reading the question was raised on a point of order whether the statutory

majority set out in the proviso to sec. LX of The Constitution Act was necessary and the President ruled that it was not; that by the joint standing orders of the Legislative Assembly and the Legislative Council it is the duty of the defendant clerk of Parliaments to present to the Governor for Her Majesty's assent bills passed by the Legislative Assembly and the Legislative Council.

Victoria is at present divided into sixty-five Assembly districts under the *Electoral Districts Act 1944* (No. 5028).

What Parliament has done in the bill here in question, is, in outline, to make provision for the appointment of three commissioners who are to divide each of the Federal electorates in Victoria into two Legislative Assembly districts so that the number of voters in each district shall be as nearly equal as possible and so that in any event the voters in one shall not exceed by more than five per cent the voters in the other. They are to take into account in doing so (a) existing boundaries and subdivisions, (b) the likelihood of any change in the distribution of electors within any locality, (c) community and adversity of interests, (d) means of communication, (e) physical features. No redivision, however, is to have the effect of decreasing the number of members of the Assembly. (In fact, as the Federal electorates stand at present to divide each into two Legislative Assembly districts would have the effect of increasing the members of the Legislative Assembly from sixty-five to sixty-six.) The commissioners on making a redivision of the electoral districts are to prepare a report and map. These are to be laid before both Houses of Parliament. Unless within a specified time both Houses reject the redivision it shall be deemed to be adopted. If both Houses do reject it the commissioners may be directed to prepare a fresh redivision which when prepared is to be laid before both Houses and it also is to be deemed to be adopted unless within a specified time both Houses reject it. On a redivision being adopted or deemed to be adopted the Governor in Council may by proclamation published in the *Government Gazette* declare the names and boundaries of the electoral districts. For the purpose of the preparation of new electoral rolls the Governor in Council may by proclamation published in the *Government Gazette* divide any electoral district into subdivisions and specify the boundaries and names of such subdivisions. The bill, by clause 10 (2), provides:

on from and after the day of the dissolution or other lawful determination of the Legislative Assembly occurring next after the publication of such proclamation (which day is hereinafter referred to as "the appointed day") such electoral districts shall be the electoral districts for the Legislative Assembly for the purpose of the Constitution Act Amendment Acts and the names and boundaries so declared shall be substituted for those provided for in the Seventeenth Schedule to the principal Act [*The Constitution Act Amendment Act 1928*] or any substitution therefor and shall take effect as if enacted in the said Seventeenth Schedule; and any reference in the principal Act or in any other Act to the said Seventeenth Schedule shall be deemed and taken to refer to the said proclamation.

By clause 11 (4)(c) it is provided that the subdivisions as proclaimed by the Governor in Council

shall be the subdivisions of the electoral districts under this Act with the boundaries and names so proclaimed in all respects as if such proclamation had been made under section 15 of the principal Act.

Clause 12 reads:

(1) When the proposed redivision or the proposed fresh redivision is adopted or deemed to be adopted as aforesaid the Governor in Council may by proclamation

published in the *Government Gazette* declare which of the electoral districts shall be metropolitan electoral districts and which shall be country electoral districts for the purposes of the principal Act.

(2) And from and after the day appointed for taking the poll at the first general election of the Legislative Assembly held after each appointed day the electoral districts so declared to be country electoral districts shall be country electoral districts for the purpose of sections fourteen seventeen and one hundred and forty-one of the principal Act.

The principal Act is *The Constitution Act Amendment Act 1928*. Clause 13 reads:

(1) On from and after the first appointed day for sections 136 and 137 of the Principal Act there shall be substituted the following sections:—

“136. Victoria shall be divided into electoral districts as provided in the Constitution Act Amendment Acts and the electors of each of such districts shall elect one member for the Legislative Assembly.

“137. The Legislative Assembly shall consist of the members elected by and representative of the electors of the respective electoral districts as aforesaid.”

(2) On from and after the day appointed for taking the poll of the first general election of the Legislative Assembly held after the first appointed day in sections fourteen seventeen and one hundred and forty-one of the principal Act as amended by any Act the words “or urban” (wherever occurring) shall be repealed.

The machinery for redivision which I have described is to be put in motion not only once, following the commencement of the Act, but also thereafter whenever any alteration is made in the number of Commonwealth electoral divisions in Victoria or in any boundaries thereof.

This bill is said to be one which in law can never become a valid Act of Parliament and one which the law will not allow to be presented to the Governor for the Queen's assent.

The Act which introduced responsible Government into Victoria was The Constitution Act, which was a schedule to the Imperial Act, 18 & 19 Vict., c. 55, and is now to be found in vol. 1 of the *Victorian Statutes 1928*, p. 822, prefacing *The Constitution Act Amendment Act 1928*, which is a statute consolidating all previous Victorian legislation and which Act I shall refer to hereafter as the principal Act.

Section I of The Constitution Act establishes the new Parliament and conveys the legislative power:

There shall be established in Victoria instead of the Legislative Council now subsisting one Legislative Council and one Legislative Assembly to be severally constituted in the manner hereinafter provided and Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws in and for Victoria in all cases whatsoever.

Section 14 of the principal Act provides:

(1) Except where express provision is made to the contrary by any enactment other than this section and except in the cases mentioned in subsection (2) of this section no person (except a responsible Minister of the Crown) who holds any office or place of profit under the Crown, or who is in any manner employed in the Public Service of Victoria for salaries wages fees or emolument shall sit or vote in the Council or Assembly, and the election of any such person to be a member of the Council or Assembly shall be null and void.

(2) Nothing in this section shall be construed to apply to the President or Chairman of Committees of the Council or the Speaker or the Chairman of Committees of the Assembly.

Section 17 provides:

The total amount of the salaries to be paid to the several responsible Ministers of the Crown out of the consolidated revenue shall not at any time exceed the rate of Ten thousand pounds per annum and the Third Part of Schedule D to The Constitution Act shall be read and construed accordingly.

The Third Part of Schedule D in question shows the salary of the Colonial Secretary or Chief Secretary as 2,500*l.*, and that of the Solicitor-General as 1,500*l.*, and shows a sum of 10,000*l.* made up of salaries of 2,000*l.* to five specified ministers.

Section 141 provides for the payment to each member of the Assembly as "reimbursement" the sum of 500*l.* per annum less any official salary or annual payment he is receiving out of the consolidated revenue.

Section 136 provides:

the Assembly shall consist of sixty-five members who shall be representatives of and elected by electors of the respective electoral districts,

and sec. 137:

Victoria shall be divided into sixty-five electoral districts each of which shall return one member to the Assembly.

The *Parliamentary Salaries and Allowances Act* 1948 (No. 5296) made some relevant alterations in The Constitution Act and the principal Act. It repealed Part III of Schedule D to The Constitution Act, and references to it in certain sections of The Constitution Act and the principal Act.

By sec. 2 it substituted for sec. 14 of the principal Act a new sec. 14 which in effect provided for appropriation of the consolidated revenue to pay specified salaries to the President of the Council, the Speaker of the Assembly and the Chairman of Committees of both Houses.

By sec. 3 it substituted for sec. 17 of the principal Act a new sec. 17, providing for the appropriation of the consolidated revenue to pay specified salaries to the Premier, to each of nine other responsible ministers, and a smaller salary to three or more responsible ministers.

Section LX of The Constitution Act provides:

The Legislature of Victoria as constituted by this Act shall have full power and authority from time to time by any Act or Acts to repeal alter or vary all or any of the provisions of this Act and to substitute others in lieu thereof Provided that it shall not be lawful to present to the Governor of the said Colony for Her Majesty's assent any Bill by which an alteration in the constitution of the said Legislative Council or Legislative Assembly or in the said Schedule hereunto annexed marked D may be made unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members of the Legislative Council and of the Legislative Assembly respectively Provided also that every Bill which shall be so passed shall be reserved for the signature of Her Majesty's pleasure thereon.

Section LXI provides, *inter alia*, that:

Notwithstanding anything herein contained it shall be lawful for the said Legislature from time to time by any Act or Acts to alter the qualifications of...members of the Legislative...Assembly...to establish new electoral...districts, and from time to time to vary or alter any electoral...district.

Section 4 of the *Constitution (Reform) Act* 1937 (No. 4533) provides:

It shall not be lawful to present to the Governor for His Majesty's assent any Bill by which an alteration in the Constitution of the Council or the Assembly (other than such alterations as are referred to in section sixty-one of The Constitution Act) or

in Schedule D to The Constitution Act or in any amendment of the said Schedule or in any provision substituted therefor may be made unless the second and third readings of such Bill have been passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively. This section shall be read as in aid of and not in derogation from the provisions of section sixty of The Constitution Act and shall not be read or construed so as to limit the effect of section thirty-seven of the Principal Act as re-enacted by this Act.

Section 37 of *The Constitution Act Amendment Act 1928*, as re-enacted in sec. 2 of Act 4533, deals with the procedure applicable to disagreements between the two Houses.

The Colonial Laws Validity Act (28 & 29 Vict., c. 63), by sec. 5, provides:

... 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... Order in Council or colonial law for the time being in force in the said colony.

The plaintiffs in these actions contend that the bill here in question makes an alteration in the constitution of the Legislative Assembly and in Schedule D or in a provision substituted therefor and that such alterations do not come within those permitted by sec. LXI of The Constitution Act.

Before I consider this contention, however, I turn to some preliminary matters raised by the Solicitor-General on behalf of the defendants. He contended:

(1) That the determination of the question whether the second and third readings of the Bill in the Legislative Council must be passed with the concurrence of an absolute majority of the whole number of the members of the Legislative Council was not for the Courts but had been committed by the Constitution to the Legislative Council itself and the Legislative Council had determined that a bare majority of the members voting was sufficient.

(2) That the Court had no authority to make the declarations asked since to do so would be to interfere with the powers, immunities and privileges of Parliament.

(3) That if the Court had authority to make the declarations asked it should exercise its discretion by not making them.

(4) That whatever might be the case in the action against the clerk of Parliaments, nothing appeared from the evidence which would justify any declaration being made in the action against the ministers.

(5) That neither of the plaintiffs had sufficient interest to support a claim for any declaration asked in either action.

(1) In contending that The Constitution Act had appointed each House of Parliament the appropriate tribunal to decide the question whether a bill before it came within the proviso to sec. LX of The Constitution Act and thereby required to be passed by an absolute majority of all the members of the House or not, the Solicitor-General first referred us to sec. IX of The Constitution Act:

The Legislative Council shall not be competent to the despatch of business unless there be present exclusive of the President one-third at least of the members of the said Council or if the whole number of members thereof shall not be exactly divided by three then such integral number as is next greater than one-third of the members of the said Council and all questions save as herein excepted which shall arise in the Council shall be decided by a majority of the members present other than the President and when the votes shall be equal the President shall have the casting vote.

He then submitted that there was nothing "herein excepted" that is excepted in The Constitution Act, except what was to be found in the proviso to sec. LX, and the determination of the question whether a bill came within the proviso was not "herein excepted" and was therefore governed by sec. IX and so left to a determination of the Council by a bare majority of the members voting; and the case was likewise with the question whether the bill was excepted from the proviso by sec. LXI. He submitted further that in the case of the present bill such questions had in fact been decided by the Council, either because the Council, in voting on and allowing the motion for the second reading of the bill to be declared carried, must be taken to have determined that a bare majority was sufficient, or because, the question having been raised on a point of order, and the President having ruled that a bare majority was sufficient, and no motion to disagree with this ruling having been made, the Council must be held to have made a like determination.

It may be observed that the only questions on which the Council gave a vote or came to a determination were the questions whether the bill should be read a second and a third time. After it had been resolved that it should be read a second time, the Honourable P. T. Byrnes asked whether the bill could proceed as the second reading had not been passed with the concurrence of an absolute majority of the whole members of the Legislative Council, and the President, after hearing addresses from other honourable members ruled that the second reading might be validly passed by the House in the ordinary way by a simple majority of members and that it was within the competence of the House if it thought fit to proceed with the bill and to pass it through its remaining stages in the ordinary way.

