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it is not sufficient that there should be an invitation to others to oppose recruiting as a means of obtaining soldiers. A person who seconds a resolution does not necessarily adopt it as his own. The defendant Pearce did not, by putting the resolution, make the statement contained in it. He thereby expressed no opinion of his own. [Counsel was stopped on this point.]

J. R. Macfarlan (*Mann* with him), for the respondent. Any resolution or statement which formally invites a body of persons to set forth their opinion that others should be called upon to refrain from assisting, or to cease to assist, recruiting, is likely to prejudice recruiting within the regulation. A person who seconds a resolution expresses his own opinion as much as does the mover. The making of the statement in the resolution was an illegal act, and Pearce by putting the resolution to the meeting invited them to say one way or the other whether they approved of the statement. Without his action the statement as coming from the meeting could not have been made. He aided and abetted in the making of the statement, and was therefore guilty of the offence of making it.

Foster, in reply.

BARTON J. The defendants were charged under reg. 28 (*b*) of the *War Precautions Regulations*, which, so far as is material, provides that any person who by word of mouth makes statements likely to prejudice the recruiting of any of His Majesty's Forces is guilty of an offence. They have obtained orders *nisi* to review the decision of the Police Magistrate, who convicted and fined both of them. It is said that there is no evidence that either of them did by word of mouth or otherwise make any such statements. Taking the case of Pearce, who was the chairman, he put to the meeting a resolution to the effect that in the opinion of the Trades Hall Council the Political Labour Council Executive should call upon all Labour Members of Parliament to refuse to assist in recruiting. Whatever that resolution did affirm, I do not think that it can be said that the chairman affirmed it. By putting the resolution I do not think he, by word of mouth or in any other way, made the statement contained

in the resolution. He invited the meeting, as he was bound to do, to give their affirmance or negation of that view. It was no concern of his, as chairman, whether they affirmed or denied it, and he does not appear to have voted. They happened to affirm it, and it is alleged now that because the affirmance was illegal he in putting the resolution to the meeting did an illegal act. Even if the affirmance of the resolution was an illegal act, I do not think that the chairman was in the relevant sense a party to making it. I do not think I need labour this point. Beyond what I have stated, no evidence was given, and there was no suggestion, that Pearce gave his assent to or furthered in any way the resolution so as to be considered as having adopted it. If he was a party to it in any sense, he was not so in that sense.

The case of Smith is different. He seconded the resolution. In my judgment, and I think I have the concurrence of my brothers, a proposition affirmed in a resolution is equally affirmed by the person who moves the resolution and the person who seconds it. Whether a statement is absolutely repeated in words or whether agreement with it is merely expressed by word of mouth is in common sense and, I think, in law, absolutely the same thing. To have affirmed, by seconding, a resolution that the Political Labour Council should call upon all Labour Members of Parliament to refuse to assist in recruiting, is to become a party to it in the sense of expressing verbally his approval of it. He makes the statement his own. The question then is whether that is a statement likely to prejudice recruiting. I think it is, and on the ground that, this being a meeting of delegates of the Labour Party, before whom presumably the question came within some rule which made it in order, the expression of the opinion that the Political Labour Council should call upon all Labour Members of Parliament to refuse to assist in recruiting was intended to influence someone. It was intended to influence the Political Labour Council, and through them Members of Parliament. If they or some of them were not assisting or were not disposed to assist in recruiting, the resolution would be entirely in the air. We cannot consider the resolution as being anything else than a statement whose meaning was that if there were persons who were assisting or were disposed to assist recruiting they must abandon

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that attitude, and must refuse to assist or to further assist recruiting. That being the purport of the resolution, it seems to be unarguable that the statement was not likely to prejudice recruiting. That is the short ground upon which I decide. I think, therefore, that Pearce is not shown to have made this statement, and that Smith has been shown to have done so.

The remaining question is as to the reception of evidence. From what has been brought before us I do not think that the Police Magistrate relied upon the evidence objected to in coming to his conclusion, and, therefore, that evidence does not affect the cases as they come before us, so as to invalidate a conviction founded on the evidence, which evidence was sufficient.

I am of opinion that the appeal of Pearce succeeds, and that of Smith fails.

ISAACS J. I agree.

GAVAN DUFFY J. I agree.

Smith's appeal dismissed with costs.

Pearce's appeal allowed. Order appealed from discharged with costs, £4 4*s. Respondent to pay costs of appeal.*

Solicitors for the appellants, *Loughrey & Douglas.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

GELLING . . . . . APPELLANT;
PLAINTIFF,

AND

CRESPIN AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY.

Aug. 27, 28, 29; *Sept.* 6.

Barton, Isaacs and Rich JJ.

Contract—Formation—Written memorandum—Evidence of omitted term—Construction—Sale of f.a.q. wheat—Wheat grown in particular State—Performance—Impossibility—Acquisition of wheat by State—Wheat Acquisition Act 1914 (*N.S.W.*) (*No.* 27 *of* 1914), *secs.* 3, 7, 8.

Where a document is prepared and executed with the intention that it shall be the record of a contract, prior negotiations are inadmissible for the purpose of qualifying the contract expressed in the document.

Therefore, where a contract was evidenced by the bought and sold notes prepared by the broker who brought about the sale, which note described merely the quantity and quality of certain wheat together with the season of its growth,

Held, that evidence was not admissible to show that the sale was of a specific parcel of wheat.

By a contract made in August 1914 between the plaintiff and the defendants, who were grain merchants, the defendants agreed to sell and the plaintiff to buy at a certain price per bushel "15,000 bags wheat f.a.q. of season 1914-15 of State where delivery is made." Delivery was to be made on trucks at Adelaide, Melbourne or Sydney, "at seller's option," and 5,000 bags were to be delivered in each of the first three months of 1915. The defendants elected to deliver at Sydney. On 24th December 1914 the Government of New South Wales, pursuant to the *Wheat Acquisition Act* 1914 (N.S.W.), which had come into operation on 11th December 1914, acquired all wheat in New South Wales

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excluding wheat then actually in transit to other States of the Commonwealth, and thereafter the authority controlling the wheat so acquired would not sell to grain merchants.

Held, that on the defendants' election to deliver at Sydney they were bound to deliver wheat grown in New South Wales in the season 1914-1915 which was of fair average quality of that season according to the standard in New South Wales for that season.

Held, also, that in the absence of evidence that it was impossible for the defendants to obtain wheat of the specified kind then in, or in course of transit to, other States sufficient in quantity to satisfy the contract, the defendants were not excused from performing the contract, even if the acquisition by the Government would have afforded an excuse upon such evidence.

Decision of the Supreme Court of New South Wales: *Gelling* v. *Crespin*, 16 S.R. (N.S.W.), 558, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Christopher James Gelling against Godwin George Crespin and George Henry Claude Crespin, trading as grain merchants under the firm name of G. G. Crespin & Sons, for non-delivery of certain wheat pursuant to a contract of sale and purchase made between the defendants and Gelling & Sons Ltd., a company registered in New South Wales, which had subsequently gone into voluntary liquidation, and the liquidator of which had transferred and assigned the benefit of the contract to the plaintiff. The action was heard before *Ferguson* J., who, with the consent of the parties, discharged the jury and after hearing evidence formally entered judgment for the plaintiff for £3,328 2s. 6d., reserving all questions of law and fact for the Court. The defendants thereupon moved for a rule setting aside the verdict and ordering a nonsuit or entering a verdict for the defendants or reducing the amount of the verdict. The Full Court made an order setting aside the verdict and ordering a verdict to be entered for the defendants: *Gelling* v. *Crespin* (1).

From that decision the plaintiff now appealed to the High Court.

