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vency proceedings, to call upon the debtor to "satisfy the judgment." I am strongly inclined to think that we should not add anything by way of implication to the express requirements of the section, or find a new pitfall for creditors seeking their dues, or lay additional technical responsibilities on sheriff's officers. However, the question has not yet arisen, and I concur with my learned brothers that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Case remitted to the Supreme Court. Respondent to pay costs of appeal. Costs of first hearing to be costs in the proceedings.

Solicitor, for appellant, *W. R. Rylah.*

Solicitor, for respondent, *A. R. Daly.*

B. L.

Discd *West* v *Deputy Commissioner of Taxation (NSW)* (1937) 56 CLR 657

Discd *McCawley* v *R* (1918) 26 CLR 9

[HIGH COURT OF AUSTRALIA.]

SIR POPE COOPER, CHIEF JUSTICE OF THE SUPREME COURT OF QUEENSLAND . . } APPELLANT;

AND

COMMISSIONER OF INCOME TAX FOR THE STATE OF QUEENSLAND . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 22, 23, 24; *June* 28.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Income Tax (Consolidated) Acts 1902-4 (*Qd.*) (4 *Edw. VII. No.* 9), *secs.* 3, 7, 12, 58—*Income Tax Declaratory Act* 1905 (*Qd.*) (5 *Edw. VII. No.* 34), *sec.* 2—*Order in Council, 6th June,* 1859, *pars.* II., XV., XVI., XXII.—*Constitution Act* 1867 (*Qd.*), (31 *Vict No.* 38), *secs.* 4, 16, 17—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 106—*Judicial Salaries, income tax on—"Diminution"—"Paid and Payable"—State Laws, inconsistency with State Constitution—Powers of Legislatures under written Constitutions—Colonial Laws Validity Act* 1865 (28 & 29 *Vict. c.* 63), *secs.* 2, 3, 5.

The power vested in a State legislature by its Constitution to enact constitutional alterations must be exercised by direct legislative provisions: So long as the Constitution remains unaltered any enactment inconsistent with its provisions is invalid.

A State law imposing a tax generally upon the income of each citizen of the State to the extent of the general balance of his income, after allowing for all sources of revenue and all lawful deductions, is not inconsistent with the provision in the Queensland *Constitution Act* 1867, that such salaries as are settled by law upon the Judges of the Supreme Court for the time being shall in all time coming be paid and payable to every such Judge for the time being so long as the patents or commissions of any of them respectively shall continue in force.

Decision of the Supreme Court: *In re the Income Tax (Consolidated) Acts* 1902-1904, *and the Income Tax Declaratory Act of* 1905, 1907 St. R. Qd., 110, affirmed.

APPEAL from a decision of the Supreme Court of Queensland.

The respondent, the Commissioner of Income Tax for the State of Queensland, claimed from the appellant, the Chief Justice of the Supreme Court of that State, the payment of income tax in respect of the salary of his office under the *Income Tax Consolidated Acts* 1902-4 and the *Income Tax Declaratory Act* 1905. The appellant objected to pay the income tax on the ground that a tax levied in respect of his judicial salary was repugnant to the Constitution of Queensland, and to that extent invalid.

A decision of the Police Magistrate at Brisbane in favour of the defendant was reversed on successive appeals by a District Court Judge and by the Supreme Court (1). From the latter judgment the present appeal was brought to the High Court.

Lilley and *MacGregor* (with them *Power*), for the appellant. The Judges of the Supreme Court are exempted by virtue of paragraph XVI. of the Order in Council 6th June 1859 (1 Pring., 238), and sec. 17 of the *Constitution Act* 1867, from the imposition of taxation in respect of their salaries. The amount of the appellant's salary was fixed by the *Salary Act* 1901 (1 Edw. VII. No. 2) at £2,500; and the constitutional provision, that the salaries granted by the Crown to Judges of the Supreme Court shall "be paid and payable" to each of them during the term of their

(1) 1907 St. R., Qd., 110.

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respective commissions, was equivalent to an enactment that the salaries should be paid to the Judges without reduction or diminution throughout their terms of office. This is essential to safeguard the independence of the judiciary from improper coercion. The legislature of Queensland were, by paragraph XXII. of the Order in Council and by secs. 2, 9, 10 of the *Constitution Act* 1867, empowered to alter the Constitution by express enactment altering or repealing constitutional provisions. But such powers of alteration must be exercised in the proper way there laid down; the mere enactment of provisions inconsistent with the Constitution does not repeal or alter the Constitution to the extent of the inconsistency.

If the *Constitution Act* 1867 was in itself an improper exercise of the legislative powers given by paragraph XXII. of the Order in Council, then the Order in Council, paragraph XVI., remained in effect with the force of an Imperial Act in the Colony, and any State Acts inconsistent with it are void to the extent of the inconsistency under the *Colonial Laws Validity Act* 1865.

The New South Wales *Constitution Act* 1850 (13 & 14 Vict. c. 59), sec. 18 (1 Pring., 213), prohibited diminution of judicial salaries during the term of office, and similar provisions from 18 & 19 Vict. c. 54 were expressly preserved by paragraph XV. of the Order in Council and by the *Constitution Act* 1867, sec. 17. The word "diminution" is not expressly incorporated in the Constitution, but equivalent expressions were used, from which the intention of the legislature to protect the judiciary is clear: *Todd on Government of Colonies*, pp. 827-8.

This taxation is a diminution of the salary granted to the Judges: *Deakin* v. *Webb* (1); *D'Emden* v. *Pedder* (2). It is immaterial at what time the diminution is imposed upon the salary, or whether it is made a condition precedent to the receipt of the salary. The salaries of federal Judges of the United States have been admitted to be not liable to federal income tax, under a constitutional provision that their salaries should not be diminished during their terms of office: *Miller on the Constitution of U.S.A.*, pp. 247-8. Sec. 17 of the *Constitution Act* 1867, was a constitutional limitation upon the legislative powers of the

(1) 1 C.L.R., 585, at p. 611-612. (2) 1 C.L.R., 91, at p. 108.

Queensland Parliament: *Buckley* v. *Edwards* (1). Their powers could be exercised to fix the salaries of future Judges, but not so as to interfere with the existing rights of present Judges. The *Income Tax (Consolidated) Acts* 1902-4 were general in terms, and must not be taken to contradict the special exemption of Judges by the *Constitution Act*: *Hawkins* v. *Gathercole* (2); *Seward* v. *Vera Cruz* (3); *Hardcastle on Interpretation of Statutes*, 3rd ed., p. 341.

[GRIFFITH C.J.—But the *Income Tax Declaration Act* 1905 declares that the Judges "are and always have been" chargeable; and the *Income Tax (Consolidated) Acts* 1902-4, sec. 58, refers to Judges as liable to the tax. The question is whether those Acts are *ultra vires* by reason of the Constitution.

ISAACS J. referred to *In re Patent Invert Sugar Co.* (4); *In re West India and Pacific Steamship Co.* (5).]