It is sufficient, then, to say that whatever sec. IX of The Constitution Act may mean it clearly does not mean that the Council is to be the proper authority to decide whether a bill comes within the proviso in sec. LX or whether it is exempted therefrom by sec. LXI of The Constitution Act and in addition, if the fact were material, which it is not, that the Council has not made any such decision.

In support of the submission that the question was not one for the Court, the Solicitor-General relied on some language of the High Court in *Clydesdale v. Hughes* (1934), 51 C.L.R. 518, at p. 529, and in *R. v. The Governor of South Australia* (1907), 4 C.L.R. 1497, at p. 1513.

In my opinion these cases give him no support.

In *R. v. The Governor of South Australia* neither the decision to refuse to issue a *mandamus* to the Governor nor the reasons given for it have any relevance to the question whether this Court has jurisdiction in the present case, and *Clydesdale v. Hughes* tells rather against his submission. That action was one for penalties for sitting as a member of the Council while disqualified from doing so. The defendant Clydesdale had been appointed a member of the Lotteries Commission, and this was said to disqualify him under *The Constitution Acts Amendment Act* 1899. While the action was pending an Act was passed enacting that to be a member of the Lotteries Commission should not work a disqualification. It was contended that such Act was governed by sec. 73 of The Constitution Act, which required that its second and third readings should be passed by absolute majorities of both Houses of Parliament, that they had not, and the Act was therefore invalid.

The Court did not say, "the question of validity is not for us". They examined that question and said, "We do not agree that it effected a change in the constitution of the Legislative Council". The enacting provisions of the original bill were recast in the Council after it had left the Assembly, which thereupon accepted the amendments made by the



Council, and it was suggested that the bill thus recast lost its identity, so that to comply with sec. 73 it needed a new introduction into the Assembly and passage at its second and third readings by an absolute majority, so to this the Court said, and these words are relied on by the Solicitor-General:

We do not think that section 73 requires a Court to consider how far amendments allowed under Parliamentary procedure affect the substantial identity of the measure. The section relates to and speaks in terms of legislative procedure. It must be taken to recognize the possibility of substantial amendment in the other House after the passage of the Bill by the requisite majorities through the House where it originates. The exact requirements prescribed by the section were complied with.

It was argued that this language showed that the Courts are not concerned with the question whether an Act is invalid because some constitutional requirement has not been complied with. It cannot be given this meaning.

The High Court, in *Taylor v. A.-G. for Queensland* (1917), 23 C.L.R. 457, and *A.-G. for N.S.W. v. Trethowan* (1931), 44 C.L.R. 394, entertained appeals from decisions of State Courts enquiring into and deciding questions of the validity of State laws, and themselves entered into such enquiry without suggesting that the question might be one for Parliament and not for the Court, and the Judicial Committee acted likewise in *Trethowan's Case* (1932), 47 C.L.R. 97.

No authority has been drawn to our attention, nor have I found one, that lends any support to the Solicitor-General's submission. The principle that the Courts must take all Acts of Parliament as valid is understandable in England, where it has long been settled that Parliament has an unfettered supremacy. To apply it to this country is to overlook the difference between "controlled" and "uncontrolled" constitutions, the terms employed by Lord Birkenhead L.C. in *McCawley v. The King* (1920), 28 C.L.R. 106, at p. 115. The Victorian Constitution is controlled by the proviso to sec. LX of The Constitution Act, by sec. 4 of the *Constitution (Réform) Act 1937* (No. 4533) and by the proviso to sec. 5 of the Colonial Laws Validity Act (28 & 29 Vict., c. 3).

What the Full Court of this Court said in *Stevenson v. The Queen* (1865), 2 W.W. & A'B. (L.) 143, at p. 162, correctly states the law:

The Legislature here is not a Court. It does not assume to determine what are its own powers. The unseemliness of one Court interfering with the privileges of another Court cannot occur. The powers of both Council and Assembly are prescribed by statute to be within certain limits, and the Court must if the question of law is raised, determine whether the power in dispute falls within those limits or not.

(2), (3) and (4). The objection is that to make a declaration at the present time when the bill is on its way from the Houses of Parliament to the Governor would be an interference with the privileges of the Council. There is no doubt that the Courts will not interfere with the Council's management of its business within the four walls of Parliament even if it appears that some legal right has been interfered with. The question is whether to make declarations such as are asked here would be such an interference. There is a case which to us must be of strong persuasive authority that it would not.

In *Trethowan v. Peden* (1930), 31 S.R. (N.S.W.) 183, a special Full Court of five Judges determined, with one dissentient, that, in like circumstances to the present, to issue an injunction would not be an interference with the privileges of Parliament. Special leave to appeal was

given by the High Court, but not on this point. In Queensland an injunction was issued under circumstances sufficiently analogous to the present ones in *Taylor v. Attorney-General (Qld.)*, [1917] St. R. Qd. 208.

In addition, sec. 12 of *The Constitution Act Amendment Act 1928*, which deals with the privileges of the Legislative Council, qualifies those privileges by these words: "so far as the same are not inconsistent with the said statute or with any Act of Parliament of Victoria" (i.e., *The Constitution Act*). Nevertheless I have had doubts on this point, and as I find it unnecessary to make any decision on it I refrain from doing so, and in consequence do not stay to consider whether if we have authority to make the declarations asked we should exercise it, or whether in any event a declaration should be made in the action against the ministers.

(5) Have the plaintiffs or either of them a sufficient interest to support the application for a declaration? In my opinion they have. Each of them is on the voters' roll for a district which the bill, if it becomes law, is likely to do away with (*Ashby v. White* (1703), 2 *Ld. Raym.* 938; *Harris v. Dönges*, [1952] 1 *T.L.R.* 1245; *Minister of Interior v. Harris*, [1952] 4 *S. Af. Rep.* 769, at p. 779). It is unnecessary for me to determine whether as members of the Assembly also they have rights or interests which would make them proper plaintiffs in these actions. These interests in one sense are apparent, since though the bill cannot take effect until the date of a new election and therefore cannot seriously deprive them of any existing right to sit in the House, use its conveniences, and draw their pay, it can and probably will affect their opportunities to again become members of Parliament. To have a well-nursed constituency to stand for is very different from having to solicit the suffrages of a new lot of electors.

I turn now to the main question, whether the bill was unfitted to be the genesis of a valid Act because of the want of a sufficient majority in its second and third readings in the Legislative Council. Dr. Coppel put it that the bill was not one to establish new electoral districts or from time to time to vary or alter any electoral district so as to bring it within sec. LXI of *The Constitution Act*, but was in fact a bill to establish entirely new machinery that might in the future be used for establishing new districts, and as such must be passed by the statutory majorities required by the proviso in sec. LX of *The Constitution Act*.

This is a bill, he said, to set up commissioners who, after the commencement of the Act, and thereafter whenever the Commonwealth electoral boundaries may be changed, are to prepare a plan for redivision of electoral districts for submission to the Legislative Assembly: if the Houses twice disapprove, the force of the commissioners' plan is spent, it can no longer alter anything. If the Houses do not disapprove, the Governor in Council, not the Parliament, is to act and by proclamation declare the names and boundaries of the electoral districts. The Parliament, he said, establishes nothing and alters nothing. The commissioners and the Governor do everything. The machinery may go on working indefinitely, sometimes producing nothing sometimes producing a redivision of districts, but if there is a redivision it is the machinery that has produced it not the Parliament.

In considering this proposition I would observe firstly that in secs. I and LX of *The Constitution Act* the power to legislate given to the Victorian Legislature is given in wide terms, and secondly that the Victorian Parliament is not a delegate of the Imperial Parliament: it has as full power and authority to make laws within the area of its authority as that Parliament; it may delegate, and may choose its own machinery (see *Hodge v. The King* (1883), 9 *App. Cas.* 117; *Powell v.*

*Apollo Candle Co.* (1885), 10 App. Cas. 282) : the Parliament that acts under the authority of sec. LXI is a Parliament with such powers, and the only question to my mind is whether by what the bill provides it can properly be said to have established new districts or varied or altered districts. I think it can. It would be a narrow interpretation to treat the word "establish" as meaning establish immediately and unconditionally. It might as well be said that an Act did not "establish" districts merely because the relevant part of it was not to come into operation till a day to be proclaimed. The bill in fact first provides the machinery and then specifically enacts what shall be the result of the working of the machinery.

Before leaving this part of the case I may say a word concerning an argument that I found it hard to appreciate. It was urged that the use of the words "by any Act or Acts" in sec. LXI necessitated that the establishing of new electoral districts, the varying or altering them and the alteration of the qualifications of members of the Assembly, must be done immediately by the Act itself and without delegation of any sort to any person or to any body other than Parliament. I can see no reason of any sort to give the words such a meaning. Where an Act provides that the commissioners are to prepare a redivision and such redivision is, if neither House objects, to constitute new electoral districts, when the condition has been fulfilled, the Act has established those new divisions as effectually as if they had been set out in a schedule to the Act itself. I find no difficulty in the use of the words "by any Act or Acts" either as used in sec. LX or sec. LXI, but if they are to be given any special significance I would agree with the view of O'Bryan J. that they should be read as distinguishing Acts which may be passed in the ordinary way, by a bare majority, from those that require a special majority under the proviso to sec. LX.

Mr. Phillips, and Mr. Menzies while replying, however, do put the case for invalidity on another ground. Their argument was directed to clauses 12 and 13 of the bill.

Two objections were taken to these provisions. First, it was said that the Act delegated the power to declare an electorate either a country electorate or a metropolitan electorate and did not itself make such declaration. As I have said, to do that was a proper exercise of the power given to the Legislature. The second objection is more serious and requires careful consideration. It is that these clauses of the bill have the effect of altering the constitution of the Legislative Assembly by changing the class of persons who in addition to salary may receive an extra allowance and still sit and vote in the Legislative Assembly without being obnoxious to the objection that they cannot sit or vote because they hold an office of profit under the Crown, and that they also alter Schedule D (Part III) of The Constitution Act, or that schedule as amended, or a provision enacted in substitution for it, and for both reasons come within the proviso in sec. LX of that Act, or of sec. 4 of the *Constitution (Reform) Act* 1937 (No. 4533), and that moreover they are not exempted therefrom by anything in sec. LXI. This contention arises from the fact that at present districts are divided into metropolitan, urban and country, and that provision is made for paying larger allowances to members representing country and urban districts than to those representing metropolitan districts.

Section 14 of the principal Act, as amended by sec. 2 of the *Parliamentary Salaries and Allowances Act* 1948 (No. 5296), forbids persons holding an office of profit to sit or vote in the Legislative Assembly, but excepts the Speaker and Chairman of Committees of the Assembly.

The original provision for payment to members is to be found in sec. 141 of the principal Act. Various alterations have been made in payment of officers, ministers and members, but for our present purpose we may confine our attention to what has been enacted in the *Parliamentary Salaries and Allowances Act 1948* (No. 5296).

The argument was put this way. The Constitution is altered by the bill because it alters the amount that officers, ministers and members are to be paid, since those members elected for urban districts now receive an additional allowance, but if the bill becomes law they will do so no longer. In addition the qualifications of members to sit and vote is an important part of the constitution of the Legislative Assembly. Those who hold an office of profit under the Crown cannot vote or sit except so far as the payment to them is expressly authorised by statute. As the law stands at present Parliament is composed of, *inter alios*, those who have been elected and are paid a special allowance because they have been elected for urban constituencies. If the bill becomes law there can be no such persons entitled to sit in Parliament.