Knox K.C. (with him *Delohery*), for the appellant. Notwithstanding the election of the respondents to deliver in New South Wales the contract does not require the respondents to supply

(1) 16 S.R. (N.S.W.), 558.

wheat grown in New South Wales. The contract requires delivery of wheat of a certain quality (see *Azémar* v. *Casella* (1)), and if it is of that quality it does not matter where it is grown. If the contract requires delivery of wheat grown in New South Wales, the evidence does not establish that it was impossible for the respondents to perform the contract. All that the evidence establishes is that all the wheat in New South Wales on 24th December 1914 not then in transit to other States became the property of the Government. The burden was on the respondents to show that they could not have obtained sufficient New South Wales wheat then in, or in course of transit to, another State to satisfy the contract. Apart from that, the acquisition by the Government did not render the contract impossible so as to excuse the respondents, for under the *Wheat Acquisition Act* 1914 (N.S.W.) the Board appointed under the Act had power to sell wheat which had been acquired (sec. 7), and the fact that they would not sell to grain merchants affords no excuse to the respondents. The position is the same as if the wheat market had been cornered. [He referred to *Wilson & Co. Ltd.* v. *Tennants (Lancashire) Ltd.* (2); *Bolckow, Vaughan & Co. Ltd.* v. *Compania Minera de Sierra Minera* (3).] Even if the respondents established that it was impossible for them to perform the contract they are not excused, because the contract was not for the sale of specific goods (*Brown* v. *Royal Insurance Co.* (4); *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration* (5)).

[ISAACS J. referred to *Horlock* v. *Beal* (6); *E. Hulton & Co. Ltd.* v. *Chadwick & Taylor Ltd.* (7).]

Impossibility is also not an excuse, because it arose from an act of a State other than the State where the contract was made—that is, Victoria. In a contract of this kind it cannot be implied as a condition that if all the wheat gets into the hands of persons who will not sell it, the vendors are to be excused. The only condition that will be implied is that if the contract becomes physically impossible, for example, if the whole wheat crop fails, the vendors

(1) L.R. 2 C.P., 431.
(2) (1917) 1 K.B., 208.
(3) 85 L.J.K.B., 1776.
(4) 1 El. & El., 853.
(5) (1915) 3 K.B., 676.
(6) (1916) 1 A.C., 486.
(7) 33 T.L.R., 363.

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are to be excused. Where the performance is rendered impossible by the act of another State not directed to rendering contracts of that kind illegal but having the incidental effect of rendering performance of the contract impossible, the vendor is not excused (*Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (1) ; *Barker* v. *Hodgson* (2) ; *Spence* v. *Chodwick* (3)). [Counsel also referred to *Zinc Corporation Ltd.* v. *Hirsch* (4) ; *Maine* v. *Lyons* (5).]

Leverrier K.C. (with him *Coghlan*), for the respondents. [Counsel was not called on to argue as to the construction of the contract.] It is not necessary that the respondents should show that performance by them of the contract was absolutely impossible. It is commercial impossibility which the respondents must show (*Horlock* v. *Beal* (6)), and it was sufficient to prove generally that they were prevented from delivering by the action of the Government. It was in the contemplation of the parties that the wheat should be procured in New South Wales ; that is shown by the provision that delivery is to be on trucks at Sydney, which implies that the wheat had come on the trucks from some part of New South Wales. Where the state of things which the parties contemplated at the time the contract was made is entirely altered by some event which they did not contemplate, the contract is discharged (*Krell* v. *Henry* (7)). The state of things contemplated by the parties was completely altered by the acquisition by the Government; it was a cutting off of the New South Wales supply. The burden was upon the appellant to show that the respondents could have got sufficient wheat outside New South Wales to fulfil the contract. On the evidence, the subject matter of this contract was the wheat bought by the respondents from Aitken, and the contract was therefore for specific goods. The broker's note is not the contract but is only a memorandum of it. There was a concluded contract when the broker informed the respondents that Gelling & Sons had accepted their offer, and if one term of it is not set out in the note that term can be supplied by other evidence (*Pitts* v. *Beckett* (8)).

(1) 12 Q.B.D., 589.
(2) 3 M. & S., 267.
(3) 10 Q.B., 517 ; 16 L.J.Q.B., 313.
(4) (1916) 1 K.B., 541.
(5) 15 C.L.R., 671.
(6) (1916) 1 A.C., 486, at p. 499.
(7) (1903) 2 K.B., 740.
(8) 13 M. & W., 743.

[ISAACS J. referred to *Gordon* v. *Macgregor* (1).]

In order that a contract with respect to wheat should be avoided by sec. 8 (2) of the *Wheat Acquisition Act* 1914, it is not necessary that the wheat which is the subject of it should be absolutely limited to wheat which is the subject of another contract which is avoided by sec. 8 (1), but it is sufficient if the parties look to wheat which is the subject of such other contract to fulfil their contract.

[ISAACS J. referred to *New South Wales* v. *The Commonwealth* (2).]

Cur. adv. vult.

Sept. 6.

The following judgments were read :—

BARTON J. At the trial the plaintiff recovered a formal verdict for £3,328 2s. 6d., all questions of law and fact being reserved for the Supreme Court of this State, who set aside the verdict and entered a verdict for the defendants. The present appeal is against that judgment.

The following summary is from the judgment delivered by *Street* J. for the Full Court, which consisted of the learned Chief Justice of the State, and *Street* and *Gordon* JJ. : —"On 30th July 1914 Lindley Walker & Co., a firm of grain brokers carrying on business in this State and in Victoria, negotiated a sale, in Sydney, of 15,000 bags of wheat from a firm named Aitken Brothers to the defendants. The subject matter of the contract, and the price to be paid, were described in the bought and sold notes in the following terms :— '15,000 bags wheat f.a.q. of season 1914-15 of State where delivery is made. Three shillings and ten pence farthing per bushel on trucks, Adelaide, Melbourne, or Sydney, at sellers' option.' The sellers' option as to the place of delivery was to be declared by 1st December 1914, and 5,000 bags were to be delivered in each of the three months of January, February and March 1915. On 17th August 1914 Lindley Walker & Co., again acting as brokers, negotiated, in Victoria, a sale of a similar quantity of wheat from the defendants to Gelling & Sons Ltd. The bought and sold notes were in identical terms, except as to price, with those employed

(1) 8 C.L.R., 316, at p. 322. (2) 20 C.L.R., 54, at pp. 96-97.

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on the purchase by the defendants from Aitken Brothers. On 30th November 1914 Aitken Brothers notified the defendants that they proposed to deliver at Sydney under their contract, and on 2nd December the defendants wrote to Gelling & Sons Ltd., notifying them of a similar election under their contract. Nothing turns upon the circumstance that the latter notice was a day or two late."

The price of the wheat sold by Gelling & Sons Ltd. to the respondents was 4s. 0¼d. a bushel.

On 11th December in the same year there came into operation the *Wheat Acquisition Act* 1914, which empowered the Governor to declare by notification published in the *Gazette* that any wheat therein described or referred to was acquired by His Majesty, and enacted that upon such publication the wheat should become the absolute and unencumbered property of His Majesty, and that the rights and interests of every person in the wheat at the date of the publication should be taken to be converted into a claim for compensation. Pursuant to that authority on 24th December 1914 a notification was published acquiring all wheat then in New South Wales other than wheat actually in transit to other States of the Commonwealth. No wheat was delivered either by Aitken Brothers to the defendants, or by the defendants to Gelling & Sons Ltd. Gelling & Sons Ltd. are now in liquidation, and the plaintiff is the assignee of their rights under their contract. The action by the appellant is for non-delivery of the wheat sold to Gelling & Sons Ltd. by the respondents, whereby the purchasers were deprived of the profit which would otherwise have accrued to them.