The Constitution cannot be repealed or altered by implication from the inconsistency of an ordinary Act with its provisions; it must be altered directly *eo nomine*; the Parliament must use its legislative authority under the Constitution to enlarge the boundaries of its ordinary powers of legislature before it can step over the existing boundaries: *The Queen* v. *Burah* (6); The Constitution, sec. 106; *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (7); *Hasker* v. *Wood* (8).

The dictum of the Earl of *Halsbury* L.C. in *Webb* v. *Outtrim* (9), that any Act once assented to by the Crown becomes as valid as any Imperial Act, unless repugnant to the *Colonial Laws Validity Act* 1865, cannot be supported by any authority; in actual experience, numerous Acts which were assented to have been admittedly invalid, and others have had to be supported by validating Acts.

The *Income Tax (Consolidated) Acts* 1902-1904 and the *Income Tax Declaratory Act* 1905, should have been reserved for the Royal assent, as required by sec. 13 of the *Constitution Act* 1867, which section adopted the provisions of 6 Vict. c. 76, sec. 31, and 13 & 14 Vict. c. 59 as to reservation of bills affecting judicial salaries.

(1) (1892) A.C., 387.
(2) 6 DeG. M. & G., 1, at p. 18.
(3) 10 App. Cas., 59.
(4) 31 Ch. D., 166.
(5) L.R. 9 Ch., 11*n*.
(6) 3 App. Cas., 889, at p. 904.
(7) 23 Ch. D., 1, at p. 11.
(8) 54 L.J.Q.B., 419.
(9) (1907) A.C., 81, at p. 88.

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Lukin and *Henchman*, for the respondent. All persons resident in Queensland and in receipt of a taxable income within the meaning of the *Income Tax Consolidated Acts* 1902-4, are liable to the tax unless expressly exempted. Judges of the Supreme Court are not mentioned by sec. 12 as exempted, and sec. 58 speaks of them as liable to the tax. All doubts of interpretation are set aside by the *Income Tax Declaratory Act* 1905, which is not subject to the rule, which applies to other Acts, that they should be construed so as not to take away existing rights: *Attorney-General* v. *Theobald* (1); *Maxwell on Statutes*, 3rd ed., p. 309. Taxation is a right of sovereignty: *Sydney Municipal Council* v. *Commonwealth* (2), and Queensland is within the ambit of its authority a sovereign State unless restricted by some Imperial Act. The Queensland legislature was given by par. XXII. express power to alter the Constitution in the ordinary course of legislation, by merely passing Acts inconsistent with the Constitution. Even if there was not power to alter the Constitution except by passing a "fundamental" law, the Income Tax Acts were not an alteration of the Constitution.

[They referred to 12 & 13 Wm. III. c. 2, sec. 3 (vii.) (the *Act of Settlement* 1700); 1 Geo. III. c. 23, secs. 1-4; 6 Geo. IV. c. 82, sec. 9; 6 Geo. IV. c. 83, sec. 8; 6 Geo. IV. c. 84, secs. 1, 2, 3; 11 Geo. IV. c. 70, sec. 2; 5 & 6 Vict. c. 35, sec. 146, and to 4 Geo. IV. c. 96; 9 Geo. IV. c. 83; 5 & 6 Vict. c. 76, secs. 31, 40, 53; 13 & 14 Vict. c. 59, secs. 13, 18, 31; 18 & 19 Vict. c. 54, secs. 1, 3, 4, 7, and Schedule, secs. 15, 26, 38, 39, 40, 41; 20 Vict. No. 10 (N.S.W.); Order in Council 6th October 1859 (1 Pring., 238), pars. II., XXII.; 31 Vict. No. 38 (Qd.), sec. 3 (*Constitution Act* 1867).]

The *Constitution Act* 1867 was only a local Act; it substituted for the Imperial Order in Council, which was a fundamental law, an enactment alterable by the ordinary course of legislation. No legislature can bind itself or limit the powers of its successors by means of a self-imposed fundamental law. All Acts of the local legislature are valid unless in conflict with an Imperial Act or Order having the force of an Act, applicable to the State, and the onus is on the appellant to show that the *Income Tax* (*Con-*

(1) 24 Q.B.D., 557.

(2) 1 C.L.R., 208, at p. 230.

solidated) *Acts* are repugnant either to the Order in Council 1859, or some Imperial Act.

[O'CONNOR J.—That repugnancy may be one ground of invalidity, but failure to follow the constitutional method of legislation may be another.]

This income tax is not a tax on the salary of a Judge, but a tax on the balance of his income on comparing his revenue from all sources with his deductable outgoings, such as interest paid out on mortgages, and life assurance premiums.

Deakin v. *Webb* (1) is not applicable, as there is no question of a conflict of sovereignties; the State income tax is levied upon property wholly within the sovereignty of the taxing authority, as a contribution from all classes of citizens equally. If it was desirable that Judges' salaries should be exempted from all deductions by way of ordinary taxation, that would have been provided for in England; instead the contrary was enacted, and this in face of the Acts of 6 Geo. IV. cc. 82, 83, 84. The *Constitution Act* 1867 says nothing that can be construed to mean that salaries of Judges, once paid to them, shall be exempt from taxation. *Buckley* v. *Edwards* (2) is distinguishable; Lord *Herschell* L.C., there contemplated only such diminutions as would be effected by direct interference with the salary. The salary has been "paid" to the Judge within the meaning of the *Constitution Act* 1867, sec. 17, when the Judge has received it in full from the Government. Income tax is not regarded by the Courts as a "deduction" in case of legacies, even where the terms of the will expressly made it so: *Turner* v. *Mullineux* (3). English and colonial Judges are protected only against the Executive, not against Parliament: *Harrison Moore on Commonwealth of Australia*, pp. 278-9. There are no "fundamental" laws in Constitutions of the English model, especially in the self-governing Colonies, which are subject to the *Colonial Laws Validity Act* 1865. Reservation of assent and special majorities are a very faint recognition of "fundamentals." Par. XXII. of the Order in Council 1859, made the Queensland legislature a "constituent" body, able to alter its Constitution by the ordinary method of legis-

(1) 1 C.L.R., 585.

(2) (1892) A.C., 387, at p. 394.

(3) 1 John. & H., 334.

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lation, subject only to the assent of the Crown. The English constitutional system, and equally the colonial system, depends entirely upon the good sense of the legislature. The New South Wales *Constitution Act* (18 & 19 Vict. c. 54), was drawn up by the colonial statesmen upon an express invitation from England to frame their own Constitution, and in this Act the prohibition against diminution of salaries was omitted.

In enacting an Act which involves a necessary inconsistency with the Constitution, as the *Income Tax (Consolidated) Acts* must do if the Constitution really prohibited any deduction, the legislature must be taken to have intended to make an alteration of the Constitution, as was in fact done by the *Defamation Act* 1889 (Qd.) (53 Vict. No. 12), and the *Criminal Code* 1894 (Qd.) (58 Vict. No. 23).

Lilley in reply. The history of the English legislation, being that of a sovereign Parliament with plenary powers, has no bearing on the legislation of the Queensland Parliament, which is limited by the State Constitution. The provision of the *Constitution Act*, that the settled salaries shall be paid during the term of office, may be formally satisfied by payment of the full amount from the Treasury, but a direct income tax is a substantial diminution which defeats the purpose of the Act. The Crown is not to be permitted to give with the right hand and take away with the left.