Again, the bill alters Schedule D, Part III, of The Constitution Act, and nothing in sec. LXI of The Constitution Act authorises such an alteration. This was the way this submission was first put, but as Part III of Schedule D has been repealed and nothing in the bill in fact does alter Schedule D, Part III, the argument appeared to be really this: sec. 3 of the *Parliamentary Salaries and Allowances Act 1948* (No. 5296) provides for salaries of ministers, and gives a certain special allowance to those who have been elected for urban constituencies; the bill, by clauses 12 and 13, alters this; and, since sec. 3 is an amendment or a substitution for Part III of Schedule D, such an alteration is forbidden by sec. 4 of the *Constitution (Reform) Act 1937* unless made by an Act the second and third readings of which are carried by the statutory majorities required by the proviso to sec. LX of The Constitution Act. Nothing in sec. LXI of The Constitution Act exempts the present bill from the proviso to sec. LXI.

The history of the division of electorates into country, urban and metropolitan is shortly this:—

By the *Electoral Amendment Act 1888* (No. 1004), the electorates were divided into metropolitan, suburban and country, and various polling hours were provided based on this division. These provisions were re-enacted in the consolidation of 1890. (See *The Constitution Act Amendment Act 1890*, sec. 240 and the Thirty-seventh Schedule.) In the *Electoral Districts Boundaries Act 1903* (No. 1895), the electoral districts were newly divided—this time into metropolitan, country and urban, differences in polling hours being retained. By the *Electoral Act 1910* (No. 2288), the difference in polling hours was abolished, but the division of electorates into metropolitan, urban and country was retained.

From that time to the passing of the *Parliamentary Salaries and Allowances Act 1948* (No. 5296) the difference in names remained, but without the difference having any effect.

Taking first the question whether the bill alters the constitution of the Legislative Assembly, I am clearly of opinion that a mere alteration of the amount paid to members cannot of itself work such an alteration. It is not part of a member's qualification that he accepts his salary. Though the speculation may seem in general an unlikely one, a member might refuse his salary and still sit and vote. He would still be part of the membership of the House. If the bill alters the constitution of the Assembly it can only be because it alters the qualifications requisite to membership. I am by no means satisfied that even an alteration in the qualification of members is an alteration in the constitution within the

meaning of the proviso to sec. LX of The Constitution Act. Section X of that Act, though it has since been repealed, suggests to me a much narrower meaning of "constitution". It reads:

The Legislative Assembly of Victoria shall consist of sixty members to be elected as hereinafter provided and for the purpose of returning such members the said colony shall be divided into thirty-seven electoral districts, the boundaries whereof shall for the purposes of this Act be set forth in the Schedule hereunto annexed marked F each of which districts shall return the number of members assigned thereto in the said Schedule.

I may remark, though this cannot aid the interpretation of the section, that the said note to it is "Legislative Assembly how constituted".

However, the answer to this argument is, I think, to be found in sec. LXI of The Constitution Act. If the bill alters the constitution of the Legislative Assembly it can only be because it alters the qualification required of members, and sec. LXI directly exempts such an alteration from the proviso in sec. LX.

Turning to the question whether the bill alters Part III of Schedule D of The Constitution Act or an amendment or substitution for it, sec. 3 of the *Parliamentary Salaries and Allowances Act* 1948 (No. 5296) purports only to enact a new sec. 17 in substitution for sec. 17 of The Constitution Act, but looking at the reference in sec. 17 to Part III of Schedule D, at the fact that Schedule D is later repealed by Act No. 5296, and at the nature of the provisions of sec. 3, I think that subsections (1) and (2) of the new sec. 17 are substituted for Part III of Schedule D.

The question therefore is, does the bill alter those provisions, and if so can a statutory authority be found for such alteration, in other words is it justified by sec. LXI of The Constitution Act. In the end it was clause 12 of the bill that was mainly relied on by counsel for the plaintiffs, and I shall first examine the questions of the effect of that clause and the authority to pass it without the statutory majority mentioned in the proviso in sec. LX of The Constitution Act.

I am of opinion that even if clause 12 does make an alteration in sec. 3 of the *Parliamentary Salaries and Allowances Act* 1948 (No. 5296), what it does is authorised by sec. LXI of The Constitution Act. The power to "establish" new districts cannot be confined to settling their boundaries. To "establish" must mean to so establish as to make the district ready to take its place in the general parliamentary scheme. The new division will require a name and sub-divisions. If it is to fit in with the existing scheme for payment of special allowances, it will require a classification. Indeed, if sec. LXI authorises, as I think it does, the establishment of so many new districts that the existing districts will be obliterated, and if there is no power to classify, the creation of such new districts will, of itself, produce the result that there will no longer be either urban districts or country districts. And if there is power to classify, on what principle can it be said that this new district or that must be classified as urban and not as country or metropolitan? Is there no alteration of sec. 3 of the *Parliamentary Salaries and Allowances Act* if one district of the sixty-six is classified as urban, and an alteration if no district is so classified? This would be a curious result of the legislation.

I agree with O'Bryan J. that a power to classify can also be found in the power to vary or alter. The use of the two words suggests that the power should be liberally interpreted. I doubt, however, whether the

power to alter or vary could safely be relied on by the defendants since it seems inappropriate to a case where all the old districts have disappeared and new ones have taken their places.

In addition, in finding power in sec. LXI of The Constitution Act to classify the new electoral districts, I am of opinion that it is not necessary to search for any special power, since clause 12 cannot properly be said to make any alteration in sec. 3 of the *Parliamentary Salaries and Allowances Act* 1948 (No. 5296). What is forbidden is not to pass an Act that may or even must have the result of diminishing any classification which would under that section give the right to a special allowance, but to pass one that alters the rights given by sec. 3. If clause 12 becomes law the rights will remain, though there will be no members of one class who will exist to claim them. It is not even as if certain districts were changed from urban to metropolitan. When the commissioners' scheme of redivision is adopted or deemed to be adopted and the Governor issues his proclamation, there will simply be unclassified districts which will then be classified as country and metropolitan.

It remains to consider clause 13 (2) of the bill. It cannot be denied that by repealing the words "or urban" in sub-secs. (1) and (2) of sec. 17 of *The Constitution Act Amendment Act* 1928, as amended, clause 13 has altered those sub-sections, and as they are substituted for Part III of Schedule D to The Constitution Act, has made an alteration which apparently comes within the ambit of sec. 4 of the *Constitution (Reform) Act* 1937 (No. 4533), and if it is obnoxious to that section, I can find no authority in sec. LXI of The Constitution Act or elsewhere that can save it. The Solicitor-General's answer on this point was that so to treat the clause was to show a pedantic concentration on words and neglect the real facts. Section 12, he said, had abolished urban districts, and so to repeal the words "or urban" could in reality make no alteration in sec. 17: those words could no longer have any operation; the alteration had substantially been already made.

That this was in the mind of the draftsman of the bill is plain from the fact that the repeal is to operate only from and after the day appointed for taking the poll for the first election under the scheme of subdivision.

I have had grave doubts whether clause 13 (2) can be so saved, and I am not yet entirely free from them, but I am not prepared to dissent from the views of my brother Judges that this clause does not require a statutory majority.

There should therefore be judgment for the defendants in both actions.

MARTIN J. read the following judgment: A bill to make provision for the redivision of the State of Victoria into electoral districts for the Legislative Assembly and for other purposes was passed by the Legislative Assembly with the concurrence of an absolute majority of its members, but, when considered by the Legislative Council, its second and third readings were passed with less than an absolute majority of the members of that body.

The procedure adopted when a bill has been passed by both Houses of the Legislature, as set forth by affidavit, is that a copy of the bill is transmitted to the official secretary of His Excellency the Governor, with a request that he nominate a place and time when His Excellency will have the bill presented to him for Her Majesty's assent.

The official secretary then forwards the copy bill to the Attorney-General for a report on whether there is any legal objection to its passing into law. If in his opinion there be no objection, the Attorney-

General certifies accordingly and the official secretary then advises the clerk of the Parliaments that His Excellency will give the royal assent at a named place and time.

The bill in question here was forwarded to the Attorney-General but, as the writs in these actions then issued, nothing further has been done and it has not received the royal assent.

In the action against the defendant clerk of Parliaments the plaintiffs seek a declaration that it is unlawful for him to present the said bill to the Governor for Her Majesty's assent; and in that against the named Ministers of State they ask for a similar declaration against each and further for one that it is contrary to law for each of them to endeavour to cause to procure the Governor to give such assent to the bill.

The Solicitor-General denies the jurisdiction of this Court to make any such declaration on the ground that, by the provisions of The Constitution Act and the *Constitution (Reform) Act* 1937, the power to determine whether or not the second and third readings of the bill were passed by an absolute majority of the Legislative Council has been conferred on that House.

Alternatively he contended that any declaration such as is sought made by this Court would involve it in an interference with the powers, privileges and immunities of a House of the Legislature to regulate and control its internal proceedings and so constitute a contempt of Parliament.

His argument on the first of these contentions is that, by sec. IX of The Constitution Act, it is provided that:

all questions save as herein excepted which shall arise in the Council shall be decided by a majority of members present other than the President,

that there is nothing in the Act which falls within the words "save as herein excepted" other than such matters as are referred to in the proviso to sec. LX thereof, and that the question whether any bill before it is one which by virtue of such proviso requires an absolute majority of the whole number of the members of the Legislative Council is one to be decided by it, under sec. IX, by a simple majority of members present. As in fact both the second and third readings of the bill were passed, after the question whether or not it came within the proviso to sec. LX had been raised and ruled on by the President and the House did not dissent from his ruling, it must be taken that the Legislative Council decided it did not, and this is a question "not herein excepted" which, by sec. IX, is committed to its decision.

I cannot think this is correct. In *R. v. Burah* (1878), 3 App. Cas. 889, at p. 904, Lord Selborne said:

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe those powers.... The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question.

The Australian authorities of *Stevenson v. The Queen* (1865), 2 W.W. & A'B. (L.) 143, at p. 162, and *Trethowan v. Peden* (1930), 31 S.R. (N.S.W.) 183, at p. 205, are to the same effect, and the words of Lord Selborne in *R. v. Burah* were adopted by the Judicial Committee of the Privy Council in *James v. The Commonwealth*, [1936] A.C. 578, at p. 613. More recently the principle has been affirmed by the Supreme Court of South Africa in *Minister of Interior v. Harris*, [1952] 4 S. Af.

Rep. 769, at pp. 779 *et seq.* It was urged that *The Speaker of the Legislative Assembly v. Glass* (1871), L.R. 3 P.C. 560, was an authority to the opposite effect, but such is not the case. The question there was whether an Act of this State passed pursuant to the powers conferred by sec. XXXV of The Constitution Act conferring on each House of the Victorian Legislature the like privileges, immunities and powers as were held by the House of Commons gave power to the Legislative Assembly to imprison under the warrant of the Speaker one whom that House had held to be guilty of contempt.

It was held it was well established that one of the privileges of the House of Commons was that it had

the right to be the judges themselves of what is contempt, and to commit for that contempt by a warrant,

and that it followed that the Legislative Assembly had a similar right. Similarly in *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271, the Court declined to interfere with the right of the House of Commons to lay down its own rules for its own procedure within its walls. Had the Imperial Parliament conferred on the Legislative Council the right of determining whether a bill before it was one which required a specified majority, then the question whether it did so or not would have been a matter for it and not for the Court, but it has not done so by sec. IX of the Constitution. The provisions contained in sec. 4 of the Act (18 & 19 Vict., c. 55) to which The Constitution Act was a schedule and in the *Colonial Laws Validity Act* 1865 (28 & 29 Vict., c. 63, secs. 5 and 6) indicate inferentially that the question whether constitutional limitations have been observed can only be determined in the only recognisable manner for so doing in British countries, *i.e.*, by the Courts.

Accordingly I consider it clear that this Court has jurisdiction to determine whether the bill in question here was one which fell within the proviso to sec. LX of the Constitution.

