THE NEW SOUTH WALES LEGISLATIVE COUNCIL ABOLITION CASE

I

The decision of the High Court in *Clayton and Ors. v. Heffron and Ors.*[1] covers a number of important points of constitutional law. The main effect of the case is to establish the principle that the State of New South Wales, acting under the authority of its own constitutional statutes, may abolish its Upper House without the consent of that chamber to the abolition bill. The Court has also given an opinion on the question, which received some discussion in *Trethowan's Case*, whether a court may by injunction or declaration interfere with the passage of a Bill which has not yet been enacted into law.

The case arose from a Bill introduced by the New South Wales Government to abolish the New South Wales Upper House. The Bill in question was the Constitution Amendment (Legislative Council Abolition) Bill 1960. Before examining the Bill it is necessary to refer to the previous history of the New South Wales Constitution Act. The original Act of 1902 had replaced nineteenth century legislation which established the authority and powers of the Legislature of New South Wales. Sec. 5 of the Act was as follows: "The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever, provided that all Bills for appropriating any part of the public revenue or for imposing any new rate, tax or impost shall originate in the Legislative Assembly."[2] By section 7 the Legislature was given authority to alter the laws concerning the Legislative Council provided that a bill of this nature was to be reserved for the royal assent and laid before both houses of the Imperial Parliament.[3] In 1929 the Constitution (Legislative Council) Amendment Act was passed. This introduced a new section 7A after s. 7. Section 7A provided that the Legislative Council was not to be abolished except in a specified manner. The manner specified was the submission of the bill after passage through

1. (1960) 34 A.L.J.R. 378.
2. The Legislature is defined by s. 3 as meaning His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly (subject to a contrary indication in the context or subject-matter).
3. The Australian States Constitution Act 1907 (Imperial) lays down the rules relating to reservation. By s. 1 (1) bills altering the constitution of the Legislature must be reserved. However, there is a proviso to the effect that this shall not affect bills in relation to which instructions have been given by the Monarch to the Governor, or where assent is given by the Governor by reason of a public emergency to a temporary bill.

both Houses to a referendum and approval by a majority of those voting at such a referendum.

In 1930 both houses of the New South Wales Legislature passed two Bills, one of which purported to repeal s. 7A, and the other purporting to abolish the Legislative Council.[4] These Bills were not submitted to a referendum. Certain members of the Legislative Council thereupon instituted a suit in the Supreme Court of New South Wales for a declaration that the Bills could not be lawfully presented for the royal assent and for an injunction restraining the presentation of the Bills. The declaration and injunction were granted by the New South Wales Full Court to which the case had been referred.[5] An appeal was taken to the High Court, the appeal being limited to the question whether the Parliament of New South Wales had power to repeal s. 7A or to abolish the Legislative Council except in the manner provided by s. 7A. The High Court dismissed this appeal[6] and the Privy Council upheld the judgments of the lower courts: *Attorney-General for N.S.W. v. Trethowan.*[7]

Trethowan's Case established the rule that the Legislature was bound to follow the manner and form laid down by s. 7A for the abolition of the Legislative Council, *i.e.*, submission to a referendum, and that a Bill could not be lawfully presented for the royal assent without this procedure being followed. Subsequent to this decision the Legislature of New South Wales passed the Constitution Amendment (Legislative Council) Act 1932 (No. 2 of 1933). This Act introduced two new sections into the Constitution Act of 1902: 5A and 5B. 5A dealt with money Bills. It provided that if the Legislative Council rejected or failed to pass a money Bill which had been passed by the Legislative Assembly, the Assembly might direct that the Bill be presented to the Governor for the royal assent notwithstanding that the Legislative Council had not assented. 5B dealt with Bills other than money Bills. It laid down a procedure whereby a Bill, passed by the Assembly, which the Legislative Council had rejected or failed to pass, could ultimately be presented for the royal assent without passage through the Legislative Council, provided that the following conditions were observed:

(1) the Legislative Council reject, fail to pass, or pass with amendment, a Bill passed by the Assembly;

(2) the Bill be passed again after an interval of three months by the Assembly and again rejected, not passed, or passed with amendments by the Council;

4. These were among the first legislative enactments of the Lang Ministry which was returned to power in 1930 after the defeat of the Bavin Ministry which had passed the 1929 amending act.
5. *Trethowan v. Peden*, 31 S.R. (N.S.W.), 183.
6. *Attorney-General (N.S.W.) v. Trethowan*, 44 C.L.R. (1930-1), 394.
[7.] *[Atto]rney-General (N.S.W.) v. Trethowan* 1932 [A.C.], 526.

(3) a free conference take place between managers of both Houses;[8]

(4) a joint sitting take place between members of both Houses;

(5) the Bill be then submitted to a referendum for approval.

It is to be noted that the Constitution Amendment (Legislative Council) Act 1932 was passed by both Houses of Parliament and approved by the electors in accordance with the procedure laid down in s. 7A.[9]

In 1959 the New South Wales Government brought in the Constitution Amendment (Legislative Council Abolition) Bill. This Bill provided by s. 2 that the Legislative Council was hereby abolished. A new section was added to the Constitution Act of 1902 as amended by inserting s. 7B after s. 7A. S. 7B provided that a Legislative Council should not be re-established except in the manner provided by the section, which was submission to a referendum and approval by the electors.

The Bill was passed by the Legislative Assembly on 2nd December 1959. On the same day the Legislative Council passed a motion that the Bill be returned to the Assembly without deliberation thereon. The basis of the motion was that the Bill should have originated in accordance with "long established precedent, practice and procedure" in the Legislative Council. On 31st March 1960 the Premier of New South Wales moved a motion to the effect that leave be given to bring in again the Bill in accordance with the procedure laid down in s. 5B of the Constitution Act. Leave was given and the Bill was again introduced. It was passed by the Legislative Assembly on 6th April 1960 and sent to the Legislative Council. The Council again refused to entertain discussion of the Bill on the basis of the claim of privilege and it was returned to the Assembly. On 7th April the Assembly by motion requested a free conference with the Council and named as its managers certain Ministers of the Crown. The Council passed a motion to the effect that it did not consider that any situation had arisen for the holding of a free conference and accordingly it refused to accede to the request of the Assembly. On 13th April the Council received a message from the Governor to the effect that he had decided to convene a joint sitting on the Bill between members of both Houses. The 20th April was appointed as a day for the holding of a joint sitting.