[HIGGINS J. referred to *Hewlett* v. *Allen* (1).]

It is the effect of the diminution, not the time at which the deduction is made, that is important: *D'Emden* v. *Pedder* (2). This argument is unaffected by the consideration that the independence of the Judges, which sec. 17 of the *Constitution Act* was intended to protect, is not struck at by a general taxing Act; although that may have been the intention of sec. 17, it is immaterial that that intention is not infringed by a diminution of salary; it is only material that sec. 17 prohibits such a diminution.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. This is an appeal from a decision of the Full

(1) (1894) A.C., 383. (2) 1 C.L.R., 91.

Court on appeal from a District Court upon a special case raising the question whether the Judges of the Supreme Court of Queensland are liable to pay income tax under the *Income Tax (Consolidated) Acts* 1902-4, either alone or read in conjunction with the *Income Tax Declaratory Act* 1905. The learned Judges based their decision entirely upon the last mentioned Act, quoting the following passage from the opinion of the Judicial Committee in *Webb* v. *Outtrim* (1):—"Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different. If, indeed, it were repugnant to the provisions of any Act of Parliament extending to the Colony, it might be inoperative to the extent of its repugnancy (see the *Colonial Laws Validity Act*, 1865), but, with this exception, no authority exists by which its validity can be questioned or impeached." Their Honors pointed out that Queensland Acts have the same validity within Queensland as Victorian Acts within Victoria. They offered no opinion upon the question whether, apart from this proposition, the Income Tax Acts, so far as they purport to tax the salaries of Judges of the Supreme Court, are within the competency of the Queensland Parliament under the existing Constitution of Queensland.

The appellant's counsel informed us that his client had paid income tax, including that claimed for the year 1904, under protest, and that he attached little importance to the mere question of liability to the tax as compared with the question of the asserted right of the legislature to disregard the Constitution, and to pass Acts inconsistent with it and injuriously affecting the tenure on which the Judges of the Supreme Court hold their office.

This latter question is one of great and general importance, and I will express my opinion upon it, assuming for the present purposes that under the Constitution of Queensland as it stood in 1905 it was not competent for the legislature to impose a tax upon judicial salaries.

The original Constitution of Queensland is to be found in the

(1) (1907) A.C., 81, at p. 88; 4 C.L.R., 356, at p. 358.

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Order in Council of 6th June 1859, made in pursuance of the powers conferred by the Act 18 & 19 Vict. c. 54. By that Order it was prescribed (par. I.) that within the Colony of Queensland there should be a Legislative Council and a Legislative Assembly. Paragraphs II., XV., XVI., and XXII. were as follows:—

"II. And it is hereby declared and ordered that within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace welfare and good government of the Colony in all cases whatsoever Provided that all bills for appropriating any part of the public revenue for imposing any new rate tax or impost subject always to the limitations hereinafter provided shall originate in the Legislative Assembly of the said Colony.

"XV. The provisions of the said last mentioned Act (17 Vict. No. 41, set out in the Schedule to 18 & 19 Vict. c. 54) respecting the commissions removal and salaries of the Judges of the Supreme Court of New South Wales shall apply and be in force in the Colony of Queensland so soon as a Supreme Court shall be established therein.

"XVI. Such salaries as are settled upon the Judges for the time being by law and also such salaries as shall or may be in future granted to Her Majesty Her Heirs and Successors or otherwise to any future Judge or Judges of the said Supreme Court shall in all time coming be paid and payable to every such Judge and Judges for the time being so long as the patents or commissions of them or any of them respectively shall continue and remain in force.

"XXII. The Legislature of the Colony of Queensland shall have full power and authority from time to time to make laws altering or repealing all or any of the provisions of this Order in Council in the same manner as any other laws for the good government of the Colony except so much of the same as incorporates the enactment of the fourteenth year of Her Majesty chapter fifty-nine and of the sixth year of Her Majesty chapter seventy-six relating to the giving and withholding of Her Majesty's assent to bills and the reservation of bills for the signification of Her Majesty's pleasure and the instructions to be conveyed to Governors for their guidance in relation to the

matters aforesaid and the disallowance of bills by Her Majesty Provided that every bill by which any alteration shall be made in the Constitution of the Legislative Council so as to render the whole or any portion thereof elective shall be reserved for the signification of Her Majesty's pleasure thereon and a copy of such bill shall be laid before both Houses of the Imperial Parliament for the period of thirty days at least before Her Majesty's pleasure thereon shall be signified."

In 1867 a series of consolidation Acts was passed by the Parliament of Queensland. One of these (31 Vict. No. 38), entitled "An Act to Consolidate the laws relating to the Constitution of the Colony of Queensland," and intended, apparently, to be passed in the exercise of the powers conferred by paragraph XXII. of the Order in Council, set out in the form of an Act the various statutory provisions then in force relating to the Constitution of the Colony, including (secs. 2, 16, 17) the provisions of paragraphs II., XV., and XVI. of the Order in Council.

It was contended for the respondent that since the passing of this Act the provisions relating to the tenure of office of the Judges of the Supreme Court and their salaries depend entirely upon the *Constitution Act* of 1867, and that this Act, being an Act of the Queensland legislature, was of no more effect than any other Act of that legislature, and, consequently, that any restrictions imposed or rights conferred by it might be disregarded or abrogated by any subsequent Act inconsistent with it, although not purporting to be an amendment of the Constitution, so that, if the legislature thought fit by Statute to alter the tenure of office of existing Judges or to reduce their salaries, they could do so without first amending the Constitution.

Sec. 106 of the *Commonwealth Constitution Act* provides as follows:—

"106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

The distinction between what are called in jurisprudence "fundamental laws" and other laws is, no doubt, unfamiliar to

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English lawyers. Nor under the Constitution of England is there any such distinction. The Parliament of the United Kingdom is supreme, and can make any laws it thinks fit, and the question whether a law once passed is beyond the competency of the legislature or not cannot arise. If, therefore, a later is inconsistent with an earlier law, the later must prevail. But in States governed by a written Constitution this doctrine has no application. The powers of the Queensland legislature, like those of the other Australian States, are derived from the grant contained in the Order in Council by which it was established. No doubt the Queensland legislature had power by virtue of paragraph II. of the Order in Council to make laws "in all cases whatsoever." But these words must be read with the rest of the Order in Council, and clearly did not authorize the legislature, while the provisions of the Constitution remained unaltered, to make any law inconsistent with it. They referred to the scope of authority under the Constitution. The re-enactment of the provisions of paragraph II. in the Act of 1867 did not make any difference in this respect. The powers of the legislature still depended upon the Order in Council, and not upon its own restatement of those powers. If, for instance, they had purported to limit these powers, the original powers would still have continued, and might have been exercised. But I think that any provisions which they purported to substitute for the original provisions of the Constitution became provisions of the Constitution itself, so that nothing could be done inconsistent with them without a preliminary alteration of the Contitution. In other words, I think that the mere re-enactment of the provisions of the original Constitution *totidem verbis* did not alter the fundamental character of the provisions themselves, which still took effect as substituted in, and, so to say, forming part of, the Order in Council. In my opinion, therefore, the legislature could not after the Act of 1867, any more than before, disregard the provisions of the Constitution as existing for the time being, so as to be able to pass a law inconsistent with them, without first altering the Constitution itself. That is to say, their power was no more plenary than it was before. The distinction between an authority to alter or extend the limits of their powers, and an authority to disregard the existing limits is clear.