The first plea was withdrawn during the argument before us. The second plea had already been abandoned. The pleas remaining to be considered are the third and fourth. The third was that the contract was one with respect to wheat which was the subject matter of a certain other contract made in the State of New South Wales prior to the passing of the *Wheat Acquisition Act* for the sale of New South Wales 1914-15 wheat to be delivered in that State, that the last-mentioned contract had not at the date of the passing of the Act or at all been completed by delivery, nor under such last-mentioned contract had any portion of the wheat relating to

such contract been delivered at the said date or at all. I do not think that this plea, which relies on sec. 8 (2) of the *Wheat Acquisition Act*, is sustained. Both the contracts were probably made in Victoria, and therefore escape the provisions of sec. 8. However that may be, I think the respondents have failed, as I shall presently show, to prove the essential allegation in this plea that the contract sued on was in respect of wheat which was the subject matter of a certain other contract as described, by which the respondents mean their purchase from Aitken Brothers.

But the defence on which the respondents mainly rely is stated by their fourth plea, which sets up that the contract was for the delivery of wheat grown in the State of New South Wales (duly declared by the respondents as the State in which delivery would be made under the contract); that after contract and before breach the Governor, acting under the Acquisition Act made the notification already mentioned, which acquired all wheat in the State of New South Wales other than wheat actually in transit on its date to Australian States outside New South Wales; that the wheat the subject matter of the contract, being wheat then in New South Wales and not at the date of the notification actually in transit, was compulsorily acquired under the Act and notification, whereby the defendants were unable to deliver any of the wheat.

It will be seen that the respondents rely for this main part of their defence on two branches: first, that on their electing Sydney as the place of delivery, the contract became one for the delivery of wheat grown in New South Wales, and next, that the compulsory acquisition of the wheat described in the Governor's notification rendered it impossible for them to perform that contract.

As to the first branch I agree with the Full Court in thinking "that the contract must be read as if the wheat stipulated for were f.a.q. wheat, of season 1914-15, of the State of New South Wales," *i.e.*, grown in that State. The reasons given by their Honors of the Supreme Court for their opinion on this point are quite satisfactory to me, and I see no necessity for adding to them. With the opinion of their Honors on the second branch, namely, the

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question of impossibility, I find myself, with great respect, unable to agree.

The attempt of the respondents to show that the wheat sold by them to Gelling & Sons Ltd. was the specific wheat purchased from Aitken Brothers has, I think, failed. It is true that the two contracts were in identical terms, but that mere fact does not confine a description of the subject matter, expressed so as to refer to a certain class of wheat, to any specific parcel of such wheat. It must be established in the first instance, if it is sought to prove that the two were identical, that the grain sold by Aitken Brothers was some specific parcel. Aitken's sale, like that of the respondents, was in general terms, and would be satisfied, as theirs would be, by the delivery of any wheat grown in New South Wales which answered the description of f.a.q. wheat of the season 1914-15. It is fruitless, therefore, to attempt to identify as something specific wheat sold by either Aitken Brothers or the respondents in those general terms. An attempt was made to identify them by means of the letter of the brokers' manager to the respondents of 2nd February 1915, five months after the contract now sued upon. This, if admissible, does not seem to me to carry the case any further. If it is admissible, so also is the telegram sent by the brokers to Gelling & Sons Ltd. on 15th August, which the manager of Gelling & Sons Ltd. admitted that he had seen. That was simply that "Crespin offer five thousand sacks each month January February and March Sydney Melbourne or Adelaide, sellers' option declared December four shillings one farthing per bushel, advise you to accept the offer no prospect of doing better"; the answer to which was as follows: "in reply to your letter of yesterday you may buy Golding's contract hundred cash" (the letter clearly referred to Golding's contract because there was no such letter as to Crespin's offer) "also Crespin's line three States four shillings one farthing per bushel, do better if possible." From these telegrams it is plain that Gelling & Sons Ltd. at the time of their acceptance had no knowledge of the Aitken transaction, and therefore could have no knowledge of any assumed identity of Aitkens' parcel with Crespins'. But in point of law the contract created by the bought and sold notes could

not be varied by the parol evidence tendered by the respondents at the trial. *Pitts* v. *Beckett* (1) was relied on. That went entirely on the question of the broker's authority to sign the contract sued on, and is not at all applicable to the present case. The case of *Gordon* v. *Macgregor* (2) is in favour of the appellant rather than the respondents.

We must take the case, then, as resting on the bought and sold notes of 17th August, and upon these it is impossible to contend with success that the contract sued on was for the sale of specific goods.

The respondents, nevertheless, maintain that they have established the defence that they were excused from their contract by the impossibility of delivery. It is not necessary to inquire whether such a defence is maintainable where the article sold is not specific, for if it were maintainable it has not been proved. As has been stated, the notification of 24th December 1914 relied on contained a proviso which prevented it from operating on all wheat then in the State of New South Wales, because the proviso expressed that the declaration of acquisition should not extend to wheat then actually in transit to States of the Commonwealth other than New South Wales. Moreover, any of the wheat untouched by the proviso could have been sold by the Government after acquisition, had they so chosen, and the fact that they refused to sell could not establish impossibility as a defence, any more than it would have done in the case of any other possessor of wheat not compulsorily acquired, who declined to sell. The respondents admitted that the "cornering" of the market by any private speculator would not have given them a defence. The acquisition by the Government does not appear to me to be of greater avail to them by reason of its having been a compulsory purchase. But even supposing that the Government's retention of its wheat had established any impossibility, that would only have been *pro tanto*, and the contract, for all that appears, could have been satisfied by purchases of wheat then in or in transit to other States. The respondents say that as there was a limitation of the quantity of wheat available caused by

(1) 13 M. & W., 743. (2) 8 C.L.R., 316.

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the notification the onus was shifted to Gelling & Sons Ltd., so that they would have to show that there was sufficient wheat in or in transit to other States to enable the sellers to satisfy their contract. I am by no means of that opinion. Even supposing that the Government's acquisition could be held to establish a partial impossibility, it was still for the respondents to show that their contract was impossible of performance because sufficient other wheat could not be obtained, and this they have not shown. But they would have to show it for the purpose of establishing what they call practical impossibility in relation to a mercantile contract, and the authorities cited do not help them in the absence of evidence to bring this case within them. I think it unnecessary either to canvass the numerous cases cited or to discuss the evidence any further. I think that the plaintiff should hold his verdict and that the appeal should be allowed with costs.

ISAACS J. The first question to be determined is: What is the contract? The respondents say the contract includes a verbal stipulation made, it is said, between the brokers' Melbourne manager, and Wiseman, the respondents' Melbourne manager, in the course of negotiations. This is put in two ways. First, that the bought and sold notes countersigned by the parties are no more than memoranda of the verbal contract, and the verbal stipulation referred to is omitted. Then it is urged that even if the countersigned documents were intended as the reduction of the contract itself to writing, it is open to the defendants to rely on the verbal stipulation referred to. There is no doubt of the materiality of the stipulation in question. It is directed to make the contract between the present parties dependent on a contract between Aitken and the respondents.

But the answers to the respondents' contention are these. The countersigned documents, according to their own internal content and the evidence relating to them, were written and signed for the purpose of reducing the agreement to writing. The bargain is a written agreement. There is not, and, according to the New South Wales procedure in such a case, there could not be, any claim for rectification. The document being the agreed record of the contract,

the authorities are clear that it is conclusive and that prior negotiations are inadmissible for the purpose of qualifying it. Some of the most important authorities are collected in *Gordon* v. *Macgregor* (1). The latest, and for us perhaps the most authoritative on the subject, is *Yorkshire Insurance Co.* v. *Campbell* (2).

The next step is to construe the written contract. The first important passage is the description of the wheat sold, namely "Fifteen thousand (15,000) bags wheat f.a.q. of season 1914-15 of State where delivery is made." The view taken by the Supreme Court as to this is clearly right. It means, when coupled with the declared option, that the wheat was to be wheat grown in New South Wales in the season 1914-15 and to be fair average quality according to the standard for New South Wales of that season. The appellant's contention that any wheat would do, so long as it was equal to fair average quality of that season's New South Wales wheat, is an inadmissible interpretation.