8. There are two forms of conferences—an ordinary conference at which managers (representatives) of both Houses meet and deliver communications in writing and a free conference at which discussion is allowed. See *May's Parliamentary Practice* (16th Ed.), 834-5.

9. The Act also reformed the method of choosing members of the Council by prescribing an elective process in place of the previous system whereby members were nominated by the Government. This put an end to the possibility of "swamping".

The Council by a majority of 33—22 passed a motion to the effect that it did not consider that a situation had arisen for holding a joint sitting and resolved that its members should not participate in such joint sitting. On 20th April twenty-three members of the Council and eighty-five members of the Assembly came together in the Legislative Council Chamber.[10] Deliberation on the Bill took place at this meeting. On 12th May the Legislative Assembly passed a resolution directing that the Bill be submitted to a referendum of electors in accordance with s. 5B of the Constitution Act. Thereupon, a suit was commenced by five members of the Legislative Council, one member of the Legislative Assembly and one member of the federal House of Representatives against the defendants, who consisted of the Premier, his Ministers and the Electoral Commissioner, for a declaration that the Constitution Amendment Bill 1960 was not a Bill which could properly or lawfully be submitted to a referendum, and for an injunction restraining the defendant Ministers from holding a referendum or from appropriating moneys from consolidated revenue in relation thereto, and the defendant Electoral Commissioner from taking any steps to submit the Bill to a referendum.

The suit came before McClelland J. in Equity, who referred it to a Full Bench which consisted of Evatt C.J., Owen, Herron, Sugerman and McClelland JJ. At the hearing, the defendants demurred *ore tenus* to the statement of claim. The Court by a majority of 4—1 dismissed the suit.[11] On an application for special leave to appeal to the High Court (which was treated as an appeal) the latter Court by a majority of 6—1 upheld the decision of the Supreme Court.[12]

II

At the outset of course the plaintiffs were under the obligation of establishing that they had a sufficient interest which would entitle them to pursue the remedies which they were seeking and that the grant of the declaration or an injunction would not interfere with the internal proceedings of Parliament. They were greatly assisted in this respect by an undertaking given by the defendants by which it was conceded that "an injunction might be granted at the suit of those plaintiffs who were members of the Legislative Council against the defendants who were Ministers of the Crown restraining them from taking any steps to hold the referendum if,

10. The President of the Council being absent, the Speaker took the chair.
11. Evatt C.J., Sugerman, Herron and McClelland JJ., Owen J. dissenting, 77 W.N. (N.S.W.), 767.
12. Dixon C.J., McTiernan, Kitto, Taylor, Menzies, Windeyer JJ., Fullagar J. dissenting, 34 A.L.J.R., 378.

in the events which have happened, it would be unconstitutional for the Bill to proceed to a referendum."[13]

The question of the jurisdiction of a court to examine matters which comprise matters of parliamentary process whereby a Bill is enacted into law has been the subject of discussion especially in the well-known article on *Trethowan's Case* by Professor Friedmann.[14] It will be remembered that in *Trethowan's Case* the Full Court of New South Wales assumed jurisdiction and granted an injunction to restrain the Bill in that case from being presented for the royal assent. The members of that court were of the opinion that the plaintiffs who were members of the Legislature had a sufficient interest to entitle them to sue. The basis of their opinion was that the plaintiffs would be deprived of parliamentary privileges if the threatened breach of the law was committed.[15] Moreover, the opinion was expressed that there was no unlawful interference with parliamentary process in granting the relief sought in view of the fact that s. 7A contained an express prohibition against presentation of a Bill for the royal assent which had not been submitted to a referendum.[16] One judge, Long Innes J., regarded the suit as being "in substance a suit the object of which is to prevent the two Houses of the Legislature from communicating to the third element thereof, His Majesty, their advice in regard to legislation in the process of making. It also, incidentally, prays in effect that this court should interfere with the internal affairs of Parliament."[17] However, on the balance of convenience he thought the injunction should be granted.[18]

The High Court, in granting special leave to appeal in *Trethowan's Case*, ordered that the appeal be limited to the question whether the Parliament of the State of New South Wales had power to abolish the Legislative Council or to alter its constitution.[19] Consequently, the vital issue of jurisdiction was excluded from argument before the High Court. However, a statement by Dixon J. (as he then was) seems to leave open whether the courts in any case could assume jurisdiction in this type of situation. "An Act of the British Parliament which contained a provision that no Bill repealing any part of the Act including the part so restraining its own repeal should be presented for the Royal Assent unless the Bill were first approved by the electors would have the force of law until the Sovereign actually did assent to a Bill on its repeal.

13. (1960) 77 W.N. (N.S.W.) at 769.
14. *Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change*, 24 A.L.J. (1950-1), 103.
15. See Street C.J., 31 S.R. (N.S.W.) at 204-6. Owen J. at 219. Long Innes J. at 232-3.
16. Street C.J. at 204-6. Owen J. at 219-221.
17. at 234.
18. at 235.
19. 44 C.L.R. at 399-400.