The second contention of the Solicitor-General, that any declaration such as is sought in these actions would constitute a contempt of Parliament was based, as far as relief is sought against the defendant clerk of Parliaments, on the facts that he is the clerk of Parliaments who, under the joint standing orders of the two Houses, particularly clauses 13A and 14, has the duty of authenticating copies of the bill when it has been passed by both Houses and presenting them to the Governor for Her Majesty's assent and, it is said, he is merely the servant of Parliament and so interference with him in carrying out his prescribed duties is a contempt of Parliament. It is important to observe that the material words of sec. LX of the Constitution are "it shall not be lawful to present", and the right of complaining against a bill only arises when it has been passed by both Houses and is ready for presentation.

Once it is admitted or decided that the Court has power to determine whether the statutory requirements have been observed a time at which they can so determine is before the offence of "presenting" is committed. This is not an interference with the rights of Parliament (which has completed all it has to do with the bill, except presenting it by its servant), as was pointed out by Street C.J. in *Trethowan's Case*, at p. 205.

So far as the action against the named Ministers of the Crown is concerned, they and each of them have the obligation of obeying the law just as every citizen has. It appears that His Excellency will assent to the bill only if he receives advice from his Ministers of State that it is within the law, and this action is not to prevent those ministers from



giving him advice but merely to declare that should they advise him that it is a valid exercise of the legislative power such advice will be incorrect in law.

In neither action is there anything which could be described as a contempt of Parliament.

Another matter raised by the Solicitor-General was that neither of the plaintiffs in the action had any right to seek the declarations sought.

Each of them is a member of Parliament and an elector. Should this bill become law the constituency which each now represents will be altered and each of them will have his name placed on a different electoral roll to that in which it now appears. They are entitled to seek the aid of the Court to determine whether these projected changes are being validly made, and so have sufficient interest to bring these actions.

The first attack on the bill is that it is one by which an alteration in the constitution of the Legislative Assembly is made and is not within any of the exceptions contained in sec. LXI of the Constitution. Even if it came within the words of that section—

to establish new electoral provinces or districts and from time to time to vary or alter any electoral province or district and to appoint alter or increase or decrease the number of members

—it is said that such action can only be taken by an Act or Acts and, as this bill does nothing more than appoint commissioners to do this, whose findings may or may not be approved by Parliament, any alteration to the present districts would not be done by an Act or Acts; in other words to come within sec. LXI the relevant Act must in its terms establish or define the electoral districts or do the other things mentioned in sec. LXI.

The second attack is that any alteration made will affect the payment of salaries and allowances to the Speaker, members and ministers in the Legislative Assembly and so alter the constitution of that House, and further will result in an alteration to Schedule D of The Constitution Act or, if one has regard to sec. 4 of the *Constitution (Reform) Act* 1937, to “any provision substituted therefor”, and that sec. LXI of The Constitution Act does not cover an alteration to those matters.

At the present time a member of the Legislative Assembly holding no office in the House or Cabinet, receives what is euphoniously termed “reimbursement of his expenses in relation to his attendance in the discharge of his parliamentary duties” at the rate of 1,050*l.* per annum and, if he were elected as member for a district other than a metropolitan one, he is paid further reimbursement at the rate of 100*l.* per annum (*Parliamentary Salaries and Allowances Act* 1948).

Under clause 12 (1) of the bill the Governor in Council, after the proposed redivision has been adopted or deemed to be adopted, may proclaim which of the new districts shall be metropolitan and which country electoral districts, matters which were formerly determined by Parliament itself, and the reimbursements of an ordinary member or a Minister of the Crown, fixed by sec. 3 (2) of Act No. 5296, will depend on whether the electoral district he represents is proclaimed by the Governor in Council to be metropolitan or country.

Section 3 of Act No. 5296 is in substitution of what was enacted in sec. 17 of *The Constitution Act Amendment Act* 1928, which amended the third part of Schedule D of The Constitution Act and so, it is contended, this bill effects in substance an alteration to Schedule D which is one of the matters which, by sec. LX of the Constitution, requires the concurrence of an absolute majority of each House.

Accordingly, it is said, that as this bill, though purporting to establish new electoral districts only, really alters Schedule D, it cannot be dealt with simply as one which it is put forward as doing but its real effect must be considered and if in fact it does alter Schedule D it must have an absolute majority in each House before it can be presented for the royal assent. That is, the necessary legal effect of the Act is what is to determine its nature (*James v. Cowan* (1930), 43 C.L.R. 386, *per Isaacs J.*, at pp. 408-9).

In answer to these contentions it is urged that the only relevant enactment is sec. 4 of the *Constitution (Reform) Act* 1937, that it has taken the place of the proviso to sec. LX of The Constitution Act under the power given by the first part of that section "to repeal alter or vary all or any of the provisions of this Act", that the bill falls within the exceptions mentioned in sec. LXI of The Constitution Act, which are retained by the said sec. 4, and that though the Legislature of Victoria is still governed by The Constitution Act the Legislative Assembly is not. The power to repeal, alter or vary just mentioned is said to have been exercised, so far as the constitution of the Legislative Assembly is concerned, by Part IV, Division 1 of *The Constitution Act Amendment Act* 1928, as amended by the *Electoral Districts Act* 1944 (No. 5028), and so it is contended this bill, if it becomes law, will amend that Act and not The Constitution Act and the proviso to sec. LX of the Constitution cannot affect it since the only operation of such proviso is with regard to legislation which seeks to repeal, alter or vary any of the provisions of "this Act" (*i.e.*, The Constitution Act).

Again, as sec. X of The Constitution Act, which enacted how the Legislative Assembly was to be constituted, was repealed in 1858 by a Victorian Act it is urged there was thereafter no restriction on Parliament varying the constitution of that House until the passage of the *Constitution (Reform) Act* 1937 and the only restrictions on its power now extant are to be found in sec. 4 of that legislation.

Whether you look at that section or at secs. LX and LXI of The Constitution Act the contention is that the same result follows, *viz.*: that the Parliament has power to establish new electoral districts and to do so not only by defining such in its own Act but by authorizing a competent body to define them and providing for the adoption by either House of what that body recommends.

So far as the argument of the plaintiffs on the alteration to Part III of Schedule D of The Constitution Act is concerned, the defendants say that this part of the schedule was repealed by Act 5296 of 1948 (sec. 3 (2) (c)) and so nothing done at this date can alter or vary it. They further say that there has been no provision substituted therefor within sec. 4 of Act No. 4533. The salaries and allowances prescribed by the *Parliamentary Salaries and Allowances Act* 1948 were not, it is contended, in substitution of Schedule D, but the initiation of an entirely new system which departed altogether from the civil list principle laid down by sec. XLVI of The Constitution Act, and which made the presence of the Third Part of that schedule otiose and so it was repealed.

The foregoing is an epitome only of the very full arguments addressed to this Court, and the authorities by which they or some of them were sought to be supported have not been mentioned. But I consider the substantial question is not whether the proviso to sec. LX of The Constitution Act has been replaced by sec. 4 of the *Constitution (Reform) Act* 1937, which has as one of its provisions

This section shall be read as in aid of and not in derogation from the provisions of section sixty of The Constitution Act,

but whether, whichever be the governing section, this bill comes within the exceptions contained in sec. LXI of The Constitution Act.

The considerations against it so doing which seem to me of most weight are these:—

Should it become an Act it is to come into operation on a day to be fixed by proclamation.

As the commissioners cannot be appointed until the Act is proclaimed and so cannot set about their duties of providing for new electoral districts until then, at the time when the Act comes into operation there are no new districts and, in the result, there may never be any.

Regarding it, at that time, can it be said to be one to establish new electoral districts or to vary or alter any such? It is true its ultimate object may be to do so, but, as any recommendations by the commissioners have no effect unless deemed to be adopted after being submitted to both Houses, the Act when proclaimed is provisional merely in its operation and does not establish new districts in all events, quite apart from the question whether the Legislature must itself fix the districts.

By its terms it sets up a fact-finding body to divide each Commonwealth electorate into two parts and provides that the report of such body is to be laid before both Houses of Parliament.

Neither of these can alter the report in any way and unless within a stated time each house passes a resolution disapproving the proposed redivision or negatives a motion for its approval it shall be deemed to be adopted.

If both Houses disapprove or negative such a motion the minister may direct the same body to make a fresh redivision which, when made, is again laid before both Houses. Unless each House disapproves such fresh redivision or negatives a motion for its approval it shall be deemed to be adopted.

This means that a scheme for redivision which is approved by one House and disapproved by the other may become law and that such a state of affairs may continue indefinitely and be repeated whenever the Commonwealth Parliament sees fit to alter the number of Victorian electorates or any boundaries thereof.

Such a procedure is undoubtedly open to a Legislature with plenary powers such as the Imperial Parliament has.

Although sec. LX of The Constitution Act begins with a grant of plenary power, it immediately, by the proviso thereto, restricts such power, and then, by sec. LXI, restores power on some of the subject-matter of the things mentioned in such proviso, if such be exercised by any Act or Acts to do the required thing. I say "some of the subject-matter" since, although it may be difficult to perceive what matters falling "in the constitution" of the Legislative Assembly still require to be passed by an absolute majority of each of the Houses, I think it must be taken there are some as there could be no reason for the Imperial Parliament including that subject-matter in sec. LX if it immediately took away all its constituent parts of sec. LXI.

One matter which would probably fall within the *residuum* is that, by The Constitution Act (sec. X), the Legislative Assembly is to be an elected body and not one nominated by official or sectional interests. A proposed change to make it a nominee body would not be within the powers given by sec. LXI and so would require the absolute majority laid down by sec. LX.

The fact that the Act, when passed, will operate if it operates at all, in establishing new districts to make the report of the commissioners the law although one House be opposed to such report appears a curious result when the power by which it is sought to be justified is in the words

“It shall be lawful for the said Legislature from time to time by any Act or Acts . . . to establish” etc., though of course the same result would follow if the Act provided the recommendations of the commissioners would become law without their being referred to Parliament at all.

Again, The Constitution Act contained a schedule setting forth the electoral districts into which the colony was divided and the number of members to be returned for each such district.

When power is given, by sec. LXI of that Act, to alter these “by any Act or Acts” there are grounds for an argument of some weight that what was intended was a consideration and adoption by the Legislature itself of the alterations proposed and not the placing of the responsibility of determining new electorates on an outside body whose findings may never be approved by Parliament. And, as the Legislature can only exercise its legislative powers “by any Act or Acts”, the use of that phrase in sec. LXI would appear to be surplusage were it not intended that the alteration or establishment desired should be detailed in the Act itself.

However, the phrase “by any Act or Acts” is found not only in sec. LXI, but in the initial paragraph of sec. LX.

What seems to be an adequate reason for the use of that phrase in sec. LX and especially the use of the word “any” therein, is that it is emphasising the power of the Legislature to do the things there mentioned by an Act or Acts of any kind whatsoever, in contrast to the manner in which those matters excepted from the general power by the proviso to that section can be effected, since they can only be done by a special kind of Act or Acts—those passed with the concurrence of an absolute majority and required to be reserved for the royal assent.

If this be so it would be natural for the same idea to be carried into sec. LXI which, paraphrased, would read thus: Notwithstanding it is provided by sec. LX that any bill by which an alteration in the constitution of the Legislative Assembly may be made must be passed with the concurrence of an absolute majority of the whole number of the members of each House and must be reserved for the royal assent, yet the Legislature may, by an Act or Acts of any kind whatsoever (*i.e.*, without necessarily being passed by absolute majorities and reserved for the royal assent) alter, etc.

The phrase “by any Act or Acts” is not always used in The Constitution Act when legislative power is given to the Legislature, as appears from sec. XLIII, which confers a grant of power upon it to levy duties of customs.