But the respondents went further, and contended that it must be not only wheat grown in New South Wales, but also wheat which the seller was to procure in New South Wales. It was said this was shown by the fact that it was to be placed "on trucks Sydney," the inference being that it was to reach Sydney from the country districts of the State. But certainly it could be procured in Sydney so far as the contract was concerned; and the strict answer is that the contract leaves it open to the sellers to procure the wheat where they please, so long as it complies with the description and they place it where prescribed. This eliminates the New South Wales expropriation as a sufficient justification for failure to deliver, even disregarding the point as to the Board being at liberty to sell.

But then, say the respondents, at least the contract left it open to them to buy the wheat either in New South Wales or elsewhere, and as the opportunities for buying in New South Wales were so extensive proportionately to the opportunities of getting 15,000 bags of New South Wales wheat elsewhere, the deprivation of the opportunity within the State so altered the contemplated situation as to go to the root of the contract and relieve the sellers from

(1) 8 C.L.R., 316, at pp. 322-323. (2) (1917) A.C., 218, at p. 225.

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liability to deliver. There was considerable discussion as to what would constitute an impossibility sufficient to exonerate a party from performance The case of *Horlock* v. *Beale* (1) contains several authoritative passages on this point. See per Lord *Atkinson* at pp. 496 *et seqq*; per Lord *Shaw* at pp. 512-513; and per Lord *Wrenbury* at pp. 525 *et seqq*. The result of what is there said may, I think, be stated in the following formula, which reconciles most if not all the cases of authority: Exoneration of a party charged with a breach of contract all depends, not upon purely external causes preventing the operation of the contract, but upon the construction of the contract itself. The question always is this: Was the obligation which is said to have been broken absolute, or was it conditional upon an event which has failed? If upon its true construction—regard being had to all circumstances which legitimately enter into construction — the contract is found by the appropriate tribunal to include a condition express or implied that the parties must be taken to have regarded as essential to performance by one or both of them, the obligation is not absolute and the non-fulfilment of the condition relieves any party for whose benefit it exists of his obligation of performance.

If the present contract itself on its true construction would be satisfied—as it would be—by delivery of wheat to be wholly procured entirely outside New South Wales so long as it complied with the stated description, it is impossible to imply the suggested condition as one which the parties are to be taken to have regarded as essential to its performance by the sellers. The expectation by the sellers that any particular source or sources would be available to them may have operated as a material inducement to them to enter into the contract; but that is very different from a condition which the Court construing the written contract must assume was assented to by both parties. Another condition suggested was that the wheat should be "commercially procurable" either inside or outside New South Wales. It is unnecessary to pronounce upon this as a condition, because, taking it at its best for the respondents, they

(1) (1916) 1 A.C., 486.

have the onus of establishing its non-fulfilment. And so the whole matter resolves itself into a pure question of fact upon the evidence in this particular case.

It is clear from the evidence that what is termed " a fair quantity " of New South Wales wheat was at the time of the Proclamation in transit beyond the State, and went out up to the beginning of January 1915, that is, for about a week. The evidence says it went out in " small quantities " making up in all " a fair quantity," but that is quite comparative, and when millions of bushels are in question " a fair quantity " may easily far exceed 15,000 bags. The actual quantity and quality of that wheat are left practically undetermined. The return which the Chairman of the Wheat Acquisition Board said he could easily give was not in evidence or accounted for. The answer of Mr. Wiseman referred to in the judgment appealed from, which was as follows : " The action of the Government in acquiring the whole of the wheat in New South Wales prevented us from supplying wheat in New South Wales under the contract," when read with the rest of his evidence, is manifestly confined to the wheat within New South Wales actually taken by the Government. From his answers to the three preceding questions it is plain he based the answer relied on upon his view of the contract, that the wheat he had sold to Gelling was the identical wheat he had bought from Aitken, and for that or some other reason, the wheat he sold was not in course of transit on 24th December. There is little doubt he answered as he did assuming a construction of this contract, and very likely assuming in that connection that he could rely on the prior negotiations. In that view his answer could be read as strictly accurate, but otherwise not. The question and answer following strengthen the impression stated as to his meaning.

In the result, the respondents have failed to adduce evidence to substantiate the " commercial impossibility " of procuring outside New South Wales wheat to satisfy the contract, that is assuming, but certainly without deciding, that that fact if proved would afford a sufficient defence in law.

The appeal should, therefore, be allowed, and the judgment of *Ferguson* J. restored.

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My learned brother *Rich* has authorized me to state that he agrees with this judgment.

[*Note.*—Since delivering this judgment I have seen the case of *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co. Ltd.* (1), decided by the House of Lords, to which case I refer on the question of "commercial impossibility."—*I.A.I.*]

Appeal allowed. Judgment appealed from discharged with costs. Judgment entered for plaintiff for £3,328 2*s.* 6*d. with costs. Respondents to pay costs of this appeal.*

Solicitors for the appellant, *Dibbs & Farrell*, Temora, by *F. R. Cowper.*

Solicitors for the respondents, *C. A. Coghlan & Co.*

B. L.

(1) 33 T.L.R., 454; (1917) A.C., 495.

[HIGH COURT OF AUSTRALIA.]

TAYLOR AND OTHERS . . . . PLAINTIFFS;

AND

THE ATTORNEY-GENERAL OF QUEENSLAND AND OTHERS . . . . DEFENDANTS.

H. C. OF A. 1917.

BRISBANE, Aug. 10, 13, 14, 15.

SYDNEY, Sept. 6.

Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

Constitutional Law (Qd.)—Amendment of Constitution—Validity of Act—Act of Parliament—Royal assent—Assent by Governor—Powers of Queensland Parliament—Bill passed by Legislative Assembly and rejected by Legislative Council—Referendum on Bill—Validity of Referendum Act—Power to abolish Legislative Council. Australian States Constitution Act 1907 (*Imperial*) (7 *Edw. VII. c.* 7), *sec.* 1—*Colonial Laws Validity Act* 1865 (*Imperial*) (28 & 29 *Vict. c.* 63), *sec.* 5—*Order in Council* (*Imperial*), 6*th June* 1859, *cl.* 22—*Constitution Act* 1867 (*Qd.*) (31 *Vict. No.* 38)—*Constitution Act Amendment Act* 1908 (*Qd.*) (8 *Edw. VII. No.* 2)—*Parliamentary Bills Referendum Act* 1908 (*Qd.*) (8 *Edw. VII. No.* 16).

The *Australian States Constitution Act* 1907 (Imperial), by sec. 1 (1), provides (*inter alia*) that it shall not be necessary to reserve, for the signification of His Majesty's pleasure thereon, any Bill passed by the legislature of any of the States if the Governor has previously received instructions from His Majesty to assent and does assent accordingly to the Bill.

Held, that the *Constitution Act Amendment Act of* 1908 (Qd.) is a valid and effective Act of Parliament, as the Governor of Queensland had, before assenting to the Bill, received instructions from His Majesty authorizing him to assent to it.

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

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The *Parliamentary Bills Referendum Act of* 1908 (Qd.) provides that when a Bill passed by the Legislative Assembly in two successive sessions has in the same two sessions been rejected by the Legislative Council, it may be submitted by referendum to the electors, and, if affirmed by them, shall be presented to the Governor for His Majesty's assent, and upon receiving such assent the Bill shall become an Act of Parliament in the same manner as if passed by both Houses of Parliament, and notwithstanding any law to the contrary.

Held, that the *Parliamentary Bills Referendum Act of* 1908 was a valid and effective Act of Parliament by virtue of the power conferred upon the Legislature of Queensland by sec. 5 of the *Colonial Laws Validity Act*.

Held, further, that there is power to abolish the Legislative Council of Queensland by an Act passed by the Legislative Assembly and affirmed by the electors in accordance with the provisions of the *Parliamentary Bills Referendum Act of* 1908.

By an Imperial Order in Council dated 6th June 1859, empowering the Governor of Queensland to make laws and to provide for the administration of justice in that colony, it was provided, by clause 22, that "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," &c.