In strictness it would be an unlawful proceeding to present such a Bill for the Royal Assent before it had been approved by the electors. If, before the Bill received the assent of the Crown, it was found possible, as appears to have been done in this appeal, to raise for judicial decision the question whether it was lawful to present the Bill for that assent the courts would be bound to pronounce it unlawful to do so. Moreover, if it happened that, notwithstanding the statutory inhibition the Bill did receive the Royal Assent although it was not submitted to the electors, the Court might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside."[20] In *Hughes and Vale Ltd. v. Gair and Ors.* Dixon C.J. expressed the opinion that he had long entertained a doubt as to the correctness of the decision of the Full Court of New South Wales in *Trethowan's Case* even on the terms of the Act. He also considered that the Act in question in *Trethowan's Case* was of a special kind in that it contained a direct statutory prohibition against presentation of the Bill for the Royal Assent.[21]

In the article cited above, Professor Friedmann argues that the English Courts, accustomed to the principle of parliamentary supremacy, may be loath to interfere in any way with a Bill which is before Parliament while the Australian Courts, existing in an environment where legislative power is limited, may have no such inhibitions.[22] In a recent English case, *Harper and Ors. v. The Secretary of State for the Home Department*,[23] the plaintiffs sought an injunction against the defendant restraining him from submitting to the Queen-in-Council draft Orders drawn up by a Commission on parliamentary constituency boundaries. Roxburgh J. granted an interim *ex parte* injunction. On appeal, the Court of Appeal held that the Commission had not departed from the rules laid down in the Act which controlled it. The members of the Court criticized the granting of the *ex parte* injunction on the ground that Parliament had not contemplated that it would be competent for the courts to interfere in this type of matter. What is significant in their judgment, however, is a short reference to Trethowan's case: "Trethowan's case can be distinguished as the Legislature of New South Wales had under the Australian Constitution limited legislative functions. We are in no sense here concerned with a

20. 44 C.L.R. at 426.
21. 90 C.L.R. (1953-4) 203 at 204-205.
22. *op. cit.*, at 106-8.
23. [1955] 1 Ch. 238.

Parliament or Legislature having limited legislative functions according to the Constitution."[24]

It might be thought then that while a strong tradition would prevent an English court from interfering in some way with parliamentary process, Australian courts, which were not enured to the tradition, would take a different view. And indeed, in *McDonald v. Cain*[25] the Full Court of Victoria assumed jurisdiction in a case of this nature. There two members of the Legislative Assembly of Victoria brought an action against Ministers of the Crown seeking a declaration that it was contrary to law for the defendants to present to the Governor for his assent a Bill providing for new electoral districts. The Bill had been passed in the Assembly with an absolute majority but with less than an absolute majority in the Council. The plaintiffs contended that under the Victorian Constitution Act a bill dealing with electoral boundaries must be passed by an absolute majority of both Houses. The members of the Court (Gavan Duffy, Martin and O'Bryan JJ.) rejected this contention and held that the Bill could be passed by a simple majority, but they also discussed the question whether they had jurisdiction. Martin J. said that ministers of the Crown had the obligation of obeying the law. A declaration did not prevent Ministers from giving advice to the Governor, but would require that, should they advise him, such advice should be correct in law.[26] O'Bryan J. was of the same opinion: "A declaration in such a case will authoritatively inform and bind those 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."[27]

The Full Court of New South Wales in *Trethowan's Case* and the Full Court of Victoria in *McDonald v. Cain* seem to have regarded a prejudicial effect on the plaintiffs' membership of Parliament as an interest sufficient to give the plaintiffs a *locus standi*.[28] The members of the Full Court of Victoria were even prepared to regard presence on the voters' rolls as creating a sufficient nexus between the individual plaintiffs and the interest sought to be

24. *ibid.*, 253. See also *Bilston Corporation v. Wolverhampton Corporation* [1942], 1 Ch. 391 at 393, where Simonds J., although admitting that jurisdiction in the abstract existed (in a case where an injunction was sought restraining one of the parties from petitioning for an Act of Parliament) said that it was difficult to conceive of a case in which it would properly be exercised.

25. (1950) 60 A.L.R., 965.

26. *ibid.*, at 978.

27. *ibid.*, at 987. Gavan Duffy J. did not decide the point. See his judgment at 972.

28. 60 A.L.R. at 978, 988. See also n. 15.

protected by their action in that their voting rights would be affected by the proposed changes in boundaries.[29]

A significant difference between these two cases and *Clayton's Case* was to be found in the fact that in *Clayton's Case* the defendants had given an undertaking not to dispute the court's jurisdiction. It might be surmised that it was the intention of the parties not so much to banish discussion of what was important principle of law as to reach a speedy determination of the substantial question, namely, whether the Government had acted contrary to the law in the steps that it had taken to abolish the Council. In the Full Court of New South Wales, Evatt C.J. and Sugerman J. adopted a view that would distinguish Australian from English practice. They recognized that in matters of major public interest the courts were empowered to assume jurisdiction and to act by injunction or declaration to prevent a Bill from being presented for the royal assent contrary to law. "A degree of convenience amounting virtually to necessity makes it proper to determine at an appropriately early stage whether such a measure, if ultimately enacted, will have been enacted with constitutional validity and in accordance with the forms required for its enactment, and the urgency in the public interest of an early determination of this question has been recognized by the entry into the agreement earlier referred to."[30] Their Honours distinguished *Hughes and Vale Pty. Ltd. v. Gair* as a case arising out of an infringement of a provision of the Constitution of the Commonwealth.[31] They considered that in deciding a case such as the one before them the Court was determining the question of constitutional validity in relation to the ultimate source of constitutional power of the State of New South Wales, *i.e.*, the authority of the Imperial Parliament, and that it was acting in anticipation of a question which could be expected to arise if the Bill was approved by the electors and received the royal assent. That question would be whether an enactment of the reconstituted Legislature would be part of the law of the State.[32] Owen J. considered that it was necessary for the court to enquire "to an extent" into the internal proceedings of Parliament in order to determine whether the requirements of manner and form prescribed by law had been fulfilled.[33]

It would seem from the statement of Evatt C.J. and Sugerman J. that they would have been prepared to assume jurisdiction even without a concession by the defendants on this question. Indeed it would seem that their opinion is in accordance with a basic principle of judicial power that jurisdiction exists independently of

29. 60 A.L.R. at 972, 978, 988.
30. 77 W.N. (N.S.W.) at 777.
31. *ibid.*
32. *ibid.*
33. 77 W.N. (N.S.W.) at 794.

consent and that consent cannot vest in a court a jurisdiction which it does not otherwise possess.

