law as to marriage formalities introduced here by 9 Geo. IV c. 83 was the common law. No special form was required by the common law, the essentials being only that the parties plight their troth in the presence of a clergyman ordained by a bishop. The Marriage Act 1928 provides for marriage by certain government officials, and by the clergy of certain religious denominations, among which is the Church of England. Such clergymen must complete a scheduled form, which includes a statement that the marriage was solemnised according to the rites of his denomination.

Martin and Smith JJ. held that the Act does not alter the common law position so as to make any requirements as to form essential. They thought it unlikely that Parliament should have intended minor omissions or variations in ceremonies to become a valid ground for nullity proceedings.

Herring C.J. dissented, his main ground being that the clause in the schedule was sufficient to change the common law position, and thus once a ceremony was commenced, it had to be completed according to the rites of the clergyman's denomination. He also said that where consent is given, as in the present case, it should be regarded as executory until the ceremony is completed.

All three judgments depend to some degree on common sense, and although it is submitted that that of the Chief Justice is the most convincing, it now seems clear that the essential part of a marriage ceremony before a clergyman in Victoria is the "plighting their troth" of the parties.

G. V. TOLHURST

CONSTITUTIONAL LAW — VICTORIA — JURISDICTION OF SUPREME COURT — BILL TO ALTER ELECTORAL DISTRICTS OF LEGISLATIVE ASSEMBLY

CASES on Victorian constitutional law are rare, and *McDonald v. Cain*[1] is one of considerable importance. The Government introduced a Bill which was passed in the Legislative Assembly by an absolute majority, but in the Legislative Council on its second and third readings only by a simple majority. The Bill introduced a new and involved machinery by which the electoral districts of the Legislative Assembly might be altered from time to time.

The plaintiffs, who were both on the electoral rolls for, and members of, the Legislative Assembly, sought declarations that it was contrary to law to present the Bill to the Governor, as it had been passed by fewer than an absolute majority in the Legislative

[1] [1953] A.L.R. 965.

Council. The claims were based on the contention that the Bill came within the proviso of sec. LX of The Constitution Act and did not come within the exceptions contained in sec. LXI. Sec LX contains a grant of full power to alter the Constitution, with a proviso that "it shall not be lawful to present to the Governor . . . any Bill by which an alteration in the Constitution of the said Legislative Council or Legislative Assembly . . . [or in Schedule 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 . . . [both Houses]".

Sec. LXI excepts from this proviso alterations "by any Act or Acts" to the qualifications of members and the establishment varying or altering of electoral districts.

At the hearing before the Full Court of the Supreme Court of Victoria[2] the Solicitor-General raised a number of preliminary objections:

(a) That the question of whether an absolute majority was necessary was not one which could be determined by the Court. It was a matter upon which the Legislative Council itself should decide. All members of the Court emphatically rejected this, holding that with reference to "controlled" constitutions there is no principle that the Courts must take all Acts of Parliament as valid. Gavan Duffy and O'Bryan JJ. quote the Full Court in *Stephenson v. The Queen*[3] as correctly stating the law, in the following words: "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". Martin J. approves of similar authority.[4]

(b) That the Court had no authority to make the declarations asked since to do so would involve an interference with the powers, immunities and privileges of Parliament to control its own proceedings and would thus constitute a contempt of Parliament. Gavan Duffy J. expressed doubts on this point and refrained from determining it as it was not essential to his decision. The remainder of the Court strongly rejected

[2] Gavan Duffy, Martin and O'Bryan JJ.
[3] (1865) 2 W.W. and A.B.(L) 143, 162.
[4] *R. v. Burah* (1878) 3 App. Cas. 889.

it. They held that at this stage there was a question of law involved—whether the presentation of the Bill to the Governor would be lawful—and that a declaration on that point would in no way interfere with Parliamentary immunities and privileges.