Per Isaacs J.: Authority to pass the *Parliamentary Bills Referendum Act of* 1908 was also conferred upon the Parliament of Queensland by clause 22 of the Order in Council.

Decision of the Supreme Court of Queensland: *Taylor* v. *Attorney-General*, (1917) S.R. (Qd.), 208, reversed.

SPECIAL CASE stated for the opinion of the Full Court of the High Court.

By a writ issued on 12th April 1917 in the Supreme Court of Queensland by William Frederick Taylor, Bartley Fahey and William Stephens against the Attorney-General of Queensland and William James Gall, Richard Joseph Cole, William Bradshaw Hardcastle, Henry Taylor Macfarlane and Frederick Bennett, the plaintiffs claimed declarations (*inter alia*) that the *Constitution Act Amendment Act of* 1908 and the *Parliamentary Bills Referendum Act of* 1908 were invalid, that the provisions of the *Parliamentary Bills Referendum Act of* 1908 were not applicable to the provisions of a certain Bill called *A Bill to Amend the Constitution of Queensland by Abolishing the Legislative Council*, and that the provisions of that Bill were in contravention of the Constitution of the Commonwealth of

Australia and of the Constitution of the State of Queensland, and that by virtue of the provisions of the *Commonwealth Electoral (War-time) Act* 1917 any referendum or vote of the electors of the State of Queensland on 5th May 1917 was prohibited and unlawful. They also claimed an injunction with respect to proceeding or further proceeding with the taking of a poll directed to be taken on 5th May 1917 under the Referendum Act of 1908 on the Bill above referred to.

A similar writ was issued on 19th April 1917 by the above-named plaintiffs on behalf of themselves and all other members of the Legislative Council other than Frank McDonnell and Alfred James Jones, who, as well as the defendants named in the first-mentioned writ, were made defendants.

A motion by the plaintiffs for an injunction as prayed in the writs having been referred, on 19th April 1917, to the Full Court of the Supreme Court of Queensland by *Cooper* C.J., that Court granted an interlocutory injunction in each case, on 28th April 1917, restraining the defendants (other than the Attorney-General), their and each of their presiding officers, assistant presiding officers, servants and agents and everyone of them from proceeding or further proceeding with the taking of the poll and from doing any act or thing for the purpose of conducting, holding or taking the poll until after the trial of the action or until further order ; and the Court ordered the question of costs to be reserved : *Taylor* v. *Attorney-General* (1).

From the orders of the Full Court of the Supreme Court the defendants, by special leave, appealed to the High Court, and on 4th May the High Court ordered that " on the Attorney-General for Queensland consenting that the question under sec. 14 of the *Commonwealth Electoral (War-time) Act* be raised in the case hereinafter mentioned by the necessary amendments and that the questions under secs. 38A and 40A of the *Judiciary Act* (that is the question of jurisdiction) becoming thereupon raised and the cause becoming thereupon removed into the High Court a case embracing all points in the action as originally indorsed on the said writ shall be stated by the parties for the determination of the Full Court of the High Court and the Attorney-General for Queensland

(1) (1917) S.R. (Qd.), 208.

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undertaking that no steps be taken on the referendum until the determination by the High Court of the said points and the Attorney-General and other defendants undertaking not to raise in any Court any question as to the competency of the parties to this action or as to the said action being properly constituted as to all matters complained of and all parties undertaking to take such steps as the Court may direct for the purpose of enabling all matters raised to be determined this appeal be allowed and the interlocutory injunction be dissolved and the costs of the motion before the Supreme Court of Queensland and of this appeal be costs of the action."

The special case, dated 21st July 1917, which was stated by the parties for the opinion of the Full Court of the High Court under and in accordance with the above-mentioned order of 4th May, was substantially as follows :—

1. The plaintiffs are and were at all material times Members of the Legislative Council of Queensland, and are electors of and property holders in the State of Queensland and electors of the Commonwealth of Australia.

The plaintiff William Frederick Taylor is Chairman of Committees in the Legislative Council of Queensland, and by virtue of such office is entitled under the *Constitution Act Amendment Act of* 1896 to and is in receipt of a salary of £500 per annum.

2. The defendant William James Gall is the Under Secretary to the Home Secretary's Department of Queensland, and is the returning officer appointed as hereinafter stated by the Governor in Council for the taking of the referendum poll directed to be taken under the *Parliamentary Bills Referendum Act of* 1908, and the defendants Richard Joseph Cole, William Bradshaw Hardcastle, Henry Taylor Macfarlane and Frederick Bennett are the assistant returning officers appointed as hereinafter stated by the Governor in Council for the electoral districts of Brisbane, Fortitude Valley, South Brisbane and Toowong, respectively, for the taking of the said referendum poll. The defendants Frank McDonnell and Alfred James Jones are also Members of the said Legislative Council, and are the persons appointed by an order of his Honor the Chief Justice of Queensland to be joined as defendants on behalf of themselves

and all other persons having the same interest as themselves in this cause.

3. The Act entitled the *Constitution Act Amendment Act of* 1908 was passed and assented to by His Excellency the Governor on 3rd April 1908. The second reading of the said Act was passed in the Legislative Council on a division by 17 to 15 votes in a House consisting of 44 members, as appears in the Journals of the House of 1908, and the third reading of the said Act was passed in the said Legislative Council without division, as appears in the Journals of the House of 1908, at which sitting of the said Legislative Council 35 members were present. The second reading of the said Act was passed in the Legislative Assembly without division, at which sitting of the said Legislative Assembly 64 members were present, and the third reading by 41 votes to 19 in a House consisting of 71 members, as appears in the Journals of the House of 1908.

4. The Act entitled the *Parliamentary Bills Referendum Act of* 1908 was passed and assented to by His Majesty on 19th August 1908. The said Act passed the second and third readings in the Legislative Assembly without division, at which sittings 63 members and 71 members respectively were present, and passed the second and third readings in the Legislative Council without division, at which sittings 31 members and 30 members respectively were present, as appears in the Journals of the House of 1908. The Legislative Assembly at the time of the passing of the second and third readings consisted of 72 members and the Legislative Council of 44 members. This Act was reserved for the assent of His Majesty.

5. On or about 19th November 1915 the Legislative Assembly of Queensland passed a Bill entitled *A Bill to Amend the Constitution of Queensland by Abolishing the Legislative Council.* The second and third readings of the said Bill were passed by 38 votes to 17 votes and by 30 votes to 9 votes respectively in a House of 72 members, as appears in the Journals of the House of 1915.

6. On or about 8th December 1915 the said Bill was rejected by the Legislative Council of Queensland by 26 votes to 3.

7. On or about 15th September 1916, in a House consisting of 72 members, the said Legislative Assembly again passed the second reading of the said Bill by 35 votes to 15 votes, and on or about 19th

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September 1916 the third reading without division, at which sitting of the said Legislative Assembly 66 members were present, as appears in the Journals of the House of 1916.

8. On or about 15th November 1916 the said Legislative Council again rejected the said Bill by 19 votes to 3, as appears in the Journals of the House of 1916.

9. On 3rd April 1917 His Excellency the Governor of Queensland, with the advice of the Executive Council, made and issued a Proclamation directing that the said Bill should be submitted to a referendum of the electors under the provisions of the *Parliamentary Bills Referendum Act of* 1908. The Proclamation aforesaid was published in the *Government Gazette* on 3rd April 1917.

10. On the said 3rd April 1917 His Excellency the Governor of Queensland, with the advice of the Executive Council, appointed the defendant William James Gall to be the returning officer for taking the said referendum poll (notification of which appointment was published in the *Government Gazette* of 3rd April 1917), and by writ under his hand commanded the said William James Gall to take the said referendum poll on 5th May 1917 and to return the said writ not later than 6th August 1917.

11. On the said 3rd April 1917 His Excellency the Governor of Queensland, by and with the advice of the Executive Council, made and issued regulations under the *Parliamentary Bills Referendum Act of* 1908 providing for the issue of the said writ and the taking of the said referendum poll, which regulations have been published in the *Government Gazette* of 3rd April 1917.