However, the judgments of the members of the High Court are marked by a definite hostility to the assumption of jurisdiction in this type of case, even taking into account the concession made by the defendants. Dixon C.J., McTiernan, Taylor and Windeyer JJ., in a joint judgment, expressed great doubt as to whether the plaintiffs had a sufficient interest to give them a *locus standi*.[34] This would seem to cast doubt on the dicta of the Full Court of Victoria in *McDonald v. Cain* to the effect that membership of or connection with the legislative body affected by the proposed legislation confers a *locus standi*. The Court did not elaborate their doubts in this matter but it would seem that they might envisage the Attorney-General acting in the interests of the public as a whole as alone possessing sufficient interest to bring such an action. Furthermore, their Honours distinguished Trethowan's case on the ground that in that case there existed a statutory prohibition against presentation of a Bill within the operation of s. 7A for the royal assent.[35] They were of the opinion that the New South Wales Court in the present case would have been powerless to act without the concessions made by the defendants. Even with the concession the Court was led into an enquiry into matters of parliamentary procedure and into going beyond the duty of deciding whether an Act of Pa liament was valid. If they were to decide the validity of a statute actually adopted, some of the matters would have been seen in truer perspective and put on one side "as matters belonging to legislative process which could not be reviewed after the statute is assented to."[36] The implication is that the court can only enquire into the question of validity after the Bill has been enacted into law.

The view of the High Court then seems to cast doubt on two propositions which had received judicial sanction in previous cases:

(1) a declaration or injunction may be granted at the suit of members of Parliament who are adversely affected by a proposed Bill relating to the chamber of which they are members;

(2) that an injunction will issue to restrain presentation of a Bill for the royal assent.

The result of this view would seem to be that any agreement to jurisdiction on the part of the defendants has no legal effect and will not lead to the conferment of jurisdiction on the Court. However, despite their doubts on the question of jurisdiction the High Court was prepared to examine the substantial issues which were

34. 34 A.L.J.R. at 380. 35. *ibid.*
36. *ibid.*, at 381.

involved in the application for special leave to appeal from the New South Wales court. The two substantial issues were, firstly, the validity of s. 5B of the New South Wales Constitution Act, the procedure of which the Government purported to adopt in passing the Abolition Bill of 1960; secondly, the extent to which the Government complied with the terms of s. 5B in attempting to resolve the deadlock between the Assembly and the Council.

III

As was pointed out earlier, s. 5B of the Constitution Act was inserted in 1932 as a means of resolving any deadlocks that might occur between the Assembly and Council.[37] It was a general provision applying to all Bills except money Bills. It therefore would seem to extend to Bills abolishing or changing the structure of the Legislative Council.

It was contended for the plaintiffs that s. 5B was invalid as being contrary to s. 5 of the Colonial Laws Validity Act. In their argument, the body in which legislative power was invested by s. 5B was a legislature different from that referred to in the Colonial Laws Validity Act. Such a legislature, it was said, was a bi-cameral one consisting of Legislative Assembly and Legislative Council. This argument was rejected by the Full Court of New South Wales on the authority of a previous decision of the High Court, *Taylor v. Attorney-General for Queensland*.[38]

Taylor's Case dealt with a provision similar to s. 5B. It was s. 4 of the Parliamentary Bills Referendum Act 1908 of Queensland, which provided for the ultimate submission of a Bill to a referendum without the assent of the Legislative Council in the event of disagreement between the two Houses.[39] It was under this provision that the Queensland Government had in 1917 introduced a Bill to abolish the Legislative Council.[40]

The Full Court of Queensland had taken the view that s. 5 of the Colonial Laws Validity Act covered a situation where there was merely a change in internal parliamentary procedure and did not authorize the abolition of a chamber of the legislature.[41] Indeed

37. *Ante*., p. 32.
38. (1916-7) 43 C.L.R., 457.
39. There was, however, no provision for a joint sitting between the two houses.
40. For the details of the passage of this Bill see 23 C.L.R. at 406-463.
41. [1917] St. R. (Qd.) 208 at 238. S. 5 is as follows:—"Every Colonial Legislature shall have, and be deemed at all times to have had, full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and any Representative Legislature shall in respect of the Colony under its Jurisdiction have, and be deemed at all times to have had, full Power to make Laws respecting the Constitution, Powers and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said Colony."

in their view s. 5 of the Colonial Laws Validity Act read together with the Queensland Constitution prevented such an abolition: "We think that the power to abolish can only come from the same source as the power to create, and that it is not within the power of the legislature of Queensland, as the Constitution now stands, or during its history has stood, to destroy the existence of either chamber, each being an essential part of the organ of government."[42]

However this view was rejected when the case came on appeal to the High Court.[43] Barton J. in interpreting s. 5 of the Colonial Laws Validity Act said: "I take the constitution of a legislature, as the term is here used, to mean the composition, form or nature of the House of Legislature where there is only one House, or of either House if the legislative body consists of two Houses. Probably the power does not extend to authorize the elimination of the representative character of the legislature within the meaning of the Act."[44] Barton J. might have arrived at the opposite conclusion if the Queensland Constitution Act (1867) was alone applicable for this provided by s. 2 for the passage of laws "by Her Majesty with the advice and consent of the Legislative Council and the Legislative Assembly." However, he considered that the effect of s. 5 of the Colonial Laws Validity Act was to vest in Parliament the power of changing the constitutional structure and provided a means whereby in the event of disagreement between the Houses the assent of the Legislative Council could be dispensed with. This procedure would extend not only to ordinary Bills but also to Bills abolishing the Council itself.[45] Isaacs J. explained the change effected by the Parliamentary Bills Referendum Act as no longer requiring "as an absolute condition of legislation the concurrence of both Houses in advising the Crown. After two failures to agree, the advice of the Legislative Assembly is sufficient provided there be obtained the approval of a majority of electors at a referendum."[46] Isaacs J. was not impressed by the argument of Feez K.C., counsel for the plaintiffs, to the effect that s. 5 of the Colonial Laws Validity Act envisaged changes in the legislative structure only of an internal nature (such as qualifications of members or electors). "I read the words 'constitution of such legislature' as including the change from a uni-cameral to a bi-cameral system or the reverse. Probably the representative character of the legislature is a basic condition of the power relied upon and is preserved by the word 'such' but, that being maintained, I can see no reason for cutting down the plain natural meaning of the words in question so as to exclude the power of a self-governing community to say that for State purposes one House