I am, therefore, of opinion that the Income Tax Acts 1902-4, if and so far as they were inconsistent with the then existing Constitution, were wholly inoperative. The Act of 1895, regarded as a mere declaratory Act, declaring the meaning of the Acts of 1902-4 was not invalid, but its effect depends upon the validity of those Acts and not upon any other basis. On the main point, therefore, I agree with the contention of the appellant. I think that, if the legislature desires to pass a law inconsistent with the existing Constitution, it must first amend the Constitution. This would be done by a Bill for that purpose, to which the attention of the legislature and the public would be called, and the passing of and assent to which would obviously depend upon considerations very different from those applicable to an ordinary law passed in the exercise of the plenary powers of the legislature under the existing Constitution.

For these reasons I am of opinion that the Constitution of Queensland for the time being has the force of an Act of the Imperial Parliament extending to the Colony, and that it is the duty of the Court to inquire whether any Act passed by the State legislature is repugnant to its provisions.

On the other point the argument for the appellant is based upon the provisions of sec. 17 of the Constitution Act already quoted. It is contended that the words "Such salaries as . . . . shall or may be in future granted by Her Majesty . . . . or otherwise to any future Judge or Judges of the said Supreme Court shall in all time coming be paid and payable to every such Judge and Judges for the time being so long as the patents or commissions . . . . shall continue and remain in force" prohibit any reduction or diminution of the salary of a Judge during his term of office, and that the imposition of a tax in respect of his salary is, in effect, such a diminution. I agree with the first of these propositions. I think that the words "shall be paid . . . . so long as" &c. have this effect. The words "shall be payable," on the other hand, have the effect of a permanent appropriation of the necessary money from the Consolidated Revenue Fund.

The only question then is whether the Queensland income tax is such a diminution. No assistance can be obtained from

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English practice, for the *Income Tax Act* (5 & 6 Vict. c. 35) expressly includes judicial salaries, and by the Fifth Rule of Schedule E the tax is directed to be deducted from the salary before payment to the holder of the office. As this Act was passed by a legislature of plenary powers, no question could arise as to its validity, so that the question whether its effect was to diminish the salary of the Judges was of no importance.

In the United States the question has arisen, but has never been the subject of judicial decision. During the Civil War an Act of Congress was passed imposing an income tax which was demanded from the Justices of the Supreme Court of the United States, whose salaries cannot under the Constitution be diminished during their term of office. They paid the tax under protest, but *Taney* C.J., on behalf of the Bench, sent to the Attorney-General a memorandum pointing out that the tax was in effect a diminution of the Judges' salaries, and submitting that it was therefore forbidden by the Constitution. This contention was accepted by the Government, and the whole amount paid for income tax was refunded. (See Mr. Justice Miller's Lectures on the Constitution of the United States, pp. 247-8).

There is no doubt that the appellant's salary falls within the Queensland Income Tax Acts as interpreted by the Act of 1905. The scheme of those Acts is to take the aggregate income of a taxpayer derived from all sources, to allow deductions in respect of specified outgoings, and to tax the balance only. The tax is not, therefore, a deduction from the salary at the source and before payment. I think that the inclusion of a Judge's salary with the rest of his income in an aggregated fund, upon the balance of which, after specified deductions, an income tax is charged in common with the incomes of all other citizens of the State, is different in principle from a direct diminution of his salary *quâ* salary. The power to make such a diminution might obviously be used to impair his independence by the suggestion that, if his decisions did not commend themselves to the legislature or the Executive Government, the power would be exercised or an attempt would be made to exercise it. The object of the provisions in the Constitution was clearly to prevent such an attack upon judicial independence. But, on the whole, I do not

think that these provisions should be read as extending to a case which does not fall within the mischief, and as to which it is at least doubtful whether it falls within the literal meaning of the words.

BARTON J. The legislation of a body created by and acting under a written charter or constitution is valid only so far as it conforms to the authority conferred by that instrument of government. Therefore attempted legislation, merely at variance with the charter or constitution, cannot be held an effective law on the ground that the authority conferred by that instrument includes a power to alter or to repeal any part of it, if the legislation questioned has not been preceded by a good exercise of such power, that is, if the charter or constitution has not *antecedently* been so altered within the authority given by that document itself. Hence an implied repeal is not within the power to alter or repeal, and is not valid because it is not an exercise of legislative power. It is only when the instrument is altered upon the authority collected from its own terms that it becomes the new charter or constitution, and the confinement of subsequent legislation within its altered bounds, be they narrowed or widened, becomes in turn a condition precedent to the validity of that legislation.

Legislation, which could not be undertaken at all without the antecedent authority of the fundamental law, cannot overstep the bounds set for it by that law and yet stand good. Before it can avail, the bounds must have been lawfully extended. That is a condition precedent, even if the makers of the disputed law had power to make the extension themselves. They cannot omit to make it, and at the same time proceed as if it had been made.

Hence the fact that the legislature of Queensland had power to alter or repeal the provisions of the Order in Council, or of the Constitution Act of 1867, or both, did not entitle it to make a valid Statute taxing the income of the appellant if it had no power to do so under the Constitution as it then stood. If at variance with the Constitution the income tax legislation, so far as it affects the appellant, cannot be held valid on the ground that the

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Constitution contains a power of alteration and repeal, and that the legislation is *quoad hoc* an *implied* repeal. If the Constitution has not been antecedently so altered, *within the authority given by itself*, as to enable the legislature to deal in the way proposed with the salary of the appellant, a condition precedent to the due exercise of the power has not been performed.

If then the Constitution does not *empower* the legislature to pass such Statutes as are here in question, I cannot uphold the contention that, in view of what has happened, they are valid even when they ignore the bounds set by the Act of 1867 taken in conjunction with the Order in Council of 1859.

But do they ignore these bounds? Is it the law that they are invalid so far as they purport to affect the appellant? That depends on the construction of the 17th section of the *Constitution Act* 1867, which I will now discuss.

In 1700 the *Act of Settlement* protected in part the independence of the Bench by providing that "Judges' commissions be made *quam diu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."

Then in 1760 was passed the Act 1 Geo. III. c. 23, avowedly for rendering more effectual the provisions of the *Act of Settlement* "relating to the commissions and salaries of the Judges." In its 1st and 2nd sections it provides that Judges' commissions "shall be, continue and remain, in full force, during their good behaviour," and that the Crown may remove any Judge on the address of both Houses of Parliament; and in its 3rd section it is as follows:—"That such salaries as are settled upon Judges for the time being, or any of them, by Act of Parliament, and also such salaries as have been or shall be granted by His Majesty his heirs and successors, to any Judge or Judges, shall, in all time coming, be paid and payable to every such Judge and Judges for the time being, so long as the patents or commissions of them, or any of them respectively, shall continue and remain in force."