12. On the said 3rd April 1917 His Excellency the Governor of Queensland, with the advice of the Executive Council, appointed certain places to be the polling places at the said referendum poll in the electoral districts of Queensland, and directed the defendants Richard Joseph Cole, William Bradshaw Hardcastle, Henry Taylor Macfarlane and Frederick Bennett to be assistant returning officers for four of the said electoral districts, to wit, Brisbane, Fortitude Valley, South Brisbane and Toowong, respectively, notification of which appointment was published in the *Government Gazette* of 3rd April 1917.

13. In the *Government Gazette* of 3rd April 1917 the Home Secretary, in pursuance of the power in him vested by the *Parliamentary Bills Referendum Act of* 1908, published a public notification containing in the schedule thereto a copy of the Bill entitled *A Bill to Amend the Constitution of Queensland by Abolishing the Legislative Council.*

14. On 12th April 1917 the plaintiffs on their own behalf issued a writ in the Supreme Court of Queensland against some of the defendants. On 19th April 1917 a further writ was issued by the plaintiffs claiming the same relief and adding certain defendants in a representative capacity as Members of the Legislative Council.

15. On 19th April 1917 a motion for an injunction as prayed in the said writs was made to his Honor the Chief Justice of Queensland, which motion was referred to the Full Court of Queensland.

16. On 28th April 1917 the said Full Court granted interlocutory injunctions as prayed in the said writs.

17. On 1st May 1917 the High Court of Australia granted special leave to appeal from the orders of the Full Court of Queensland.

18. On 2nd, 3rd and 4th May the said appeal was heard before the High Court of Australia when an order (which is the order of 4th May already set out so far as material) was made by the said High Court.

19. The said referendum was duly taken on 5th May 1917, and a majority of votes was cast against the Bill.

20. The said 5th May 1917 was appointed as a polling day for an election of the Senate and for a general election of the House of Representatives, and an election for the Senate and a general election for the House of Representatives were duly held on the said day.

The questions for the opinion of the Court are :—

(1) Is the *Constitution Act Amendment Act of* 1908 a valid and effective Act of Parliament ?

(2) Is the *Parliamentary Bills Referendum Act of* 1908 a valid and effective Act of Parliament ?

(3) Is there power to abolish the Legislative Council of Queensland by an Act passed in accordance with the provisions of the *Parliamentary Bills Referendum Act of* 1908 ?

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(4) Was the referendum taken on 5th May 1917 a valid referendum?

(5) How and in what manner are the costs of the proceedings to be borne and paid?

The special case now came on for hearing.

Feez K.C. and *Stumm* K.C. (with them *Fowles* and *Douglas*), for the plaintiffs. The Constitution of Queensland has been established by the following Statutes: *Australian Courts Act* 1828 (9 Geo. IV. c. 83); *Australian Constitutions Act* 1842 (5 & 6 Vict. c. 76), providing a government for New South Wales, and giving authority for the establishment of new colonies in the territory comprised within the Colony of New South Wales, with similar forms of government; the *Australian Constitutions Act* 1850 (13 & 14 Vict. c. 59), which gave power to alter the constitution of the Legislative Councils established by 5 & 6 Vict. c. 76 or to establish instead thereof Councils and Houses of representatives, *i.e.*, power to establish a bicameral system of government. The bicameral system was introduced into New South Wales by 18 & 19 Vict. c. 54 (1855), secs. 3-7 and Schedule. Under the provisions of this Act an Order in Council was made in 1859 making Queensland a separate colony, and provision was made for a Legislative Council and Legislative Assembly (Order in Council, 6th June 1859, pars. 1, 2, 8, 14, 22).

The *Constitution Act Amendment Act of* 1908 was not reserved for His Majesty's assent as required by sec. 1 of the *Australian States Constitution Act* 1907, and is therefore invalid.

Secs. 1 and 2 of the Queensland *Constitution Act of* 1867 (31 Vict. No. 38) have not been altered or repealed. Before the Legislative Council could be abolished those sections would have to be amended so as to allow for its abolition. The Imperial Parliament has said that the Legislature of Queensland shall consist of a Legislative Council and a Legislative Assembly. The *Constitution Act of* 1867 is a consolidation (see preamble). Sec. 9 gives the only power to alter the Constitution. The Order in Council of 6th June 1859 is still the basis of the Constitution (*Cooper* v. *Commissioner of Income Tax (Qd.)* (1)). The *Constitution Act* is merely a transfer of powers

(1) 4 C.L.R., 1304.

to the Parliament of Queensland which are only as wide as those given by the Order in Council, and the exercise of any wider powers must be left to the Imperial Legislature. The power conferred is that of altering the constitution of either body of the Legislature, and determining what shall be the internal composition of both Houses; but no power is given to abolish either House (*Attorney-General for New South Wales* v. *Rennie* (1)).

[ISAACS J. referred to *Australian States Constitution Act* 1907, sec. 1 (2).]

Where the power to abolish is intended to be given the word "abolish" is used as in clause 20 of the Order in Council. The preamble to the Order in Council provides for the establishment of a legislature in a manner "as nearly resembling the form of government and legislature which should be at such time established in New South Wales," *i.e.*, the bicameral system. This system is the only one provided for by 18 & 19 Vict. c. 54. Under the provisions of 18 & 19 Vict. c. 54 it was not intended that the Legislature established by the Order in Council should have power to destroy one of its branches.

The Order in Council, by clause 22, gave limited power to alter the Constitution. Then further power was given by the *Colonial Laws Validity Act* 1865, sec. 5. So far as the Legislative Council is concerned, the Queensland Parliament have exhausted their power under both the Order in Council and the *Colonial Laws Validity Act*, by the passing of the *Constitution Act of* 1867. The *Parliamentary Bills Referendum Act of* 1908, which substitutes for the Legislative Council in some cases the vote of the people and the Legislative Assembly, goes beyond this power, and is invalid. Further, this Act does not apply to the Legislative Council: it requires for its continued operation the continued existence of both Houses.

The *Colonial Laws Validity Act* does not give power to abolish the Legislative Council; it may give power to take the power to abolish it, but that power has not been taken.

The provisions of sec. 14 of the *Commonwealth Electoral (War-time) Act* 1917 come within the defence power of the Commonwealth,

(1) (1896) A.C., 376, at p. 379.

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and also within the power to regulate Federal elections (Commonwealth Constitution, sec. 51 (VI.) (*Farey* v. *Burvett* (1)).

Ryan A.-G. for Qd. and *Blair*, for the defendants. The *Constitution Act Amendment Act of* 1908 does not come under the class of Bills requiring reservation for His Majesty's signature (*Australian States Constitution Act* 1907, sec. 1 ; *Keith's Responsible Government in the Dominions*, vol. II., p. 998). In any event the Governor was authorized by the Secretary of State for the Colonies to assent to the Bill (*Australian States Constitution Act* 1907, sec. 1, proviso (c)).

The *Parliamentary Bills Referendum Act of* 1908 is to be read and construed with and as an amendment of the *Constitution Act of* 1867. This Act altered the Constitution in effect by providing for a third body, the electorate, in certain cases. The power to pass this Act was conferred by clause 22 of the Order in Council of 6th June 1859, or, if this is insufficient, by the *Colonial Laws Validity Act* 1865, sec. 5, which confers upon the Queensland Parliament full power to make laws altering or repealing any part of the Order in Council (*Dicey's Law of the Constitution*, 8th ed., p. 101 ; *Webb* v. *Outtrim* (2) ; *Cooper* v. *Commissioner of Income Tax (Qd.)* (3) ; *Keith's Responsible Government in the Dominions*, vol. I, p. 436 ; *R.* v. *Burah* (4) ; *West Derby Union* v. *Metropolitan Life Assurance Society* (5) ; *Powell* v. *Apollo Candle Co.* (6)).