However, the words “by an Act or Acts” are found in sec. XXVII and “by any Act or Acts” in sec. XXXV. The matters dealt with in both these sections might be considered to be covered by the phrase “in the constitution of the said Legislative Council or Legislative Assembly” in sec. LX, and so the use of the words mentioned might well be to ensure that any legislation on the matters mentioned may be passed by simple majorities as can those set out in sec. LXI.

If, as I think is the case, there is a natural construction of the phrase “by any Act or Acts” in sec. LXI which does not entail a limitation on the power given by that section one should not be anxious to adopt a construction which does entail such a limitation when the Legislature concerned, though controlled by a Constitution Act, is granted plenary powers save in certain matters expressly excepted from such.

In such a case the grant of power should be read liberally, not narrowly; the construction adopted should be in aid of rather than in derogation of power.

There is no doubt that, by a proper Act or Acts, the Victorian Legislature has power, without an absolute majority being required at any stage of its passage to establish what is popularly known as "two-for-one" electorates. Having regard to the facts that the bill, should it become an Act, will be provisional only in its operation, that at no stage is it necessary that the Legislature shall pass the establishments proposed by the commissioners, and that, in terms, it neither establishes nor varies any electoral districts, I have felt doubt whether it is such an Act as is contemplated by sec. LXI but, since I consider there is a natural legal construction of the phrase "by any Act or Acts" in that section which would obviate the giving of a restricted scope to the power granted I do not think that doubt should prevail and accordingly I am of opinion that this bill is within sec. LXI and does not require an absolute majority on its second and third readings in either House of Parliament.

The second main objection to it was based on the facts that, by sec. 12, the Governor in Council may, by proclamation, declare which of the electoral districts adopted shall be metropolitan and which country for the purposes of the principal Act and that, by sec. 13 (2), the words "or urban" appearing in secs. 14, 17 and 141 of the principal Act are repealed.

The principal Act (*The Constitution Act Amendment Act 1928*), as amended from time to time, and more particularly by the Parliamentary Salaries and Allowances Act (No. 5296 of 1948) made provision for an extra allowance, over and above the salary received by others of the same rank, to those representing country or urban electoral districts, which were defined in the schedules to the principal Act. Under the bill there will be no urban districts and the right of a member to receive the extra allowance will depend on whether or not the Governor in Council classified his electorate as "country".

I do not consider such a result can fairly be described as a change in the constitution of the Legislative Assembly.

When The Constitution Act was passed there was no payment of members—in fact there was none until the year 1886—and it is improbable that the Imperial Parliament, the members of which were also unpaid at the time, visualized there would be payment in the future. That, of course, is not conclusive as to what is included in the constitution of the Legislative Assembly, but I regard the payment of members and extra allowances for those who represent other than metropolitan electorates as incidents to membership and not as part of the constitution of the House, and I can see no reason why Parliament by a simple majority should not delegate to the Governor in Council the power of declaring which of its electoral districts should carry an extra allowance for the members thereof.

If, however, a classification under sec. 12 of the bill does amount to a change in the constitution of the Legislative Assembly, that section appears to me to be an exercise of the power conferred on the Legislature by sec. LXI of The Constitution Act to "vary or alter" any electoral district. As, for the same reasons that I consider it unnecessary that the new electoral districts established by the bill should be defined by its terms, I am of opinion that there is no need for any alterations or variations to be detailed in it, there can be no objection to the details being committed to the Governor in Council.

But it was also contended that the bill came directly within sec. LX of The Constitution Act or sec. 4 of the *Constitution (Reform) Act 1937* in that it altered Schedule D or a provision substituted therefor, and that nothing in sec. LXI exempted such a bill from the necessity of

being passed by an absolute majority in each House. The Third Part of Schedule D to The Constitution Act made provision for fixed salaries for certain officials plus a sum to be divided among other officials.

The Constitution Act, by sec. XLVIII, provided :

XLVIII. It shall be lawful for the Governor to abolish any of the offices named in the Third and Fourth Parts of the said Schedule or to apply the sums thereby appropriated to such other purposes connected with the administration of the Government of Victoria as to Her Majesty Her heirs and successors shall seem fit.

It does not appear whether or not this power was ever exercised, but the relevant part of the schedule was amended by sec. 17 of *The Constitution Act Amendment Act 1928* and later, in 1948, both this sec. 17 and the Third Part of Schedule D were repealed (Act 5296, sec. 3).

In place of sec. 17 provision was made for salaries of definite amounts to be paid to the Premier and to each of nine of his ministers respectively and also provision for allowances to three other ministers, and the section also provided that each minister who represented a country or urban electoral district was to receive a fixed allowance in addition to his salary or ministerial allowance.

I feel that this section (sec. 3 of Act 5296) is properly described as a provision substituted for the Third Part of Schedule D, but I doubt whether this bill can be said to effect an alteration in such substituted provision. It may be that a consequence of a proclamation issued under sec. 12 (1) is that the Governor in Council may increase the remuneration of one who holds an office of profit under the Crown, since a Speaker or a minister who has been a metropolitan may find himself a country member and so entitled to the additional allowance given such by Act 5296, but I do not think that such a possible indirect result of the bill, should it become law, comes within the description

any bill by which an alteration in Schedule D to The Constitution Act or in any amendment of the said schedule or in any provisions substituted therefor may be made.

If the bill is not vitiated by the provisions of its sec. 12, I consider its sec. 13 (2) cannot harm it.

As was said during argument, the object and result of the section is merely to tidy the legislation, by taking from it a phrase which no longer has any meaning or effect.

The result is that in my opinion the bill here is within the powers conferred on the Legislature by sec. LXI of The Constitution Act and, as it was agreed that these motions should be treated as the trial of the actions, there should be judgment for the defendant clerk of Parliaments and for the defendant ministers respectively.

O'BRYAN J. read the following judgment: In the first of these actions the plaintiffs claim a declaration that it is unlawful and contrary to The Constitution Act for the defendant, who is the clerk of the Parliaments, to present to the Governor for Her Majesty's assent a bill which was passed by the Legislative Assembly of the State of Victoria on the 31st day of March 1953 and by the Legislative Council of the State of Victoria on the 9th day of April 1953, being a bill for an Act to be known as *The Electoral Districts Act 1953*, inasmuch as the second and third readings of the said bill were not passed with the concurrence of an absolute majority of the whole number of members of the Legislative Council.

In the second action the plaintiff's claim is against the defendants who are the Premier and other responsible Ministers of the Crown for a declaration that it is contrary to law for all or any of them to endeavour

to cause or to procure the Governor to give Her Majesty's assent to the same bill, and for a further declaration that it is contrary to law for any of them to present the said bill to the Governor for Her Majesty's assent or to endeavour to cause or procure the said bill to be presented to the Governor for Her Majesty's assent, and the ground for both these claims is as in the first action that the bill was not passed with the concurrence of an absolute majority of the whole number of members of the Legislative Council.

In each case the claim is based upon the contention that the bill in question falls within Section LX of The Constitution Act because it is said by it an alteration may be made in the constitution of the Legislative Assembly, and for the further reason that by it an alteration is made in Schedule D of The Constitution Act or in a provision substituted therefor (see *Constitution (Reform) Act* 1937, Act No. 4533, sec. 4), and still further because it does not fall within the excepting provisions of sec. LXI of The Constitution Act. It is common ground that the bill was not passed at either its second or third reading in the Legislative Council with the concurrence of an absolute majority of the whole number of the members of the Legislative Council.

The Solicitor-General took preliminary objections to the Court entertaining the claims made in these actions and to the Court granting the relief asked. He contended first that this Court has no jurisdiction to grant the relief claimed because the power to determine the question whether the second and third readings of the bill were required to be passed by an absolute majority has been committed by The Constitution Act to Parliament itself, or, alternatively, if the Court has jurisdiction to grant the relief claimed it should dismiss these actions on the ground that it is within the constitutional power of Parliament itself to decide whether absolute majorities are required. These contentions were based upon an interpretation of the Constitution, with which I find myself unable to agree. The Solicitor-General relied in particular upon secs. I, IX, XXI and LX. Section I provides that:

there shall be established in Victoria instead of the Legislative Council now subsisting one Legislative Council and one Legislative Assembly to be severally constituted in the manner hereinafter provided and Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws in and for Victoria in all cases whatsoever.

That is a plenary power of legislation and should be read as giving the amplest powers to pass all laws it thinks fit for the good government of the State. Section LX puts beyond doubt the proposition that this power includes a power to make laws altering the Constitution itself. It expressly says:

The Legislature of Victoria as constituted by this Act shall have full power and authority from time to time by any Act or Acts to repeal alter or vary all or any of the provisions of this Act and to substitute others in lieu thereof.

The Solicitor-General then contended that when the section goes on to provide that in certain cases bills must be passed by an absolute majority of the whole number of the members of both Houses and be reserved for the signification of Her Majesty's pleasure thereon—the proviso should be read simply as a direction to Parliament and that it is for Parliament to say whether a particular bill is or is not within the class of measures provided for. For this purpose he relied upon the amplitude of the plenary powers conferred by sec. I and the opening words of sec. LX. He also relied upon secs. IX and XXI. By these sections the Legislative Council and the Legislative Assembly respectively are authorised to

determine all questions which arise in the respective Houses by a simple majority vote of the members then present, and the Solicitor-General contends that the words "save as herein excepted" in these sections refer to the proviso in sec. LX which is the only exception appearing elsewhere in The Constitution Act. Even if these words did refer to sec. LX, I do not think they help his argument, but in my opinion they are plainly referable to the exception contained in the respective clauses themselves. In effect, what secs. IX and XXI are saying is that all questions which shall arise in the Council and the Assembly respectively shall be decided by the majority of the members present (other than the President or Speaker as the case may be) save that the House shall not be competent to proceed to the despatch of business unless the requirement as to a quorum earlier made is satisfied. Whatever force there may be in the contention that the wide words of secs. I and LX suggest that Parliament is to decide whether a particular bill is required to be passed by an absolute majority, the Imperial statute to which The Constitution Act was a schedule (18 & 19 Vict., c. 55) provided by sec. 4 that while it should be lawful for the Legislature of Victoria to alter or repeal all or any of the provisions of the Constitution or any other laws for the good government of the colony, that power was subject to the conditions imposed by the Constitution on the alterations of the provisions thereof in certain particulars unless and until such conditions should be repealed or altered by the authority of the said Legislature. These words would appear plainly to include the proviso to sec. LX. But any doubt on that matter is set at rest by the *Colonial Laws Validity Act* 1865 (28 & 29 Vict., c. 63), sec 5, which provides that the power of the Legislature to make laws respecting the constitution, powers and procedure of such Legislature shall be subject to their being 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.

Section 6 of the same Act also seems to negative the contention that it is for Parliament to decide whether a particular bill falls within the proviso to sec. LX. That section provides that the certificate of the clerk or other proper officer of the Legislature that the document to which it is attached is a true copy of any colonial law assented to by the government of such colony shall be *primâ facie* evidence, *inter alia*, that such law has been duly and properly passed and assented to. This suggests that the question whether a bill has been duly and properly passed is open, as the certificate referred to is only *primâ facie* evidence that it has been so passed.

These statutes therefore in my opinion negative the Solicitor-General's contention. He, however, suggested that there is high authority for the proposition that the matters referred to in the proviso to sec. LX are matters of Parliamentary procedure only and that the due observation of such matters is for the consideration of Parliament only. He relied upon the passage in the joint judgment of Rich, Dixon and McTiernan JJ. in *Clydesdale v. Hughes* (1934), 51 C.L.R. 518, at pp. 528, 529. When speaking of sec. 73 of the *Constitution Act* 1889 (W.A.) (a very similar section to our sec. LX), these learned Judges said:

we do not think that sec. 73 requires a Court to consider how far amendments allowed under Parliamentary procedure affect the substantial identity of the measure. The section relates to and speaks in terms of legislative procedure. It must be taken to recognise the possibility of substantial amendment in the other House after the passage of the bill by the requisite majority through the House where it originates. The exact requirements prescribed by the section were complied with.