These three sections have been embodied in the Queensland *Constitution Act* 1867 (secs. 15-17) almost *totidem verbis* and actually of identical purport and effect, and the last-quoted of

them—the section now in dispute—stands as Paragraph XVI. in the Order in Council of 1859.

In addition, these forms of legislation, adopted as they were in Great Britain to secure the emoluments and independence of the Bench, have been employed on other occasions in colonial Constitutions and in enactments on the same subject.

It is strongly urged for the respondent that because the Imperial *Income Tax Act* 1842 (5 & 6 Vict. c. 35), gives express power to deduct the tax from certain salaries, including judicial salaries, before payment over to the officers entitled, it is clear that the Imperial Parliament never intended that judicial salaries should be immune from taxation. I do not think that a strong inference can be drawn in this or the contrary direction from that mere fact. As a sovereign Parliament, not tied by any written Constitution, the legislature of the United Kingdom can deal with the matter as it likes. But it may be borne in mind that, while it has subjected judicial salaries to income tax, it has never, so far as we know, attacked the independence of the Bench by reducing a Judge's salary during his occupancy of his office. My own opinion is that the meaning of the section is plain and free from ambiguity, and that it ought to be construed in its clear English sense. The object of the section on its face is to secure the due payment of the salaries according to the terms on which they are allotted, and as long as the commissions of those entitled to them remain in force. That is what is said, and I think it is all that is meant. In this sense the notion of a reduction (*e.g.*, by Statute) is excluded, and, looking at the origin of the provision, and the clear object to be inferred from the words of the *Act of Settlement*, I have no doubt that the judicial independence was meant to be protected by that and subsequent legislation so far that even a sovereign Parliament would not dream of reducing a Judge's salary during his tenure of office. But the ordinary taxation of the State stands on a different footing. It is imposed on all who come within the area prescribed for taxation, whatever their rank or occupation. It is raised for revenue purposes, and one does not think of a Colonial Treasurer trying to levy a tax on the whole people, yielding many hundreds of thousands of pounds, for the mere purpose of vindictively obtaining a few pounds from one or

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half a dozen Judges. To reduce the salaries of officiating Judges is, or may be, an attack on their independence—a punishment for its exercise. To subject them, in common with all their fellow citizens, to a general tax, is not likely to be anything of the kind, and it is not in reason to suppose that Parliament, in imposing it, has thought of it in that light. And whatever the Parliament of Queensland has thought in imposing it, the Parliament of the United Kingdom in its past legislation, the framers of the Order in Council of 1859, and the Parliament of Queensland in the *Constitution Act* 1867, have none of them, in my opinion, aimed at more than has been said in the words of the enactment, which certainly do not of themselves prohibit inferentially something which is not a reduction of salary as generally understood.

I ought to have referred earlier to secs. 36 and 37 of the 1867 Constitution and the Schedules. These sections make a permanent appropriation of the sums mentioned in the Schedules, which sums are to be accepted and taken "by the Crown by way of civil list." The Judges' salaries are included in Schedule A., their pensions in Schedule B. The sections "settle" within the meaning of sec. 17 the permanent pecuniary provision for the independence of the Judges which it is the object of legislation such as sec. 17 to require.

For the reasons above given I think this appeal must be dismissed.

The judgment of O'CONNOR J. was read by GRIFFITH C.J.

The decision of the Supreme Court in this case rests upon the ground that the provisions of the Queensland Income Tax Acts under consideration are not repugnant to any Imperial Statute. In the view that I take of the matter in controversy it is not essential to deal with that ground. The rights of the parties really depend upon the construction to be placed on sec. 17 of the Queensland *Constitution Act* 1867.

It is admitted that, but for that section, the appellant would be liable in this action. But it is contended that that section confers on the Chief Justice a right to have the full amount of statutory salary paid to him without diminution by any act of the Government, whether the diminution is by way of deduction

before the salary is paid over, or by way of taxation on income received after it has been paid over, and that the imposition of the tax claimed is in violation of that right, and therefore invalid.

The contention on behalf of the Commissioner is that the imposition of income tax on the appellant, in common with other citizens, in respect of his judicial salary does not infringe any rights conferred by sec. 17 of the Constitution, and that even if the exercise of the rights of the Government under the Income Tax Acts is inconsistent with the exercise of those of the appellant under sec. 17 of the *Constitution Act*, the latter, being the earlier Act, must be taken to have been repealed by the former to the extent of the inconsistency. These different contentions resolve themselves into two main questions: First, what is the true construction of sec. 17 of the *Constitution Act*? Secondly, can legislation inconsistent with any portion of that Act be passed by the Queensland Parliament until after the enactment of a measure expressly intended to repeal that portion? I propose to deal with these questions in the order in which I have stated them.

There is no difference in the rules to be applied in the interpretation of a Constitution Act and in the interpretation of any other Statute. The object of the Court must always be to ascertain the intention of the legislature from the language it has used. Where the language is ambiguous the Court may be aided by a consideration of the other sections of the Statute, its scope and purpose as a whole, the subject matter, and the condition of the law before it was passed. But where the language used is unambiguous the rule to be applied is that stated by Lord Chief Justice *Tindal* in the *Sussex Peerage Case* (1) as follows:—"My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law giver."

(1) 11 Cl. & Fin., 85, at p. 143.

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I proceed at once to apply these principles to the interpretation of the section under consideration, sec. 17 of the *Queensland Constitution Act* 1867 (31 Vict. No. 38), which is as follows:— "Such salaries as are settled upon the Judges for the time being by Act of Parliament or otherwise and all such salaries as shall or may be in future granted by Her Majesty her heirs and successors or otherwise to any future Judge or Judges of the said Supreme Court shall in all time coming be paid and payable to every such Judge and Judges for the time being so long as the patents or commissions of them or any of them respectively shall continue and remain in force."

The *Supreme Court Act* 1867, assented to on the same date as the *Constitution Act*, consolidated the previous Statutes and reconstituted the Court. Sec. 14, amended as to the amount of the Chief Justice's salary by the *Chief Justice's Salary Act* 1900, fixes the salaries of the Chief Justice and Judges, but does not authorize the appropriation of the amount from the public moneys. A later Act, the *Supreme Court Act* 1874, by sec. 6 expressly directs that the salaries and pensions payable to the Judges of the Supreme Court "shall be charged on and paid out of the Consolidated Revenue Fund of Queensland." But in 1867 the only appropriation of Judges' salaries was by sec. 10 of the *Supreme Court Act* and sec. 17 of the *Constitution Act*, which are in terms identical. But for the words of appropriation in these Statutes it would be necessary for Parliament in each year to authorize the payment out of public funds of public moneys for these purposes. Thus, in the light of the Act re-establishing the Supreme Court under the *Constitution Act* 1867, we may now examine the provisions of sec. 17 of the Constitution itself. Applying the test suggested by *Tindal* C.J. in the passage above quoted, the words used by the legislature appear to me to be in themselves precise and unambiguous, and we have therefore only to inquire what is the meaning of these words taken in their natural and ordinary sense. The first inquiry is, what rights does the section secure, taking its words in their natural and ordinary meaning? It secures to each Judge, firstly, that the salary attached to his office when his commission was issued shall be paid to him undiminished in amount so long as his commission

continues in force; secondly, that the money necessary to meet the payments as they arise is permanently appropriated from the public funds, and will be paid without the necessity for further parliamentary discussion or action. The obligation is imposed by the section on the Government that they shall pay and continue to pay to the Judge the salary fixed by Statute at the time when his commission issues so long as the commission is in force.