The *Constitution Act of* 1867, by sec. 2, gives power to legislate in all cases whatsoever, and includes, therefore, a power to amend the Constitution (*Dicey's Law of the Constitution*, 8th ed., p. 101 ; *Jenkyns British Rule and Jurisdiction beyond the Seas*, p. 75).

The provisions of sec. 14 of the *Commonwealth Electoral (War-time) Act* 1917 (No. 8 of 1917) are not within the Commonwealth defence power or the power of regulating elections ; and, even if they are, its provisions are merely directory, and not mandatory, and therefore do not avoid a referendum taken on the same day as the Federal elections (see *Montreal Street Railway Co.* v. *Normandin* (7), and the title of the Act and sec. 2). By sec. 3 the *Commonwealth Electoral*

(1) 21 C.L.R., 433, at p. 442.
(2) (1907) A.C., 81 ; 4 C.L.R., 356.
(3) 4 C.L.R., 1304, at p. 1314.
(4) 3 App. Cas., 889, at p. 904.
(5) (1897) A.C., 647, at p. 655.
(6) 10 App. Cas., 282, at p. 290.
(7) (1917) A.C., 170.

(*War-time*) *Act* 1917 and the *Commonwealth Electoral Act* 1902-1911 are to be read as one. (See *Smith* v. *Oldham* (1).)

Feez K.C. and *Stumm* K.C., in reply.

The following judgments were read :—

Sept. 6.

BARTON J. This special case was stated as in the original jurisdiction of this Court in consequence of its order made on the fourth of last May by consent of the parties to an appeal, who are the present parties.

There are five questions for the opinion of the Court :—(1) Is the *Constitution Act Amendment Act of* 1908 a valid and effective Act of Parliament ? (2) Is the *Parliamentary Bills Referendum Act of* 1908 a valid and effective Act of Parliament ? (The two Statutes mentioned are Acts of the Parliament of Queensland.) (3) Is there power to abolish the Legislative Council of Queensland by an Act passed in accordance with the provisions of the *Parliamentary Bills Referendum Act of* 1908 ? (4) Was the referendum taken on 5th May 1917 a valid referendum ? (5) How and in what manner are the costs of the proceedings to be borne and paid ?

As to question No. 1 the position of the plaintiffs rested on the contention that the Bill had not been reserved for the assent of His Majesty, and that in view of the necessity for that assent the Bill was not law. It in fact received the assent of the Governor of Queensland, which, it was contended, did not suffice to give it the form of law. On its appearing that the Governor had been authorized by the Secretary of State for the Colonies to assent to the Bill, counsel for the plaintiffs very properly withdrew the objection, and the answer to the question must be in the affirmative.

On question No. 2 I have had a great deal of doubt, but I have come to the conclusion that in this instance also the answer must be in the affirmative. I was for some time much impressed by the reasons and conclusions of the Supreme Court of Queensland in the able judgment read by *Lukin* J. upon the injunction motion which was the subject of the appeal already mentioned, and but for

(1) 15 C.L.R., 355, at p. 358.

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sec. 5 of the *Colonial Laws Validity Act* 1865 I should have been much disposed to agree with that judgment.

Assuming agreement with the Full Court up to that point, I am of opinion that sec. 5 of the Imperial Act establishes the contention of the defendants as to the validity of the Referendum Act of 1908. The section is both declaratory and enacting. The Act of which it is a part was passed by the Imperial Parliament two years before the Queensland *Constitution Act of* 1867 " to consolidate the laws relating to the Constitution of the Colony of Queensland."

The Parliament of Queensland is a " representative legislature " and also a " colonial legislature " within the meaning of the Imperial Act. As such it is deemed always to have had, and it has had from 1865, " 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." Also it is deemed always to have had, and it has had from 1865, " 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 Queensland. 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.

Argument has been raised on the difference in phraseology between the first part of this section referring to Courts of judicature, and the second part referring to the constitution, powers and procedure of the legislature, and I am far from thinking that there is not a good deal of force in the argument. But I think that the words of the second part of the section, with which we are more immediately concerned, are too strong and too comprehensive to enable one to say that the power therein given is not sufficient to give validity to the legislation impeached. The section is one of continuous vitality, and acts upon all laws as to the constitution and powers

of the legislature, so as to give them validity whether they were passed before or after 1865. It is true that the *Constitution Act of* 1867 provided for all laws passed thereunder to be enacted "by Her Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly in Parliament assembled," and that the Constitution did not recognize the making of laws by any other authority. It is also true that in general 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, and that 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 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. I stated that proposition in the case of *Cooper* v. *Commissioner of Income Tax (Qd.)* (1), in expressing my agreement with the other members of this Court. Normally, therefore, in the absence of such a provision as sec. 5 of the Imperial Act, I should have been prepared to hold that the *Parliamentary Bills Referendum Act of* 1908, which, though it professed to be an amendment of the *Constitution Act of* 1867, was merely, in view of its provisions, an Act at variance with the Constitution, not preceded by a valid extension of the constitutional power, was therefore itself, as it stood, invalid. But in the present case the Imperial provision seems to me to take away the application of the principle I have stated to legislation of the kind which it authorizes. The *Parliamentary Bills Referendum Act* is a law "respecting the powers" of the Legislature in certain cases. It provides that when a Bill passed by the Legislative Assembly in two successive sessions has in the same two sessions been rejected by the Legislative Council it may be submitted by referendum to the electors, and if affirmed by them shall be presented to the Governor for His Majesty's assent. It therefore provides for the substitution of the popular vote for the assent of the Legislative Council as often as the circumstances indicated may occur. I feel bound to say that

(1) 4 C.L.R., 1304.

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Barton J.

in my opinion the words of the Imperial sec. 5 cover such a case. If the Act in question had been invalid without it, I am constrained to think that it gives the necessary validity.

Question No. 2, therefore, I answer in the affirmative.

Question No. 3 asks whether the Legislative Council of Queensland could be abolished by the process provided by the Referendum Act of 1908. In 1916 a Bill for that purpose was twice in successive sessions passed by the Legislative Assembly and each time rejected by the Legislative Council. Seeing that it proposed the abolition of that branch of the Legislature, was it such a Bill as might validly be submitted to the process authorized by the Referendum Act? The latter Act was unrestricted, and, as I think it valid, I do not see how the fact of the Bill of 1916 being a Bill to deal with the Legislative Council can be held to place it beyond the legislative authority of 1908. There is power to make laws "respecting the constitution" of the legislature, and this, if passed, is such a law. The means of making it a law are provided validly by the Referendum Act. It seems to me, therefore, that I cannot but hold that there is power to abolish the Legislative Council by an Act passed in accordance with the Referendum Act. That is to say, I must answer question No. 3 in the affirmative.

The fourth question really raises a controversy as to the validity of the 14th section of the *Commonwealth Electoral (War-time) Act* 1917. In the circumstances we think it unnecessary to answer that question.

As to question No. 5, we are of opinion that there should be no costs.

ISAACS J. In view of par. 19 of the special case, I was of the same opinion as my learned brother *Barton*, that the Court ought not to answer the questions. The action was, in its inception, only in the nature of *quia timet*, and whatever argument was then open to maintain it—as to which I say nothing—seemed to me to disappear after the referendum was lost, because no damage had arisen or could possibly arise. It appeared to me that the observations of Lord *Loreburn* L.C. in *Glasgow Navigation Co.* v. *Iron Ore Co.* (1) as to

(1) (1910) A.C., 293, at p. 294.

hypothetical questions applied, and that no party had a right to insist on the Court answering the first four questions for the purpose of determining the fifth, as to incidence of costs. The majority of the Court, however, being of a different opinion, I merely record my own, and proceed to consider the questions.

1.—In my opinion the *Constitution Act Amendment Act of* 1908 is a valid and effective Act of Parliament.