42. *ibid.*, at 239.
43. 23 C.L.R., 457.
44. *ibid.*, at 468.
45. *ibid.*, at 469-470.
46. *ibid.*, at 471.

is sufficient as its organ of legislation."[47] Gavan Duffy and Rich J.J. also agreed the power conferred by s. 5 was not restricted to matters of internal procedure. They recognized, however, that the representative nature of the legislature could not be abolished.[48] Both Isaacs and Powers J.J. were also of the opinion that the power to change the constitution of the legislature did not extend to a law dispensing with the Crown as an element in the legislative process.[49]

The principle then to be derived from the reasons of the judges is that s. 5 of the Colonial Laws Validity Act vested in the Legislature the power to lay down a method of legislating by which the assent of one House to proposed legislation could ultimately be dispensed with. This procedure might extend to a Bill which sought to abolish one House. The exceptions, however, are that the representative character of the Legislature must be preserved and that the assent of the Crown could not be dispensed with. These two exceptions would prevent a State Legislature from enacting legislation which would establish a republican type of constitution (a situation which would be prevented not only by the Colonial Laws Validity Act but also by the Commonwealth Constitution Act) or a dictatorial type of constitution which would vest legislative power in one man or in a junta or (as was suggested in argument in *Clayton's Case*) would provide for the passage of legislation by a minority of the Legislature.

This, of course, focuses attention on the question to what extent the Legislature can divest itself of authority and transfer it to some other body. In *Clayton's Case* the High Court was not prepared to examine this question in isolation from the particular statutory powers of the New South Wales Legislature, but there is some discussion of the question in the judgment of Evatt C.J. and Sugerman J. in the Full Court of New South Wales.[50] Mr. Bowen Q.C., counsel for the plaintiffs, had submitted that s. 5B of the Constitution Act had infringed the basic constitutional requirement that a subordinate Legislature could not divest itself of authority at the same time as it continued in existence. The effect of s. 5B, he said, was that while the power of the Legislature to make laws in a bi-cameral manner (*i.e.*, by a body consisting of two houses) continued to exist, s. 5B provides a means whereby legislation could be passed in a unicameral manner (*i.e.*, without the assent of one house). Strong reliance was placed on a dictum of the Privy Council in *Re Initiative and Referendum Act*[51] and a dictum of

47. *ibid.*, at 474.
48. *ibid.*, at 477-9.
49. *ibid.*, at 472, 474, 481.
50. 77 W.N. (N.S.W.), 777-779.
51. "No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, . . . but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence." [1919] A.C. 935 at 945.

Dixon J. (as he then was) in *Dignan's Case*[52] in support of the argument that there had been an unlawful abdication of authority. Evatt C.J. and Sugerman J. did not accept this argument:

"The Legislative Council remains a part of the Legislature and of the legislative process, true as it may be that its capacity is limited. In order that s. 5B may operate the Bill must be twice presented to it, and the Legislative Council must twice reject or fail to pass it, or pass it with an amendment to which the Legislative Assembly does not agree. Its capacity, that is to say, is limited to deliberation upon and concurrence in the Bill if it is prepared to accept it; it is deprived of an uncontrolled capacity to reject conclusively, since its rejection is only effective if it coincides with the express wish of the majority of the electors. However, this is merely a procedure for resolving deadlocks between the two Houses, such as, in varying forms, is also found not only in rigid but also sometimes in flexible constitutions."[53] The High Court, as I said, was not prepared to examine this argument in isolation but based their decision on the authority which s. 5B derived from the New South Wales Constitution.[54] It might seem then that *Clayton's Case* would be merely a restatement (*mutatis mutandis*) of the principles in *Taylor's Case*. However it differs from *Taylor's Case* in an important respect: the later court placed emphasis on the New South Wales Constitution Act as a source of authority for s. 5B and doubted whether the Colonial Laws Validity Act authorized the enactment of a provision such as s. 5B.[55]

It will be of interest at this stage to summarize the early history of the New South Wales Constitution Act. By s. 32 of an Imperial Act (13 & 14 Vict. Ch. 59)[56] the Governor and Legislative Council of New South Wales were authorized to establish instead of a Legislative Council a bi-cameral legislature consisting of a Council and a House of Representatives. Pursuant to this power the New South Wales Legislative Council passed a Constitution Bill which was reserved for the royal assent. This Bill (later known as the Constitution Act) was contained in a schedule to an imperial act 18 & 19 Vict. Ch. 54 (later known as the Constitution Statute) which gave the Queen power to assent to the reserved Bill (with certain amendments made to it) which was contained in the schedule.

52. "It should also be noticed that, in the opinion of the Judicial Committee, a general power of legislation belonging to a legislature constituted under a rigid constitution does not enable it by any form of enactment to create and arm with general legislative authority a new legislative power not created or authorized by the instrument by which it was established." (1931-2) 46 C.L.R., 73 at 95-6.

53. 77 W.N. (N.S.W.) at 778. Such a situation of course has some similarity with the cases where a subordinate legislative body passes conditional legislation. See *R. v. Burah*, 3 App. Cas. 889. *King-Emperor v. Benoari Lal Sarma & Ors.* [1945], A.C. 14.

54. 34 A.L.J.R. at 387-8.

55. *ibid.*, at 388.