The section imposes no other obligations on the Government.

One contention on the part of the appellant is that the tax amounts to a diminution of salary, and that, although the diminution takes place after the salary has been paid, the effect is that he receives less than the statutory amount. Assuming it is so, that is no infringement of the right which the Constitution has given, because the full amount of statutory salary has been paid him by the Government in each year. It is clear that there has been no failure on the part of the Government to perform their obligations under the Constitution if the words of sec. 17 are to be taken in their ordinary sense.

The appellant's case cannot be based upon any failure of that obligation. The real meaning of the contention is that the appellant is not only entitled to be paid the full amount of his statutory salary, but that when it is paid he cannot be taxed in respect of it, even although the tax is imposed under a general law affecting every person in receipt of a certain income. In other words, that a Judge of the Supreme Court is entitled to have his salary exempted from any general scheme of taxation of incomes.

Now, as I have pointed out, if the language of the section is to be taken in its natural and ordinary sense, no such right is conferred. But it is said that, having regard to the necessity of preserving the independence of the Judges and the course of legislation which has secured that independence, the section must be read as conferring the right claimed. My examination of the authorities and the history of the legislation in question has led me to the contrary conclusion, and has satisfied me that the words of the Constitution are incapable of being construed in any other way than as enacting that the independence of the Supreme Court Judge in regard to his remuneration was intended

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to be secured only by conferring on him the right to be paid the statutory salary attached to the office at the time when the commission was issued to him so long as the commission should remain in force.

The legislative history of the provision in question is well known. The independent position which the Judges now enjoy under the British Constitution first acquired statutory security by the provisions of the *Act of Settlement*. The Statute 1 Geo. III. c. 23 was the first enactment which made those provisions effective. The preamble recites as follows the safeguards to be established and maintained :—" Whereas by an Act passed in the twelfth and thirteenth years of the reign of His Late Majesty King William the Third, intituled, An Act for the further limitation of the Crown, and better securing the rights and liberties of the subject; it was enacted, that after the limitation of the Crown thereby made should take effect, Judges commissions be made *quam diu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament, it might be lawful to remove them."

Of these three safeguards we are concerned with one only in this case, that by which the Judges' salaries " are ascertained and established," and in reference to that the Preamble, after referring to other provisions, recites :—" And Your Majesty has also desired your faithful Commons that you may be enabled to *secure the salaries of the Judges* during the continuance *of their commissions*."

The securing of the salaries of the Judges during the continuance of their commissions is effected by sec. 3, the terms of which have been followed in identical language by every enactment passed since then in England for securing the salaries of Judges placed in the position of independence guaranteed by the *Act of Settlement*. Sec. 17 of the *Queensland Act* 1867 is an exact reproduction of that section.

Such being the terms in which the salaries of the Judges in England were secured, it is important to note that the English *Income Tax Act* 1842 by Schedule E, Rule 3, not only expressly renders the holders of all judicial offices liable to income tax on their salaries, but enables the Government to deduct from the

salary before paying it over any sums which may be due for unpaid income tax. In 1855 the British Parliament passed the Act of 18 & 19 Vict. c. 54 which authorized Her Majesty to erect Queensland into a separate Colony and to establish its Constitution by Her Letters Patent and Order in Council. In 1859 Letters Patent and an Order in Council were issued by Her Majesty erecting the Colony and establishing its Constitution.

It must, I think, be assumed that at that date the British Parliament deemed that the provisions of sec. 3 of 1 Geo. III. c. 23 were a sufficient safeguard of the independence of English Judges in regard to remuneration, although the English Income Tax Acts had for some years expressly enacted that their salaries were to be liable to taxation just as the salaries of other citizens were liable. In providing for the independence of the Supreme Court Judges the Order in Council by clause XVI. secures their salaries in terms identical with those used in sec. 3 of 1 Geo. III. c. 23, and also with the section of the New South Wales Constitution then in force on the same subject. When in substitution for the Order in Council of 1859 the Queensland Parliament passed the *Constitution Act* 1867 establishing its own Constitution, it adopted in sec. 17 *verbatim* the provisions of clause XVI. of the Order in Council.

Such being the history of clause 17 of the Constitution, it is difficult to conceive that Her Majesty in Council, while adopting the identical language of the Statute by which the independence of English Judges as to remuneration was then secured, intended to confer on the Judges of the Queensland Supreme Court an immunity from taxation which the British Parliament at that time did not consider necessary in the case of English Judges.

Nor is there anything in the history of the Queensland *Constitution Act* 1867, or in the terms of its other provisions, to indicate that the legislature, although adopting verbatim the language of clause XVI. of the Order in Council, intended to confer upon the Judges of the Supreme Court a security for their salaries beyond that contained in the words of the clause interpreting these words in their natural and ordinary sense.

I am therefore of opinion that sec. 17 does not confer upon a Judge of the Supreme Court of Queensland the exemption from

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income tax that has been claimed. Being of opinion, therefore, that the only right given to a Judge of the Supreme Court under sec. 17 is to have his salary as fixed by Statute at the time of the issue of his commission paid to him during the continuance of his commission, and that the collection by the Government of income tax on the salary after it has been paid to the Judge is not a violation of that right, I have arrived at the conclusion that the appeal must be dismissed.

Holding that view, it is not essential for the determination of the rights of the parties in this case to express any opinion upon the contention that the appellant cannot, even if his case comes within sec. 17 of the Constitution, rely upon its provisions because it has been impliedly repealed by the Income Tax Acts. But, as the question is one of far-reaching importance, I think it right to state my view of the law.

For this purpose I shall assume that sec. 17 does give a Judge of the Supreme Court the right of exemption from the provisions of a general income tax on the ground that the payment of the tax would amount to a reduction of his statutory salary. It is not contended that there has been any amendment of the *Constitution Act* 1867 in this respect, unless it is to be taken that sec. 17 has been impliedly repealed by the *Income Tax Acts* of 1902-4 and the *Income Tax Declaratory Act* 1905. The opposing views may be thus summarized:—

Mr. Lilley properly admits that it would be open to the Queensland legislature to repeal sec. 17 by an Act amending the Constitution, and that, if that were done, there would be nothing to prevent the Income Tax Acts from applying to the Judges of the Supreme Court as to other citizens. But he contends that, while sec. 17 stands as part of the Constitution, no law can be initiated which contravenes its provisions. *Mr. Lukin's* argument, on the other hand, is that the *Constitution Act* 1867 stands in precisely the same position as any other Act of the Queensland legislature; that the Parliament which passed it could not bind succeeding Parliaments as to the mode of repealing or altering it; and that any subsequent Parliament is at liberty, if it thinks fit, to repeal or alter it by implication, that is, by passing another law inconsistent with its provisions.