I do not think that this passage helps the defendants' argument. In that case the Court held that the bill did not fall within sec. 73, but the judgments do not suggest that it was not open to the Court to consider whether the bill fell within the class of bill requiring special majorities or whether the bill had been passed by the special majorities required. What happened was that the bill, which originated in the Assembly, was passed there by the requisite majority for special bills but was amended in the Council and passed there as amended by the requisite majority; and on return to the Assembly was accepted in its amended form. The contention was that this bill had by the amendment lost its identity and to comply with sec. 73 it should have been newly introduced into the Assembly and passed as amended by an absolute majority. The Court held that the question whether the bill by amendment had lost its identity and required such fresh introduction was a matter of Parliamentary procedure to be decided by Parliament itself.

The other case relied upon by the Solicitor-General, *R. v. The Governor of the State of South Australia* (1907), 4 C.L.R. 1497, at p. 1513, was concerned with so different a subject-matter that it does not appear to be at all helpful in this matter. Section 47 of the Australian Constitution Act in so many words committed to the Senate the determination of the question whether there was or was not a vacancy in that House.

For these reasons I am of the opinion that the proviso to clause LX contains certain entrenched provisions and that the Constitution is to the extent contained in that proviso, and subject to the exceptions thereof contained in sec. LXI, a controlled constitution. The words of the proviso are, "it shall not be lawful to present to the Governor... for Her Majesty's assent [certain] bills". It follows, in my opinion, that the question whether it is lawful to present a particular bill to the Governor for Her Majesty's assent, it being alleged that bill falls within the proviso, is a question of law for this Court to determine. The question of the validity of an Act if it has received Her Majesty's assent is one which must be decided by this Court as a matter of law. It is part of this Court's function to determine what the law is, and in particular if an Act has not been passed by the majority required by the proviso to sec. LX it is for this Court to say whether the bill is one which falls within the proviso to that section, and if it does whether it falls within the exceptions contained in sec. LXI. This question was reserved in *Kenny v. Chapman* (1861), 1 W. & W. (L.) 93, though the Court did in that case consider whether a certain Act fell within the provisions of sec. LXI. The Court held that it did not require the concurrence of an absolute majority of the Council and the Assembly.

The Solicitor-General then went on to contend that to grant the relief asked in these writs would in the circumstances involve the Court in an interference with the powers, immunities and privileges of Parliament to control its own internal proceedings, and would therefore constitute a contempt of Parliament, and that so far as relief is claimed against the defendants, who are responsible Ministers of the Crown, it would involve an interference with the constitutional right and power of the Governor to seek and obtain the advice of his responsible ministers. For the first of these propositions the Solicitor-General relied upon sec. XXXV of The Constitution Act, which provides that it shall be lawful for the Legislature of Victoria by any Act or Acts to define the privileges, immunities and powers to be held, enjoyed and exercised by the Council and Assembly and by the members thereof respectively. By what is now sec. 12 of *The Constitution Act Amendment Act 1928* the Council and Assembly respectively

hold enjoy and exercise such and the like privileges, immunities and powers as... at the time of the passing of the Constitution Statute were held, enjoyed and exercised by the Commons House of Parliament of Great Britain and Ireland and by the committees and members thereof, so far as the same are not inconsistent with the said Statute or with any Act of the Parliament of Victoria.

In *The Speaker of the Legislative Assembly v. Glass* (1871), L.R. 3 P.C. 560, the declaration of the House of Assembly that Glass had committed a contempt and breach of privilege of the House and his commitment to gaol therefor on the Speaker's warrant were upheld by the Privy Council as an exercise of a like privilege to that held, enjoyed and exercised by the Commons, and therefore not examinable in the Courts. The Privy Council said in effect that one of the most important privileges of the House of Commons is the privilege of committing for contempt and incidental to that privilege the House has always had the right to be itself the judge of what is contempt and the Courts of law have no right or jurisdiction to reconsider the House of Commons' action in such a matter. In effect in *Glass's Case* it was held that the uncontrolled power of judging the contempt and of committing by a general warrant for contempt of the House are perhaps the most important ingredients in the privileges which the House of Commons in England possessed. It would be strange therefore if, under a power to transfer, and a transference in fact of, the whole of the privileges and powers of the House of Commons that which is so important were to be held not to have been transferred. But that is a long way removed from this case. It is to be noted that sec. 12 of The Constitution Act Amendment Act is limited to a transference of privileges, immunities and powers "not inconsistent with the Constitution Statute or with any Act of the Parliament of Victoria", and it would be a strange reading of sec. 12 if it were construed as a grant of power to Parliament to do that which by sec. LX of the Constitution has been declared not to be lawful. In *Stevenson v. The Queen* (1865) 2 W.W. & A.B. (L.) 143, the powers of the Legislative Assembly were held by the Court to be limited by a restriction to be implied from the Constitution statute, although the House of Commons in like case would have had the power claimed. Stawell C.J., in the course of reading the judgment of the Court, said, at p. 162:

The Legislature here is not a Court. It does not assume to determine what are its own powers. The unseemliness of one Court interfering with the privileges of another Court cannot occur. The powers of both Council and Assembly are prescribed by statute to be within certain limits and the Court must, if the question of law is raised, determine whether the question in dispute falls within those limits or not.

The Solicitor-General then relied upon *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271, and what was said by Lord Coleridge C.J., at pp. 272-3, and by Stephen J., at pp. 276-7. But in that case what was sought by the plaintiff was an order to declare that what had been done in the House itself, *viz.*, the refusal of the House of Commons to allow the oath by law prescribed to be taken by members of the House of Commons to be taken by the plaintiff, and a further order restraining the Sergeant-at-Arms from preventing the plaintiff by force from entering the House and taking the oath as member. This was held to be an invocation of the Courts of law to control the House of Commons in its internal procedure and proceedings—a thing which is plainly outside their jurisdiction. It is ancient and well-established law that what is said and done within the walls of Parliament cannot be inquired into in a Court of law.

What was said in that case is plainly applicable to matters which concern the internal affairs of the House and has in my opinion no relevance to a case such as we have before us. To the same effect is the case of

*R. v. Sir R. F. Graham-Campbell; Ex parte Herbert*, [1935] 1 K.B. 594, in which an attempt was made to invoke a judicial inquiry in the Court of King's Bench into the legality of the supply of intoxicating liquor in the House of Commons. The attempt failed because it was an attempt to control the House of Commons in a matter in which it had the privilege of regulating being a matter of its own internal affairs and procedure. No Court of law has jurisdiction to interfere in such matters. But how can the action for a declaration against the clerk of Parliaments be equated to such cases? The Solicitor-General's contention, as I understand it in this connection, was that the declaration sought in the first action is against the defendant in his capacity as the clerk of the Parliaments, and what is asked is a declaration that what he is required to do as the servant or agent of Parliament is unlawful and contrary to the Constitution. That is, so the Solicitor-General contends, an attempt to interfere with the powers and privileges and internal affairs of Parliament itself. The Joint Standing Orders of the Legislative Council and the Legislative Assembly, which are made under the authority of the Constitution, by Orders 11, 12, 13 (a) and 14, require the clerk of the Parliaments to present three copies of this bill to the Governor for Her Majesty's assent. He contended therefore that the clerk was required as the agent of Parliament to present this bill to the Governor for Her Majesty's assent, and for this Court to declare at this stage that such action would be illegal is to interfere with the internal affairs of Parliament itself. I do not agree that this is so at all. So far as the Houses of Parliament are concerned they have done what they have a perfect right to do in regard to this bill and have passed it by certain majorities. The question at this stage is whether it is lawful now to present the bill to the Governor for Her Majesty's assent. This is a question of law, and a declaration by this Court that it would be unlawful so to do in no way interferes with the powers, privileges or immunities of Parliament or its members or with the internal affairs of Parliament itself. The direction in Order 14 must be read subject to the law and the Constitution. Somebody has now to decide whether the bill can lawfully be presented to the Governor for Her Majesty's assent thereto. We must assume that Parliament and its clerk will do only that which lawfully can be done with this bill. If this Court and not Parliament is the arbiter of that question, how can it be said to be an interference with Parliament or its internal affairs or privileges to declare the law in that regard for the guidance of him who now is in control of the bill?

Nor in my opinion does the second action which is brought against the Premier and other responsible Ministers of the Crown involve any interference with the constitutional right or power of the Governor to seek or obtain the advice of his responsible ministers. All the Court is asked to do is to declare what the law is in an action to which these ministers are made defendants. A declaration in such an action will authoritatively inform and bind these responsible Ministers of the Crown as to what the law is, on a matter which concerns them as ministers. Such a declaration does not interfere with their right to give advice to the Governor or the Governor's right to seek their advice. All it ensures is that the responsible Ministers of the Crown will know what the law is so that correct legal advice may be given if it is sought. It is said that the substance of the action against the ministers is to restrain them from giving certain advice to the Governor. In my opinion that is a misstatement of the case. The action merely asks that a declaration be made as to what the law is, so that the correct advice may be given if it is to be tendered or asked for. Nor do I think that as a matter of discretion this Court should refrain from entertaining this action, even though the

result may be that the law is declared to be otherwise than would appear, from the course of this action, to be the present opinion of the responsible ministers, the defendants to these proceedings. If the relief sought against the responsible Ministers of the Crown were an injunction to restrain them from giving certain advice, the Court might well as a matter of discretion refrain from granting such an injunction unless it were clear that the responsible Ministers of the Crown intended to act contrary to law, which I can hardly imagine the case would ever be. In *Trethowan v. Peden* (1930), 31 S.R. (N.S.W.) 183, the Supreme Court of New South Wales was quite prepared and did in fact grant an injunction to ensure that constitutional provisions and safeguards were given effect and that a bill was not presented for Her Majesty's assent which could not have the force of law unless certain Constitution safeguards were satisfied. In this case, however, since the relief asked is no more than a declaration as to what the law is, I see no reason why this Court should not make the declaration asked if it is satisfied that the bill is one which under clause LX is required to be passed by an absolute majority of both Houses, and is not within the excepting provisions of clause LXI. If the law were to be so declared I would assume that the responsible Ministers of the Crown would not take any action towards having the bill presented to the Governor for Her Majesty's assent.

The Solicitor-General's next contention was that neither plaintiff has a sufficient interest to maintain the actions which they have brought. He says that they must show that they have rights and rights against the defendants whom they are suing to warrant the Court making a declaration in their favour. He relied upon *Attorney-General for New South Wales v. Brewery Employés Union of New South Wales* (1908), 6 C.L.R. 469. He read to us a number of passages from the judgments in that case. It is sufficient if I refer to what was said by Griffith C.J., at p. 491:

The first condition of any litigation in a Court of Justice is that there should be a competent plaintiff, *i.e.*, a person who has a direct material interest in the determination of the question sought to be decided. The Court will not decide abstract questions nor will it decide any question except when raised by some person entitled by reason of his interest to claim a decision. This doctrine should certainly not be relaxed for the purpose of bringing in question the validity of Statutes passed either by the Commonwealth Parliament or by a State Legislature.

See also what was said by Barton J. at p. 519, Isaacs J. at pp. 553, 557, and by Higgins J. at pp. 590, 594. See also *Anderson v. The Commonwealth* (1932), 47 C.L.R. 50.