56. The Australian Constitutions Act, 1850.

The authority then of the New South Wales Legislature derived ultimately from an imperial enactment, immediately from its own enactment. The Constitution *Statute* by s. 4 made it lawful for the New South Wales Legislature to make laws repealing or altering any of the provisions of that reserved Bill (*i.e.*, the Constitution Act) subject to conditions imposed by the reserved Bill (such as numerical majorities, reservation for the royal assent) unless those conditions were repealed by the New South Wales Legislature. The Constitution *Act* by s. 1 provided for the establishment of a Legislative Council and Legislative Assembly which would have authority to make laws for the peace, order and good government of the Colony in all cases whatsoever. In 1902 the Constitution Act with amendments was repealed and consolidated in a new Act. S. 3 of the new Act defined the Legislature as meaning the Crown with the advice and consent of the Legislative Council and Legislative Assembly. S. 5 of the Act provided as follows: "The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever. Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly." S. 7 gave the Legislature power to alter laws relating to the Legislative Council (with a proviso that such Bills must be laid before the Imperial Parliament before the royal assent be given).[57]

As I pointed out earlier, the High Court in *Clayton's Case* considered that s. 5 of the Constitution Act rather than s. 5 of the Colonial Laws Validity Act was the source of authority for s. 5B. It will be remembered that in *Taylor's Case* the members of the Court gave an extended meaning to the words "constitution, powers and procedure of the legislature" in the Colonial Laws Validity Act so as to cover a provision such as s. 5B.[58] Similarly, in *Trethowan's Case* the authoritative force of s. 7A (which provided that a bill to abolish the Council or to alter its powers should be submitted to a referendum) was considered to be derived from s. 5 of the Colonial Laws Validity Act. Rich J. considered that the Colonial Laws Validity Act was "the final and authoritative expression of every colonial representative legislature's power to make laws respecting its own constitution and procedure."[59] It did not deal with narrow questions of parliamentary procedure but with the "entire process

57. See n. 3.
58. See ante p. 41-2. Isaacs J., however, in *Taylor's Case* considered that clause 22 of the Order-in-Council (1859) establishing the Colony of Queensland was wide enough to support the validity of the Parliamentary Bills Referendum Act and might support constitutional changes outside the ambit of s. 5 of the C.L.V.A. 23 C.L.R. at 476.
59. 44 C.L.R. at 417.

of turning a proposed law into a legislative enactment."[60] Dixon J. (as he then was) was also of the opinion that s. 7A was a law respecting the powers of the Legislature. "An interpretation which restricts application of the words of the proviso to conditions occurring, so to speak, within the representative legislature, confines to matters of procedure part of a constitutional provision basal in the development of self-governing Colonies. The more natural, the wide and the more generally accepted meaning includes within the proviso all the conditions which the Imperial Parliament or that of the self-governing State and Colony may see fit to prescribe as essential to the enactment of a valid law."[61] In *Trethowan's Case* the Privy Council also considered that s. 5 of the Colonial Laws Validity Act was the master section, although they intimated that s. 4 of the Constitution Statute might still have some operative effect.[62]

In *Clayton's Case* the members of the Full Court of New South Wales considered that s. 5B was a law respecting the constitution, powers or procedure of the Legislature. Herron J., for example, said that "Wider words than 'full power to make laws respecting the constitution, powers and procedure of such legislature' can hardly be used in conferring power to make constitutional laws."[63] However, the members of the High Court (with the exception of Fullagar J.) cast doubt on the application of the words "constitution, powers or procedure of the legislature" to s. 5B. The reason given was that no alteration was made to the legislature itself. The legislature was left as it was—what was prescribed was a method whereby in the event of disagreement between the two Houses, the disagreement could ultimately be resolved by the passage of a Bill into law without the concurrence of one House.[64]

In reconciling *Clayton's Case* with the previous decisions one might say that the present view of the High Court is that the words "constitution, powers or procedure of the legislature" in the Colonial Laws Validity Act refer to the enactment of provisions imposing requirements which in some way modify the constituent parts of the legislature but do not extend to deadlock provisions such as s. 5B where the actual constituent parts of the legislature are left intact and a method is prescribed in substitution for the normal legislative process in the case of a disagreement between the two Houses. It therefore seems that the statements of the judges in both *Taylor's Case* and *Trethowan's Case* to the effect that all that pertains to the process of turning a Bill into law is covered by the words of s. 5 were too wide.

60. *ibid.*, at 418-9.
61. *ibid.*, at 432-3.
62. [1932] A.C. 526 at 539.
63. 77 W.N. (N.S.W.) at 799.
64. 34 A.L.J.R. at 387. Fullagar J. was of the opinion that s. 5 of the Colonial Laws Validity Act did confer power. *Ibid.*, at 391.

If then s. 5 of the Colonial Laws Validity Act did not provide the source of authority for s. 5B what other section or Act did? Before the Full Court of New South Wales in *Clayton's Case* two of the judges (Evatt C.J. and Sugerman J.), referring to the dictum of the Privy Council in *Trethowan's Case* previously cited, considered that s. 4 of the Constitution Statute was merely supplementary to s. 5 of the Colonial Laws Validity Act.[65] In contrast, the judges of the High Court found the complete source of authority to reside in s. 5 of the Constitution Act. In the view of Dixon C.J., McTiernan, Taylor and Windeyer JJ., this section conferred complete authority with reference to New South Wales on the Legislature of that State and this power extended to alterations of the Constitution Act itself, including the passage of a law providing a procedure whereby the assent of one House (subject to the restrictions noted previously in *Taylor's Case*) might be dispensed with. In other words, s. 5 of the Constitution Act of 1902 conferred constituent as well as ordinary power.[66] Menzies J., in a separate judgment, examined the history of the Constitution Act and came to the conclusion that s. 5 of the 1902 Act, together with s. 1 of the original Constitution Act, could be regarded as giving power to alter or repeal the Constitution once the effect of the Constitution Statute (the imperial enactment) was exhausted.[67] This would mean that the authority of the New South Wales legislature today is based on a local and not an imperial enactment.

However, all the judges in the High Court were agreed that this did not mean that s. 5 of the Colonial Laws Validity Act was inapplicable to constitutional legislation of the State which did not concern the "constitution, powers or procedure" of the Legislature. While it did not provide the source of authority for legislation which fell outside this category, it did control such legislation by means of the proviso which required that laws be passed in the "manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said Colony."[68] This would mean that the powers of the Colonial Legislature enumerated in the first part of s. 5 of the Colonial Laws Validity Act are merely illustrative and not exhaustive of the constitutional powers conferred and that the proviso controls not only laws relating to constitution, powers and procedure of the Legislature but all laws of a constitutional nature. There is no doubt that the members of the High Court recognized that the proviso is still in operation with regard to such laws even though their authoritative source

65. 77 W.N. (N.S.W.) at 777.
66. 34 A.L.J.R. at 388. This latter proposition was of course established in *McCawley's Case* [1920] A.C. 691.
67. 34 A.L.J.R. at 396-8, 397.
68. *ibid.*, at 387-8.

arises outside the Colonial Laws Validity Act.[69] The consequence of this view is that any Bill leading to a deadlock between the two Houses could only be passed into law without the assent of the Legislative Council by following the manner and form laid down in s. 5B.