The whole controversy really turns on the question whether the *Constitution Act* 1867 does stand in the same position as any other Act of the Queensland legislature, or whether it is in reality a fundamental law which, although capable of being amended by that legislature, binds it until amended, just as a Constitution embodied in an Imperial Act would bind it. The primary object of the 18 & 19 Vict. c. 54, which first authorized the granting of a Constitution to Queensland, was to enact the Constitution for New South Wales embodied in the First Schedule. The territory afterwards established as the Colony of Queensland was then a part of New South Wales. Sec. 7 enabled Her Majesty to separate that territory, erect it into a separate Colony, and establish its Constitution by Letters Patent and Orders in Council, it being directed that the legislature was to be established "in manner as nearly resembling the form of Government and legislature which shall at such time be established in New South Wales as the circumstances of such Colony (Queensland) will allow," &c. The Order in Council of 1859, established the Constitution of Queensland accordingly, partly by its own express provisions, and partly incorporating by reference various Imperial and New South Wales Statutes. The Constitution so established was undoubtedly a fundamental law, and binding on the Queensland Parliament created under it in the same way as a Constitution embodied in an Imperial Act would have been binding, subject only to the powers of repeal and alteration contained in clause XXII. to which I shall refer later on. So fully was this recognized by the British Parliament that when, later, doubts were raised as to the validity of laws passed by the Queensland Parliament by reason of the Order in Council not having established a legislature in the form by the 18 & 19 Vict. c. 54 directed, it was found necessary to validate and declare effectual the Orders in Council and the laws passed by the Queensland legislature thereunder by an Act of the Imperial Parliament, the 24 & 25 Vict. c. 44. The Order in Council, by clause XXII., declares that the legislature of Queensland to be established under the Order "shall have full power and authority from time to time to make laws altering and repealing all or any of the provisions of this Order in Council in the same manner

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as any other laws for the good government of the Colony," &c. The rest of the sentence does not affect the matter now under consideration.

The question at once arises, what was the power and scope of legislation permitted to the Queensland Parliament under that clause? It was no doubt open to that legislature to repeal or amend any or all of the provisions of the Order in Council. But the whole scope and purpose of the Order indicate that it was never intended to authorize the entire abolition of any binding form of Constitution or the entire disregard of its provisions. At the time when the Order was issued the other Colonies of Australia were governed under Constitutions conferred by Acts of the Imperial Parliament, which were fundamental laws binding on the Parliaments created under their provisions. There is nothing in the Statute authorizing the Order in Council, nor in the Order itself, nor in its history, to indicate that it was intended to place the Queensland Parliament in a different position; to give it liberty at its own will to treat its Constitution as non-existent. The power given under clause XXII. of the Order was, in my opinion, not a power to abolish the Constitution altogether, nor to substitute for the Constitution under the Order a body of provisions which, although embodied in a Constitution Act, gave no rights and no security whatever either in respect of forms of Government or legislative bodies or officers. It was a power to substitute for the fundamental law of the Constitution under the Order in Council another fundamental law in the form of a Constitution in whole or in part of Queensland's own making, and which, when made and while it existed, would be as binding on the Queensland Parliament as the original Constitution under the Order. The *Constitution Act* 1867 was the exercise by Queensland of these powers. On the face of it, it is a consolidation of laws relating to the Constitution. It purports to preserve and protect rights of Judges and other officers of the Government. It deals comprehensively with the whole ground generally covered by a Parliamentary Constitution, and, under the circumstances, it must be taken to be the fundamental law under the Order in Council. Its authority can be found nowhere but in

the Act of 18 & 19 Vict. c. 54, under which the establishment of the Queensland Constitution was originally authorized.

Whether the validity of a law passed by a colonial legislature, and assented to by the Governor, can be questioned on any other grounds than those mentioned in the *Colonial Laws Validity Act* 1865 it is unnecessary at present to inquire, because the *Constitution Act* 1867 having been, as I have pointed out, enacted by virtue of an order in Council issued under an Imperial Act extending to the Colony of Queensland, clearly comes within the express provisions of sec. 2. It follows that a law of the Queensland Parliament which is repugnant to any provision of the Queensland *Constitution Act* 1867 is, by virtue of the *Colonial Laws Validity Act* 1865, void and inoperative. Assuming, therefore, that sec. 17 of the Constitution gives to the Supreme Court Judge immunity from taxation in respect of his salary, the provisions of the Income Tax Acts which purport to tax that salary must be invalid, as being contrary to that section of the Constitution which then stood and still stands unrepealed.

The position generally may be thus stated. The Queensland Parliament may repeal or alter any portion of its Constitution, and when the repeal or alteration has taken effect, that portion is as if it never had been. But so long as it exists no Act conflicting with it can be passed. In other words, before an Act can be passed taking away any right given by the Constitution, the Queensland Parliament must first repeal the portion of the Constitution which gives the right.

I wish to express my entire concurrence on all grounds in the judgment of my learned brother the Chief Justice which I have had the opportunity of reading.

ISAACS J. I have had the opportunity of reading the judgment of the learned Chief Justice, and I agree with the reasons there stated, and have nothing further to add.

HIGGINS J. I also think that the appeal should be dismissed. The appellant, by refusing to pay income tax, has usefully brought before this Court, for further definition, a principle of the greatest importance—a principle which has materially con-

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duced to the independence and purity of British Courts, to the confidence of the public in these Courts, and thereby to the order and peace of the British dominions. Owing to this principle, as embodied in the *Act of Settlement* and subsequent Acts, the Judges of British Courts have been able to say to those who are in places of power and influence, as executive ministers or otherwise. "We

". . . . . Neither beg nor fear
" Your favours nor your hate."

The question here is, does that principle, under the Constitution of Queensland, extend so far as to exempt a Justice of the Supreme Court of Queensland from liability to pay income tax in respect of his official salary; or rather, so far as to enable him to exclude his official salary from his statement of the income on which he is to pay tax. This question is to be faced on considerations quite different from those discussed in *Deakin* v. *Webb* (1) and in *Webb* v. *Outtrim* (2) as to the salary of federal officers. In the case of a State taxing the income of a federal officer, there is, or may be, a clashing of what may be called, though not quite accurately, two sovereignties. The view of the High Court, as stated in *Deakin* v. *Webb* (3), is that the recompense of a federal officer is not to be lessened, nor the full exercise of the executive or judicial power of the Commonwealth interfered with, except by that power—the federal power—from which the officer derives his appointment. Whatever may be our views as to the decision in *Deakin* v. *Webb* (1), or as to the effect of the more recent decision of the King in Council in *Webb* v. *Outtrim* (2), in this case there is no such conflict of State power with federal power. Here it is the Queensland legislature which purports to exact from its State Judges income tax, according to the same scale as from every other citizen. The question is, does the Queensland Constitution forbid such taxation on the official salary of the State Judges? In the first place, I entertain no doubt, notwithstanding the ingenious argument of counsel for the appellant, that the Queensland legislature, by the *Income Tax Act Amendment Act* 1904, intended to tax the Judges (see *Income Tax Act*

(1) 1 C.L.R., 585.
(2) (1907) A.C., 81; 4 C.L.R., 356.
(3) 1 C.L.R., 585, at pp. 613-615.