I am prepared to assume that a person who has no interest otherwise than as a member of the public in the validity of a bill before Parliament has not got a sufficient interest in the subject-matter to warrant his seeking from the Court a declaration as to its invalidity or declaration such as is asked here that it would be unlawful to present it to the Governor for Her Majesty's assent or to advise the Governor it was not required to be passed by an absolute majority of the total number of members of both Houses. However, in my opinion in this case the plaintiffs have shown that although this bill concerns the public generally and relates to public affairs and public rights, it is one which affects them directly and is one in which they have a direct and special interest. In whatever way one views this bill it is one which may well affect the distribution of seats in the Legislative Assembly. Both the plaintiffs are members of the Legislative Assembly and both of them are electors, one for the electoral district of Shepparton and the other for the electoral district of Rainbow. As such electors each of them has a direct and

special interest in remaining upon the electoral roll upon which his name at present stands, and his right as an elector would be affected if his name were removed onto the roll of another electoral district in which he would be grouped with a different group of voters from his present position. The right to vote is a right which the law will protect, and it is not correct to say that you are depriving a person of nothing if you take away from him that which he has but give him back something different but which is equally good. In my opinion both the plaintiffs as electors are entitled to bring these actions. Their rights as such are directly affected by this bill—see *British Medical Association v. The Commonwealth* (1949), 79 C.L.R. 201. If their rights are affected the defendants owe to them a duty not to present this bill, if it would be unlawful so to do, and not to advise the Governor that it does not require absolute majorities, if in law it does. For the foregoing reasons I am of opinion that all the preliminary objections raised by the Solicitor-General fail.

I now turn to the substance of this case to consider whether the bill is one which falls within the proviso of sec. LX of The Constitution Act and if it does whether it comes within the excepting provisions of sec. LXI. Before I do that I shall refer to sec. 4 of the *Constitution (Reform) Act* 1937, Act No. 4533. In my opinion the result would be the same whether one considers the requirements as to majorities under secs. LX and LXI of The Constitution Act or under sec. 4 of the *Constitution (Reform) Act* 1937. The Solicitor-General, however, contended that the proviso to clause LX only relates to an alteration in the constitution of the Legislative Council or Assembly or in Schedule D as they stand in The Constitution Act unamended and that, since both the constitution of the Legislative Assembly and Schedule D have been amended by various Acts of the Victorian Legislature the proviso to clause LX is no longer applicable. Apparently some such doubts have existed, and the *Constitution (Reform) Act* 1937, sec. 4, appears to have been enacted to reinstate the limitations of the legislative power of the Houses of Parliament in like terms to those which appeared in The Constitution Act. But as sec. 4 contains these words, "This section shall be read as in aid of and not in derogation from the provisions of section sixty of The Constitution Act", little purpose seems to be served by considering whether this bill is required to be passed by an absolute majority in both Houses by reason of the provisions contained in sec. LX as well as by those contained in sec. 4. There seems to be no valid reason for saying that sec. 4 does not apply to it, though for what it is worth I am of the opinion that the proviso to clause LX also operates (if that makes any difference, which I think it does not) in regard to alterations in the constitution of the Legislative Council or Legislative Assembly as the same now are under the provisions of The Constitution Act as amended.

I now turn to the bill itself. Dr. Coppel's contention was that the real essence and substance of this bill is that it sets up commissioners who after the commencement of the Act and thereafter whenever Commonwealth electoral boundaries are changed (unless such change would result in a reduction of the total number of members of the Legislative Assembly) are to prepare and propose new electoral districts for the Legislative Assembly of Victoria. Each such proposal of itself effects nothing, and unless adopted or deemed to be adopted by Parliament in accordance with the provisions of sec. 9 will be a nullity and totally ineffective. If the proposed re-division is adopted or deemed to be adopted the Governor in Council may by proclamation declare the names and boundaries of the new electoral districts which will then become effective for the next general election of the Legislative Assembly and

will remain effective until the Commonwealth Parliament changes its electoral districts, and even then will remain effective unless the proposals of the commissioners following such change in Commonwealth electorates are adopted or deemed to be adopted by Parliament. Dr. Coppel contends that although such a bill is one whereby an alteration may be made in the constitution of the Legislative Assembly so that it is within the proviso to sec. LX and the prohibiting part of sec. 4 of Act No. 4533, it is not an Act to establish new electoral districts nor is it an Act to vary or alter any electoral district or to increase the whole number of members of the Legislative Assembly; it is an Act which sets up machinery which may have one or more of those results, but it is not an Act to do those things. He supports this contention by an examination of other parts of The Constitution Act. Although he says you might in a sense regard this as an Act to alter or vary electoral districts, sec. LXI should not be read to authorise such an Act as this. The original provision for the constitution of the Legislative Assembly is contained in clause X of The Constitution Act, which provides that

the Legislative Assembly of Victoria shall consist of sixty members to be elected as hereinafter provided and for the purpose of returning such members the said colony shall be divided into thirty-seven electoral districts the boundaries whereof shall for the purposes of this Act be those set forth in the Schedule hereunto annexed marked F, each of which districts shall return the number of members assigned thereto in the said Schedule.

Now Dr. Coppel contends that sec. LXI should be read in the light of the previous provisions of The Constitution Act which set up the Legislative Assembly. The constitution as provided by sec. X is for the division of Victoria into a given number of electoral districts each returning a given number of members, giving a total of members as prescribed by the Act itself—the boundaries of the various electoral districts being set out in a schedule to the Act itself. The constitution of the Council is defined in the same way (see sec. II). Now Dr. Coppel said when you find that the Constitution goes on to pronounce that the constitution of the Council and the constitution of the Assembly is only to be altered by an Act of Parliament assented to by an absolute majority of the total number of members of both Houses, but an exception is made in the case of an Act to establish new provinces or districts or to vary or alter any electoral province or district, or to increase the total number of members of the said Legislative Houses—these exceptions should be read as authorising Acts which themselves do these very things, so that by reference to the Act itself he who reads will find how the House is constituted in respect of numbers of members, numbers of electoral districts or provinces, the boundaries of the various provinces, etc. That, he says, is the fundamental basis of the constitution of the two Houses, and if Parliament wishes to depart from that basis it must do so by an Act duly passed with the majorities required by sec. LX.

His argument in effect is that sec. LXI only allows detailed changes in the system set up in the case of the Assembly under sec. X and in the case of the Council under sec. II, and does not allow machinery to be set up which will enable changes to be made outside an Act of Parliament altogether, and certainly does not allow machinery to be set up which will allow alterations to be made from time to time without further Act of Parliament. It is not without interest to follow the changes which have been made from time to time to sec. X and the schedule thereto. Section X and Schedule F were repealed and a new section and schedule enacted by Act No. 64, sec. 1. There has been a number of alterations in details over the years. In The Constitution Act Amendment Act of

1928 the constitution of the Assembly is defined by secs. 136, 137 and 138. They provide in effect for the division of Victoria into sixty-five electoral districts each returning one member and that (as it follows) the Assembly shall consist of sixty-five members. The names and boundaries of each electoral district are set forth in the Seventeenth Schedule to that Act. This is the same general set-up or constitution as in the original sec. X. The number of members is defined, the electoral districts are set out in detail, etc. The existing provisions as to the constitution of the Assembly are to be found in these same secs. 136, 137 and 138 as amended by the *Electoral Districts Act* 1944 (Act No. 5028). That Act bears some resemblance to the present Act. The number of districts, however, remains the same and each returns one member to the Assembly. It was designed, however, to effect, and it did in result effect a redivision of Victoria into sixty-five electoral districts. For this purpose it set up three commissioners to prepare a plan for the proposed redivision of the State into sixty-five electoral districts. It contained provision for the commissioners preparing a proposed redivision on the basis of there being thirty-two metropolitan and thirty-five urban and country electoral districts, each metropolitan, urban and country district to have a certain quota of electors respectively. When these proposals were approved the Governor in Council might by proclamation declare the names and the boundaries of the new electoral districts. It is under the provisions of this Act that the present electoral districts for the Legislative Assembly are now defined, and so one does not now find the boundaries of the present electoral districts set out in any Act of Parliament or schedule thereto.

I turn back now to sec. LXI. Before doing so I should say that I am clearly of the opinion that this bill does fall within the words "Bill by which an alteration in the constitution of the... Assembly... may be made". (See sec. LX of The Constitution Act and sec. 4 of the Act 4533.) The expression "constitution of the Assembly" in both these sections includes in my opinion such matters as the number of persons who compose the Assembly, the definition of electoral districts, their number, the number of members each district shall return, the qualification of electors and of members. In my opinion all these matters are clearly embraced by the words "constitution of the Assembly" in these sections. An alteration *may* be made, by this bill, in more than one of these matters. It is accordingly within the proviso to sec. LX. Is it taken out of that proviso by sec. LXI? Section LXI should, in my opinion, be approached having in mind that the words are addressed to a Legislature having, in all but specially excepted and those relatively few matters, plenary legislative powers. Section I is couched in the widest possible terms and the introductory words of sec. LX are also words of wide and ample meaning. The power to legislate granted to such a law-making body should, in my opinion, be read widely. Once the power is granted over a subject-matter the Legislature is uncontrolled in the manner in which it shall effect its purpose. Mr. Menzies, for the plaintiffs, contended that as the controls contained in sec. LX are only as to majorities and reservation for royal assent, and as the detailed matters set out in sec. LXI are merely exceptions from the general subject-matters controlled by sec. LX, sec. LXI should not be read as amply as a grant of legislative power but more strictly as exceptions to a subject-matter which, generally speaking, the Constitution regards as worthy of special safeguards. Dr. Coppel stressed the words used in sec. LXI, namely,

it shall be lawful for the... Legislature... by any Act or Acts to alter... to establish... to vary or alter....

He contended that these words should not be read as a plenary grant of legislative power enabling the Legislature to delegate its power to alter, etc., to another body. The words, "it shall be lawful for the Legislature to alter" indicate, he contended, that it was for the Legislature itself to do the precise act of alteration. He contrasted the words used with a power to pass an Act for the purpose of altering or which may effect the result of altering. That argument did not impress me. He further contended, however, that the additional words "by an Act or Acts" were unnecessary unless it was intended to limit the power to alter any electoral district or boundary, etc., to an alteration made by the terms of the Act itself, indicating that the intention was that Parliament should itself consider the precise alterations or variations to be made and so not to include a power to delegate the making of alterations to another body or to set up machinery which will or may effectuate an alteration of the kind contemplated by sec. LXI. There is force in this argument, but in my opinion the answer lies in a consideration of the context of sec. LXI and the principle of construction that a donation of power to a constitutional Legislature whose general legislative powers are plenary, should be read in aid of power rather than in derogation thereof. Section LX provided that for certain subjects Acts of Parliament must be passed by absolute majorities and be reserved for signification of Her Majesty's approval thereof. Section LXI was intended as an exception to this proviso and in my opinion the words "by any Act or Acts" were introduced to that section to show that for these matters it did not require a special Act, an Act passed in a special way, that is, by special majorities and by special reservation for royal assent, but by any Act. This is supported by the use of the same words in the first part of sec. LX itself. Read in that way the words "it shall be lawful for the . . . Legislature by any Act or Acts to alter", etc., take on a wider meaning and embrace in my opinion the power to legislate for that purpose and to that end to delegate its powers to another body or to legislate for the creation of machinery which will or may alter any electoral province or district, etc.

In my opinion it is too narrow a meaning to give to the words of sec. LXI that unless the Act itself defines the alterations to the qualifications of electors or members; unless the Act itself establishes new electoral districts or itself alters or varies existing electoral districts or itself provides for an increase in the whole number of members of one or both of the legislative Houses, it is not an Act to do these things within the meaning of sec. LXI. Such a meaning would, in my opinion, offend well-established canons of construction applicable to powers conferred by a Constitution Act upon the Legislature. This is so, in my opinion, even though as Mr. Menzies pointed out, sec. LXI is not a section conferring an original legislative power upon the Parliament but an exception to a withdrawal of power to legislate by simple majorities. It is to my mind not to the point that the bill effects its purpose by setting up machinery which after its first operation will only function when the Commonwealth electoral districts change or that in the end no proposals of the commissioners may be effective. Parliament has shown its will, true, by a simple majority, but has shown its will that electoral districts shall be altered or varied in this way; that new electoral districts shall be established in this way, and that the number of members of the Assembly may be increased in this way. Having done so by a bill duly passed by simple majorities the result, in my opinion, is that it is a bill for an Act to do these things within the meaning of sec. LXI. This attack on the bill, therefore, in my opinion fails.