IV

The alleged privilege of the Legislative Council.

I want now to examine the manner and form laid down in s. 5B and to see to what extent the Constitution Amendment Bill of 1960 complied with it. The plaintiffs had submitted that as a matter of privilege the Bill, in so far as it affected the Legislative Council, should have originated in that Chamber, that this privilege was a matter of law within the proviso of s. 5 of the Colonial Laws Validity Act, and that the failure of the Government to introduce it first in that Chamber meant that it had failed to comply with the proper manner and form relating to Bills of this nature.[70] Reference was made to Rule 2 of the Standing Orders of the Council (as amended the 15th May 1951). The Rule was as follows: "In all cases not specially provided for by these Rules or Orders or other Rules and Orders hereafter adopted resort may be had to the Rules, Forms and Usages of the Imperial Parliament as laid down in the latest edition of May's Parliamentary Practice which shall be followed as far as the same can be applied to the proceedings of this House, and in the Committee of the whole House, or any other Committee." The relevant section in May's work is: "a Bill which concerns the privileges or proceedings of either House should, in courtesy, commence in that House to which it relates."[71] It was submitted that this was a legal privilege, evidenced so far as the Legislative Council of New South Wales was concerned by weighty practice, which became a Standing Order by virtue of Rule 2. It was further submitted that all Rules and Standing Orders of the New South Wales Legislature had the force of law by virtue of s. 15 of the Constitution Act of 1902, which empowered the Council and Assembly to adopt Standing Rules and Orders

69. In *Trethowan v. Peden*, 31 S.R. (N.S.W.) 183 Dr. Evatt K.C., in argument had submitted that the power of alteration and repeal, conferred by s. 4 of the Constitution Statute, was so complete as to exclude any right in the Parliament of N.S.W. to impose any binding terms upon a succeeding Parliament. This view was accepted by Long Innes (at 225) on the basis of the maxim *Generalia specialibus non derogant*, but rejected by the other judges. In the view of Long Innes J. the Colonial Laws Validity Act was a general act in this context.

70. The case of *Barton v. Taylor* (1886) 11 A.C. 197 at 203 establishes the principle that in the case of a colonial legislature privilege is conferred either by statute or by the *lex et consuetudo parliamenti* so far as it is applicable. The decision of the Judicial Committee makes it clear that only limited powers fall within this second category.

71. 16th Ed., p. 492.

which, on being laid before the Governor and being approved by him, were to become "binding and of force."

The view of Evatt C.J. and Sugerman J. in the Supreme Court was that such a claim of privilege even if it could be considered as having statutory force could not prevail over the clear words of s. 5B, which envisaged that any Bill to which the section applied would originate in the Assembly.[72] Herron J. pointed out that s. 5 of the Constitution Act of 1902 by requiring money Bills to originate in the Legislative Assembly implied that all other Bills might originate in either House and therefore it negatived the existence of the privilege claimed.[73] He also considered that the words of s. 15 of the Constitution Act did not give statutory force to the asserted Rule as they did not cover the bringing in of a Bill but only its passage.[74] Moreover, s. 5B (ss. 5) expressly extended the operation of s. 5B to a Bill to which s. 7A applied, *i.e.*, to a Bill affecting the powers of the Legislative Council. As Herron J. pointed out, s. 7A laid down one manner and form when the Houses were in agreement, while s. 5B laid down another manner and form when the Houses were in disagreement.[75] The members of the High Court were in agreement with the Supreme Court on this point.[76]

The real substance of the plaintiffs' case was to be found in their argument that the proposed Bill had not followed the manner and form laid down by s. 5B itself. It will be remembered that s. 5B laid down a certain procedure which consisted of the following steps:

(1) the Legislative Council's rejection or failure to pass a Bill originating in the Assembly;
(2) re-enactment after an interval by the Assembly and further rejection or failure to pass by the Council;
(3) a free conference between managers of the Houses;
(4) a joint sitting between members of the Houses;
(5) submission of the Bill to a referendum.

A number of these matters fall within the category of internal parliamentary procedure and it is obvious that the High Court would not have been prepared to examine the steps carried out by the Government if it had not been for the concession given by the defendants.[77]

The meaning of the phrases "reject", "fail to pass".

It was contended by the plaintiffs that the Legislative Council had not "rejected" or "failed to pass" the Bill. It was said that

72. 77 W.N. (N.S.W.) at 784-5.
73. *ibid.*, at 805.
74. *ibid.*
75. *ibid.*, at 801.
76. 34 A.L.J.R. at 382-3.
77. 34 A.L.J.R. at 380-1.

there was a specific parliamentary sense of the word "rejection"—refusal to acquiese after deliberation—and that therefore the Council had not rejected the Bill. As far as the phrase "failure to pass" was concerned, reference was made to ss. 4 of s. 5B which provided that "for the purposes of this section the Legislative Council shall be taken to have failed to pass a Bill if the Bill is not returned to the Legislative Assembly within two months after its transmission to the Legislative Council and the Session continues during that period". It was argued that this section contained an exhaustive definition of the words "failure to pass" and that the Legislative Council in returning *in limine* the Bill on the basis of its alleged privilege had by its action not come within the operation of ss. 4.

The members of the New South Wales Full Court (with the exception of Owen J.) did not accept these arguments. Herron J. pointed out that there were some ways of refusing assent to Bills which did not amount to a consideration of the provisions of a Bill and that ss. 4 of s. 5B was merely illustrative of one way in which the Council might fail to pass a Bill, *i.e.*, by inactivity.[78] Moreover, there was no specific parliamentary sense of the word "reject". Rejection could occur even though a Bill was not considered on its merits.[79] The High Court was in agreement with the Supreme Court on this point.[80] Owen J., however, considered that the word "reject" implied a deliberation on the merits of the Bill and also that ss. 4 provided an exhaustive definition of the phrase "failure to pass" with the consequence that a basic requirement of s. 5B had not been fulfilled, *i.e.*, a rejection or a failure to pass. Ss. 4 did not apply as the Bill had in fact been returned and in so far as the Council had not deliberated on the merits of the Bill it could not be said to have rejected it.[81]

The meaning of the phrase "after a free conference between managers".