1902, sec. 3, "income derived from personal exertion," secs. 7, 12, 58). In sec. 12, there is an express exemption of the Governor "in respect of the emolument of his office as Governor"; and there is no such exemption provided for the official emolument of Judges. In sec. 58, it is provided that no Judge shall on account of his liability to tax under this Act be debarred from dealing with any matter upon which he may be called upon to adjudicate under this Act. Moreover, if any doubt could linger after such provisions, that doubt is, in my opinion, absolutely settled by the declaratory Act of 1905 (No. 34 of 5 Edw. VII.). For in this Act it is declared that each of the persons for the time being holding the office of Chief Justice is and always has been chargeable with, and liable to pay, income tax in respect of his official salary. But the question remains, does the Queensland Constitution, as distinguished from the Queensland Acts of Parliament, forbid the levying of such a tax on the Judges? As usually happens in constitutional cases, the controversy has raised a great number of curious and delicate points, but in the end the issue is reduced to a very narrow compass, and here it is as to the meaning of sec. 17 of the *Constitution Act* 1867. I assume, in favour of the appellant, that this Act, and particularly this section, were authorized by the Imperial Act 18 & 19 Vict. c. 54, sec. 7, and by the Order in Council thereunder of the 6th June 1859. I assume also that, notwithstanding the exceptionally wide and very peculiar powers contained in par. XXII. of the Order in Council, of altering the Constitution, the legislature of Queensland has no power to pass a law forbidden by the Constitution as it stands, unless and until the Constitution has been definitely so altered, with His Majesty's consent, as to give the legislature power to pass such a law. I understand that it is the particular desire of the appellant to test the power of legislating in defiance of the Constitution, to test the validity of the declaratory Act of 1905 on the assumption that it is in violation of the Constitution. But it is not necessary for the purpose of the decision in this case to decide such a point, for, in my opinion, the declaratory Act of 1905 is not in violation of the Constitution. The point may never come for decision; but, if it should, it will be well if it can be approached as a fresh subject uninfluenced

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by any expressions of opinion made in a case that has been solved on other and narrower grounds. I do not think that the mind bestows the same searching scrutiny on a point which is not necessary for a decision as on a point which is necessary. I confine my decision to sec. 17 of the Constitution. When the Constitution says that the salary shall in all time coming be paid and payable to every such Judge and Judges for the time being so long as the patents or commissions for them or for any of them respectively shall continue and remain in force, does it involve the proposition that the Judges shall not be liable to any taxation in respect of their salaries as Judges? Does this provision for payment in full of the salary involve, by necessary implication, that the legislature is prohibited also from compelling an increase of the expenditure of the Judges? The question really carries its own answer on its face. The protection of the Constitution extends only up to the time that the money gets into the possession of the Judge. The money must get there; but there is nothing said as to what may happen afterwards. In this case, the salary for 1905, which is the basis of assessment, has in fact been received in full by the appellant; and, in my opinion, this satisfies the requirements of the Constitution. It is urged that if the Commissioner's view is right there will be nothing to hinder the Crown from deducting the income tax from the salary before payment. But this result by no means follows. In England there is an express power to make such a deduction (5 & 6 Vict. c. 35, sec. 146, Schedule E, Rule 3). At all events, the difficulty has not yet arisen, for the salary has been paid in full. For my part, I am at present strongly inclined to think—and I state my present opinion because it confirms me in my view of the main question—that the income tax cannot be so deducted before payment of the salary, and that a Queensland Act providing for such a deduction would, in the present state of the Constitution, be *ultra vires* and void. The Constitution provides that the salary shall be "paid and payable"; and, in my opinion, nothing that will not support a plea of payment will be a sufficient answer to a Judge's claim for salary. Even if the income tax were made payable before or on the same day as the Judge received his salary, I think that the Crown could not refuse to pay the salary on the

ground that it has a set-off. Where has the right to set-off been given? At common law, a defendant, who had a cross claim, had to bring a cross action. The right to set-off is purely statutory (2 Geo. II. c. 22, sec. 13): *Liskeard and Looe Railway Co.* v. *Liskeard and Caradon Railway Co.* (1). *A fortiori*, a counter-claim cannot be used so as to enable the Crown to escape payment. But the protection of the Constitution does not go farther than actual payment; and we have no right to give a meaning to the words of the Constitution which the words do not bear in themselves, on the grounds urged by counsel—that, without further protection, the independence of the Judges has not been secured by the Constitution against all possible risks. That is a matter for the framers of the Constitution. It has to be remembered that the protection given, according to our construction, extends as far as that given to the English Judges; and it is in most, if not all, of the States, stronger in quality, by virtue of the sections forming part of a written Constitution, a fundamental law. The sections of the Queensland Constitution, secs. 16-18, follow almost *verbatim* the words of the English Act 1 Geo. III. c. 23. The British Parliament has uncontrolled power to alter that Act at its will, but it has never been altered; and yet the words in that Act have not prevented the English Parliament from making the Judges as well as others liable to income tax. The British *Income Tax Act* 1842 makes the Judges liable to the same income tax as other citizens; and, as I have said, it specifically enables the tax to be deducted from their salaries. Perhaps it is not an unfair inference that the Queensland legislature, in adopting the Queensland Constitution in 1867, and the Privy Council in framing the Order in Council in 1859, did not, in using the same words as the Act 1 Geo. III. c. 23, intend to give the Queensland Judges an immunity from a tax to which the English Judges were already subject. The same Act (1 Geo. III. c. 23) has been embodied in most, if not all of the Constitutions of the Australian Colonies; and there is no instance on record of a Judge in Australasia having escaped the payment of an income tax by reason of those words in the Constitution. I am, therefore, of opinion that both questions in this special case

(1) 18 T.L.R., 1.

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should be answered in the affirmative; and as to the amount of income tax to be paid there is no contest.

Appeal dismissed.

Solicitors, for appellant, *Macpherson, Green & Macpherson.*
Solicitor, for respondent, *Hellicar* (Crown Solicitor).

N. G. P.

[HIGH COURT OF AUSTRALIA.]

àBECKETT AND ANOTHER . . . . APPELLANTS; DEFENDANTS,

AND

BACKHOUSE AND OTHERS . . . RESPONDENTS. DEFENDANTS AND PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1907.

MELBOURNE, *May* 27.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

Appeal from Supreme Court of a State—Special leave to appeal—Time for appealing expired—Condition.

An order was made by the Supreme Court of Victoria on an originating summons determining that the daughters of a settlor, to the exclusion of his sons, were entitled to an uncertain portion of a trust fund. The sons did not, within the time limited for appealing, appeal either to the Full Court or to the High Court, and until that time had expired they believed that the portion of the trust fund affected by the order would not exceed a certain sum. A claim was then made by the daughters that the order affected a much larger sum. On application by the sons for special leave to appeal:

Held, that special leave should be granted, on the undertaking by the appellants that, in the event of the appeal being allowed, they would not claim a refund of moneys paid by the trustees on the faith of the order not having been appealed from within time, and to indemnify the trustees against any such payments.