(c) That the actions against the Ministers of the Crown were an interference with the constitutional right of the Governor to seek or obtain the advice of his Ministers. This was rejected as a declaration would only have the effect of ensuring that the Ministers know the correct advice to give.[5]

(d) That neither of the plaintiffs had a sufficient interest to maintain the action. Gavan Duffy and O'Bryan JJ. considered that they had a direct and special interest because their names were on electoral rolls and if the Bill became law they might be removed to the roll of another district. Martin J. did not distinguish between their capacity as electors and as Members of the Legislative Assembly, but he came to the same conclusion.

With respect to the Bill itself the Court unanimously held that it was lawful to present it to the Governor; that it came within sec. LXI; and that the declarations should not issue. A number of ingenious arguments, based on statutory interpretation, were addressed to the Court (e.g. that the words "by any Act or Acts" in sec. LXI meant that the proposed alterations to electoral districts had to be contained within, and executed by, Acts, i.e. that the power could not be delegated). All of these were rejected by the Court, perhaps the only notable point being that a change in the salaries of Members is not an alteration to the Constitution of the Assembly. Gavan Duffy J. expresses doubts[6] as to whether even an alteration to the qualifications of members is an alteration to the Constitution within the meaning of sec. LX.

Although all the arguments advanced are dealt with precisely, underlying each of the judgments is the notion that the Constitution Act is not a document which should be interpreted narrowly: it should be interpreted as widely as possible within its natural meaning. The Constitution is not an ordinary legislative enactment, it is "a living thing, couched in wide and general language to meet the

[5] From dicta at pp. 987-8 it would appear that O'Bryan J. at least would be less willing to grant an injunction restraining the presentation of a Bill for Royal consent than was the Supreme Court of New South Wales in *Trethowan v. Peden* (1931) 31 S.R. (N.S.W.) 183.

[6] at p. 974.

requirements of changing social conditions, and the changing elements and character of the political institutions under which we live."[7]

McDonald v. Cain does not contain any new legal doctrines. It is, however, a case of considerable importance with reference to the Victorian Constitution Act and the jurisdiction of the Supreme Court in matters pertaining to Victorian constitutional law.

G. V. TOLHURST

[7] per O'Bryan J. at p. 993.

PROPERTY — RESTRICTIVE COVENANTS — LACHES AND ACQUIESCENCE

A LENGTHY considered judgment of Smith J. in *Bohn v. Miller*[1] presents an interesting discussion of some of the principles relating to the passing of the benefit of a restrictive covenant. Land was sold to the defendants subject to a restrictive covenant restraining them from erecting any building other than a dwelling house on each lot, and later, portions of the land to which the benefit of the covenant was attached were sold by the original covenantees to the plaintiffs in this action, but no assignment to them of the benefit of the covenant was made. The defendants erected on the land a sawmill, which was later destroyed by fire, and the plaintiffs sought an injunction to restrain the erection of the proposed new sawmill buildings.

The plaintiffs claimed that a right to enforce the covenant had become vested in them by reason of their ownership of their land. Three grounds were relied on for this. First, that their land and that of the defendant company was part of a building scheme; second, that the ordinary common law and equitable rules applied to pass the benefit of the covenant; third, that s. 56 or s. 78 Property Law Act, or ss. 72, 121 or 269 Transfer of Land Act, entitled the plaintiffs to sue. The defendants denied that any of these grounds had been established and argued further that the right to enforce the restrictions had been lost by reason of laches or acquiescence.

Smith J. stated first that he was not satisfied on the evidence that there was any such building scheme as was alleged by the plaintiffs.

He then turned to discuss the ordinary rules of common law and equity as to the passing of the benefit of restrictive covenants to successive holders of the land, and here agreed with the general tendency of the authorities, culminating in *Zetland v. Driver*,[2] that in order that the benefit of a covenant may pass with a part of the

[1] [1953] A.L.R. 711.

[2] [1939] Ch. 1.