Mr. Phillips for the plaintiffs presented a separate and distinct attack upon the bill. His argument was based upon sec. 12 and sec. 13 (2) of the bill. Section 12 provides that when the proposed redivision or the proposed fresh redivision is adopted or deemed to be adopted under sec. 9, the Governor in Council may by proclamation declare which of the electoral districts shall be metropolitan districts and which shall be country electoral districts for the purposes of the principal Act (the principal Act being The Constitution Act Amendment Act); and that from and after the day appointed for taking the poll at the first general election of the Legislative Assembly held after each appointed day the electoral districts so declared to be country electoral districts shall be country electoral districts for the purposes of secs. 14, 17 and 141 of the principal Act. Section 13 (2) provides that on, from and after the day appointed for taking the poll at the first general election of the Legislative Assembly held after the first appointed day, the words "or urban" in secs. 14, 17 and 141 of the principal Act as amended shall be repealed. The history of the classification of electoral districts into metropolitan and others is interesting. The first classification was made by Act No. 1004 (*Electoral Amendment Act 1888*), which classified electoral districts as "metropolitan", "suburban" and "others". The classification was made to differentiate polling hours, which were fixed for the metropolitan and suburban districts as from 8 a.m. to 7 p.m. and for other districts from 8 a.m. to 5 p.m. In the 1890 consolidation these provisions were re-enacted. The *Electoral Districts Boundaries Act 1903* (Act No. 1895) classified electoral districts as metropolitan, urban and country, and the purpose of such classification was still for different polling hours. The Electoral Act of 1910 (Act No. 2288) removed the provisions for different polling hours, but electoral districts still continued to be classified as metropolitan, urban and country, but apparently for no purpose. This continued until 1948, when the *Parliamentary Salaries and Allowances Act 1948* (Act No. 5296) took up the classification as it existed and provided for payment of allowances to persons elected for country and urban electoral districts. By sec. 14 of The Constitution Act Amendment Act, as amended by Act No. 5296, the President of the Council, the Speaker of the Assembly, the Chairman of Committees of the Council and Chairman of Committees of the Assembly are given out of consolidated revenue salaries as therein set out. The section contained a further provision that if any of these officers was elected for a country or urban electoral district of the Assembly, he is to be paid an additional allowance of an amount therein set out. Likewise sec. 17, as amended by Act 5296, provided for the payment out of consolidated revenue to the Premier and nine other responsible ministers named salaries, and adds that such of them as were elected for a country or urban electoral district of the Assembly shall be paid an additional allowance as therein set out. Section 141, as amended by Act 5296, provides, *inter alia*, for the payment to members of the Legislative Assembly, if the member was elected for a country or urban district of the Assembly, a further allowance as therein set out. Now the purpose of sec. 12 is to enable the Governor in Council by proclamation to declare which of the new electoral districts shall be metropolitan electoral districts and which shall be country electoral districts. This, in effect, abolished the classification of urban electoral districts. Electoral districts in future will be classified as country or metropolitan. Section 13 (2) then, in effect, provided that when this happens the reference to urban electoral districts is to be struck out of secs. 14, 17 and 141. The purpose of sec. 12 is to effect a new classification of the electoral districts when the redivision of the State is effected under the bill. It is not a

provision for altering or varying the boundaries of electoral districts or for establishing new electoral districts. It assumes that there has been a redistribution of electoral districts for the State of Victoria and then goes on to provide for their classification by the Governor in Council.

I am of the opinion that the classification of the electoral districts is within the power to vary or alter and establish new districts contained in sec. LXI. It was contended that alteration or variation is confined to a change of the boundaries of electoral provinces or districts and that as the Constitution as originally enacted contains no provision for the classification of electorates, the words "alter or vary" can hardly refer to a change in classification. So to hold would be to take far too narrow a view of the language of a Constitution statute. The Constitution is a living thing, couched in wide and general language to meet the requirements of changing social conditions and the changing elements and character of the political institutions under which we live. Parliament having decided to exercise a power which it undoubtedly has under sec. LXI to redistribute the whole of the electoral districts in the State, found that for certain purposes the existing electoral districts are classified according to particular characteristics. If these purposes were to continue to be served, the new districts created by the new sub-division must be classified, and the power to make a re-classification is, in my opinion, incidental to and included in the power to re-distribute electoral districts, or to use the words of the Act, is included in the power to establish new electoral districts, to vary or alter existing electoral districts and to increase the whole number of members of the Legislative Houses. The commitment of such re-classification to the Governor in Council is as much an exercise of the power as if Parliament had itself defined which of the new districts should fall within one class and which within another.

It is not to the point that the sole purpose of the existing classification and of the re-classification is to determine whether a member, or a particular official in Parliament, or a responsible minister is to receive a special allowance as part of his emoluments. Clause 12 of the bill is therefore in my opinion warranted by the provisions of sec. LXI. If it were not, I should doubt if it was within the proviso to sec. LX, *i.e.*, if it makes or may make an alteration to the constitution of the Legislative Assembly and so have to be passed by an absolute majority of the House. As I have already said, the phrase "The constitution of the Legislative Assembly" in my opinion embraces such things as the qualification of electors and the qualification of members—*Clydesdale v. Hughes* (*supra*) is not, in my opinion, an authority to the contrary. The Act under consideration in that case was in effect a declaratory Act and did not purport to alter the law as to qualification. It simply removed doubts as to qualification by validation. The words "constitution of the Assembly" mean in effect the make up or composition of the Assembly—see *Taylor v. Attorney-General for Queensland* (1917), 23 C.L.R. 457, at pp. 468, 477. But they may have a somewhat extended meaning in sec. XL by reason of what is contained in sec. LXI. The plaintiffs contend, however, that they embrace a great deal more. They contend that anything which might be regarded at the time when The Constitution Act was passed as a fundamental attribute of the Assembly or its members is part of the constitution of the Assembly. Accordingly they contend, for example, that the fact that members acted originally in an honorary capacity was part of the constitution of the Assembly. So they say an Act for payment of salaries to members altered the constitution of the House. Therefore any bill whereby an alteration may be made in such payment is a bill which may alter the constitution of the

Assembly. In my opinion such a construction gives too wide a meaning to the expression "constitution of the Assembly". An alteration in the classification of districts is not, in my opinion, an alteration in the constitution of the Assembly, even though that alteration is made for the purpose of determining which officers, responsible ministers or members shall receive an additional salary or allowance.

For these reasons secs. 12 and 13 of the bill do not, in my opinion, bring it within the proviso to sec. LX as a bill whereby an alteration may be made in the constitution of the Assembly.

But another reason was advanced for the contention that clauses 12 and 13 (2) brought the bill within the proviso to sec. 4 of the Constitution (Reform) Act of 1937, if not within sec. LX. It is not disputed that this bill has to satisfy the provisions of the *Constitution (Reform) Act 1937*, Act No. 4533, sec. 4, and in one respect sec. 4 would appear to be more restrictive of the legislative power than sec. LX. This section requires to be passed by an absolute majority any bill by which an alteration may be made in Schedule D to The Constitution Act, or in any amendment of the said schedule or in any provision substituted therefor. It is said that the effect of secs. 12 and 13 (2) is that an alteration may be made in an amendment of Schedule D or at least in a provision substituted therefor. Schedule D was based upon sec. XLVI of The Constitution Act, which provided for a civil list. Part III of Schedule D provided for a fixed salary for the Colonial Secretary or Chief Secretary and a lump sum for division amongst a number of the named responsible ministers, and a fixed sum for the Solicitor-General. *The Constitution Act Amendment Act 1928*, sec. 17, had amended Part III of Schedule D by providing that the total amount of the salaries to be paid to the several responsible Ministers of the Crown out of consolidated revenue should not at any time exceed the rate of ten thousand pounds per annum. But in 1948, the Parliamentary Salaries and Allowances Act (Act No. 5296) instituted an entirely new system for the payment of salaries and allowances to responsible Ministers of the Crown. Section 3 of that Act repealed sec. 17 of The Constitution Act Amendment Act and put in its place a new section whereby provision was made for fixed salaries to be paid to the Premier and to nine other responsible ministers and a computed payment to three other responsible ministers. The section also provided for payment in each case of an additional allowance in the case of those who had been elected for a country or urban district of the Assembly. The same section repealed Part III of the Schedule D and removed any reference to this Part of the schedule from the relevant sections of The Constitution Act, *viz.*, secs. XLVI, XLVII and XLVIII. Section 3 of the Act No. 5296 is, in my opinion, undoubtedly a provision substituted for Part III of Schedule D as amended by previous Constitution Act amendments. The Solicitor-General contended that those parts of sec. 3 which provided for an allowance to ministers who had been elected for country or urban electorates could not be said to be in substitution for Part III of Schedule D because that Part contained no provision for allowances. I do not agree with that contention. The whole of sec. 3 contains the provision substituted for Part III of Schedule D. That, however, leaves open the question whether the bill by secs. 12 and 13 (2) makes or may make an alteration in the provisions contained in sec. 17 of *The Constitution Act Amendment Act 1928* as amended by Act No. 5296, sec. 3. At first sight it would appear to do so, as sec. 13 (2) in so many words amends sec. 3 of Act No. 5296. However, the substance of the matter is that Parliament, having determined upon a redistribution of electoral districts and the creation of at least one new electoral district was faced with the

position that a re-classification of electoral districts would have to be made if the existing provisions for allowances were to operate, and in its wisdom decided that in future the classification of districts as urban districts should be discontinued, leaving the new districts to be classified either as country or metropolitan.

In my opinion, if sec. 12 of the bill had stood alone, the provision for a re-classification would not have made this a bill by which an alteration was made or might be made in sec. 3 of Act 5296. The operation of that section will be affected when the districts are re-distributed, but that, in my opinion, is not enough to bring the bill within the provisions of the *Constitution (Reform) Act 1937*, sec. 4, or of sec. LX of the Constitution. If sec. 13 (2) had been omitted from the bill altogether, although the new classification when made would result in there being no urban districts, it could not be said that the present sec. 17 of *The Constitution Act Amendment Act 1928* had been amended or altered merely because there was nothing for part of its provisions to operate upon. Section 13 (2) effects no other purpose than to tidy up the new sec. 17. As there will be no such things as urban districts, the word "urban" is struck out of sec. 17.

The establishment of even one new electoral district must inevitably affect the operation of a law relating to the payment to members of salaries and allowances, whether districts are classified or not, and the alteration of existing electoral districts inevitably may affect the operation of the law relating to payment of allowances to ministers elected for districts classified in a particular way. The fact that an Act for these purposes does or may affect the operation of the existing law relating to allowances therefore cannot take it outside the law-making power conferred by sec. LXI.

It follows, in my opinion, that as sec. LXI, permitting as it does the establishment of new electoral districts and the alteration and variation of existing ones, plainly includes a power to make a completely new subdivision of Victoria into electoral districts, that section must embrace a power to re-classify the new districts—even though the result is that the operation of the existing law as to payment of allowances to ministers or members may be affected.

The law as to payment of allowances is not thereby affected, though its operation may be.

For these reasons I think that this attack upon the bill also fails.

For these reasons both these actions, in my opinion, fail. The declarations asked should not be made and there should accordingly be judgment for the defendants in each action.

*Order accordingly.*

Solicitors for the plaintiffs: *Phillips, Fox & Masel*, agents for *P. V. Feltham*, Shepparton.

Solicitor for the defendants: *F. G. Menzies*, Crown Solicitor.

P.E.J.