In the Supreme Court Evatt C.J. and Sugerman J. were of the opinion that these words did not create a condition precedent for the ultimate submission of a Bill to a referendum. The words were directory rather than mandatory. Failure to comply with them did not mean that the subsequent action of the Government was invalid. "The words of the section may be taken as imposing a duty but it is not a duty involving such consequences that it may be enforced by *mandamus*, or that an action lies for breach of it, or that non-performance of it may amount to non-fulfilment of a condition precedent having similar consequences in law to those which may attach to such a non-fulfilment in private transactions. The words in question are addressed to the Houses them-

78. 77 W.N. (N.S.W.) at 806.
79. *ibid.*
80. 34 A.L.J.R. at 384, 392, 399.
81. 77 W.N. (N.S.W.) at 795-6.

selves (regarding them, as Mr. Bowen has properly pointed out, as responsible bodies) as part of a wider duty to endeavour to reach agreement if they can, which is the real matter in question, and as indicating one step amongst others either indicated in the Statute or left to be initiated by the Assembly, towards that end. . . ."[82] In their view proper tender of a free conference by the Assembly rejected without cause by the Council was to be regarded as equivalent to the holding of one.[83] McClelland J., on the other hand, regarded the provision as mandatory but as applicable only where the Legislative Council agreed to a holding of a conference within a reasonable time and was prepared to do all things necessary to carry it out.[84] Herron J. said that the provision could either be regarded as directory or that a condition could be implied relating to the Council's willingness to participate in a conference.[85]

The view of the majority in the High Court was that the words were not mandatory but directory and did not create a condition precedent to the exercise of the power of the Governor to call a joint sitting of members, and that therefore the failure to hold a free conference did not lead to the invalidation of the steps taken to hold the referendum.[86] Kitto J. in a separate judgment differed from the majority in holding that all the steps laid down in s. 5B were mandatory. In his view every step was conditional upon the completion of the preceding steps. The Council's consent should continue to be indispensable for the enactment of a Bill, except where a defined course had been precisely followed.[87] However, he thought that a condition should be implied that the Council would be willing to send managers to a free conference. Therefore the provision had no operation where this willingness was not present.[88]

Fullagar J. dissented from the majority. He thought that the provision relating to a free conference was mandatory and that no implication could be read into it that the Council must be willing to co-operate. He could not see how some requirements of the section could be regarded as directory and others mandatory. In his opinion, all of them were co-ordinates requiring to be fulfilled in the particular manner and form prescribed.[89]

The Joint Sitting.

The members of both the Supreme Court and the High Court (except Owen J. who offered no opinion, and Fullagar J., who dissented) agreed there had been a joint sitting despite the fact that the Upper House as a whole had refused to attend a joint sitting. It was pointed out by Herron J. that the section referred to a

82. *ibid.*, at 787.
83. *ibid.*, at 788.
84. *ibid.*, at 820-1.
85. *ibid.*, at 807-8.
86. 34 A.L.J.R. at 386.
87. *ibid.*, at 395.
88. *ibid.*
89. *ibid.*, at 392-4.

joint sitting between the members of the Houses, and not to a joint sitting between the Houses.[90] Fullagar J., however, considered that what had taken place was only a meeting between members and, in so far as this provision was a mandatory requirement, the proposed submission of the Bill to a referendum was invalid.[91]

Conclusion.

These then were the substantial[92] grounds on the basis of which the High Court arrived at the conclusion that the procedure adopted by the Government leading up to its preparations to submit the Constitution Amendment Bill to a referendum was valid and was in accordance with s. 5B of the Constitution Act which itself derived its authority from s. 5 of the Act.

Viewing the decision as a whole, one might say that its most important effect is to emphasize the local Constitution Act rather than the Colonial Laws Validity Act as the source of authority for the State of New South Wales (and, impliedly, for States with similar constitutions) to change its constitution.

It also seems that the High Court will refuse to intervene to restrain a Bill from being presented for the royal assent, even where a concession on this point has been made by the parties against whom relief is sought. Therefore, an action will be entertained by Australian courts only after a Bill has been enacted into law. In such an action the court will not entertain discussion of matters of parliamentary procedure. Many of the matters which were judicially examined in *Clayton's Case* (*e.g.*, free conferences, joint sittings) would therefore remain outside the field of enquiry of the Court. It would only be where, as in *Trethowan's Case*, some extra-parliamentary process was ordained (*e.g.*, submission of a Bill to a referendum) that the Court would pass judgment on the question whether the complete legislative procedure as required by the proviso of s. 5 of the Colonial Laws Validity Act had been followed.

Even in this type of case a plaintiff would have to overcome the obstacle of proving that he had a sufficient interest, and the doubts expressed by the High Court on the *locus standi* of members

90. 77 W.N. (N.S.W.) at 808.
91. 34 A.L.J.R. at 392.
92. It was also argued that s. 15 of the Commonwealth Constitution (which provides for the filling of a casual vacancy in the Senate by a vote of the "Houses of Parliament of the State for which he was chosen, sitting and voting together") prevented the abolition of the Upper House. This argument was summarily rejected by the High Court and the Full Court on the ground that it was not intended to terminate the power of a State, if it existed, to change to a unicameral system. 34 A.L.J.R. at 387; 77 W.N. (N.S.W.) at 782-3, 801.

of parliament might indicate that only the Attorney-General acting in the public interest could institute such an action. Of course, the Attorney-General of the State in which the disputed enactment had been made, in so far as he is a member of the Government, would be loath to bring such an action. One might surmise that the Attorney-General of the Commonwealth, acting as guardian of the Commonwealth Constitution (which, by s. 106, gives sanction to the State Constitutions) would then be entitled to intervene.

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