The argument never seriously put the validity of this Act in contest. The plaintiffs rather threw the burden on the defendants of proving (1) that it had been passed by a two-thirds majority, and (2) that the royal assent had been validly given. Both provisions appear in fact to have been observed.

I also agree with the view expressed by Lord *Elgin*, on behalf of the Imperial Government, in his telegram of 23rd March 1908, that neither provision applied to the measure.

2.—"Is the *Parliamentary Bills Referendum Act of* 1908 a valid and effective Act of Parliament?" This Act, as is well known, was passed in consequence of a great constitutional crisis involving the relations of the two Houses, the Ministry and the Governor. Apparently it was enacted as a method of preventing the recurrence of such a situation. It was passed avowedly as an amendment of the Constitution by both Houses unanimously, and was reserved for His Majesty's assent. To declare such an enactment constitutionally impossible is no doubt within the function of a Court, but the consequences would be so momentous that only the very clearest conviction of its invalidity would justify the declaration.

Its effect may, for the present purpose, be shortly stated. Both Houses are left unaltered in composition and affirmative powers. But the change effected by the Act consists in 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 the electors at a referendum. Sec. 10 declares: "If the referendum poll is decided in favour of the Bill, the Bill shall be presented to the Governor for His Majesty's assent, and upon receiving such assent the Bill shall become an Act of Parliament in the same manner as if it had been passed by both

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Houses of Parliament, and notwithstanding any law to the contrary."

The Act makes no change in respect of the mode of obtaining the royal assent. Presentation to the Governor for that assent is always necessary, and whether it is given by the Governor at once or upon express instruction, or is reserved for His Majesty's personal assent, is a matter to be determined by considerations other than the provisions of the Act.

The effect, summed up briefly, is that the Legislature of Queensland—apart from the Crown, which must in all cases assent—henceforth consists of the two Houses concurring, except in the case of an irreconcilable difference, and in that case it is constituted by the Legislative Assembly alone, on condition that the electors approve of the Assembly's proposal.

The Attorney-General contends for two distinct authorities to pass this measure. One is clause 22 of the Order in Council of 1859; the other is the *Colonial Laws Validity Act* 1865.

The plaintiffs' answer to the Order in Council is twofold. They say that clause 22, whatever its ambit otherwise may have been, at all events extends no further than to alter provisions in the Order in Council itself, and as that was repealed by Act 31 Vict. No. 39 (1867) and replaced by the *Constitution Act of* 1867 (31 Vict. No. 38), a separate and distinct Act, and not the Order in Council, it follows that clause 22 can have no operation upon the Act. Then say the plaintiffs, further, as to the construction of clause 22, it never did extend so far as to exclude altogether one of the legislative Houses established by the Order in Council itself.

With respect to the *Colonial Laws Validity Act*, their argument is that, equally with clause 22 of the Order in Council, its extent does not reach to eliminating one of the Houses from law making. They urge that if that were possible, the Crown itself might be excluded, since the Crown is a part of the legislature.

Taking the *Colonial Laws Validity Act* first, on account of its more general importance, the relevant provision is contained in sec. 5. The crucial words are "every representative legislature shall . . . have . . . full power to make laws respecting the constitution, powers, and procedure of such legislature."

Mr. *Feez* argued that the words "constitution . . . of such legislature" are limited by the outward form of the legislature at the time the constitutional amendment is made. Thus, if it then besides the Crown consists of one chamber, it cannot provide for two chambers, and if it then besides the Crown consists of two chambers, it cannot provide for one chamber. According to the argument, internal changes only are possible—such as the number and qualifications of members and the electoral franchise. This argument, which was directed both to question 2 and question 3, went on to deduce that, as one chamber cannot be entirely abolished, neither can the necessity for joint concurrence of both Houses in every act of legislation. It was supported by urging that since "legislature" included the Crown, the Attorney-General's view would authorize the total elimination of the Crown as part of the legislature.

I do not agree with this contention. To begin with, the word "legislature" in this connection is not intended to include the Crown. That word is undoubtedly sometimes used to include the Crown, which is the first branch of it. But it is also frequently used even by Parliament itself to denote the law-making authority other than the Crown. In sec. 7 of the same Statute, referring to the "Legislature of South Australia," the expression "legislature" in the phrase "persons or bodies of persons for the time being acting as such Legislature" is manifestly exclusive of the Crown, both from its form and from the fact that the "assent" of the Queen or the Governor is regarded as an additional factor. This limited use of the term is common. For instance, in *Anson's Law and Custom of the Constitution* (vol. II., part 2, at p. 68), in dealing with the self-governing colonies, the learned author observes: "The legislature consists of two chambers, except in certain provinces of the Dominion of Canada." The context must always be looked at to see which is meant. The Imperial Act called the *Australian States Constitution Act* 1907 (7 Edw. VII. c. 7) is a good illustration. Sec. 1 contains examples of both senses. "Every Bill passed by the Legislature of any State" which "shall be reserved for the signification of His Majesty's pleasure thereon" necessarily, as to the expression "legislature," refers to the Houses only. But "any Act of the Legislature

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of the State " in the same section must include the Crown. Other examples are found in the same Act. When power is given to a colonial legislature to alter the constitution of the legislature, that must be read subject to the fundamental conception that, consistently with the very nature of our constitution as an Empire, the Crown is not included in the ambit of such a power.

I read the words " constitution of such legislature " as including the change from a unicameral to a bicameral system, or the reverse. Probably the " representative " character of the legislature is a basic condition of the power relied on, 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 is sufficient as its organ of legislation. Some strong reason must be shown for cutting down the primary meaning of the words themselves applied to such a subject matter. I have shown why the grounds advanced for that purpose are insufficient.

Now, when the history of the enactment is remembered, does it present any reason for restricting the words ? It originated through difficulties arising in South Australia with regard to Acts passed there respecting the Constitution; and the matter, having been placed before the Imperial Government, was referred to the Law Officers of the Crown (Sir Roundell Palmer and Sir Robert Collier), whose report to Mr. Cardwell, dated 28th September 1864, indicates the origin of the general power contained in sec. 5 and other sections of the Act. That report certainly in no way suggests any such limitation as is contended for.

In my opinion, therefore, the full meaning of the words must be given to them, and, consequently, supposing there were no other authority to support the Queensland Referendum Act of 1908 than the *Colonial Laws Validity Act* 1865—which is a standing general power of all representative legislatures outside and irrespective of their own separate Constitutions—the answer to the second question should be in the affirmative.

But I am further of opinion that the Attorney-General's contention is right, that the same result would be attained by force of

clause 22 of the Order in Council of 6th June 1859. That Order in Council was issued under the authority of the Act of 1855 (18 & 19 Vict. c. 54). Some question having been raised as to its validity, because of a doubt whether the form of government and legislature it established followed with sufficient precision the form then existing in New South Wales, Act 24 & 25 Vict. c. 44, sec. 3, was passed by which it was validated retrospectively. It existed in full force up to 31st December 1867. Its 22nd clause says: "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" &c. The exception preserves the 14th clause.

Now, in pursuance of that power, the Queensland Legislature passed the *Constitution Act of* 1867. That Act was partly a repetition and partly an alteration of the provisions of the Order in Council. The Order in Council had been altered by previous enactment, and the Act of 1867 consolidated all the constitutional laws up to that time. The only way an alteration in the Order in Council could be made was by an Act of Parliament, which therefore, by virtue of the 22nd clause of the Order, could and can itself be altered and repealed, unless that clause itself is to be regarded as no longer in existence. The only suggestion for so regarding it is that the Order was wholly repealed by the Queensland Act. It is true that by sec. 3 of Act 31 Vict. No. 39 the Order in Council is said to be repealed. But when the Act is read as a whole, including the Schedule, the intent of the Legislature is clear that their intention was to repeal entirely the Order in Council so far as it made provision for the Government of Queensland, but to leave untouched clause 14 (as an exception) and clause 22 (as an outside permanent power). I would in any case construe the 3rd section and the Schedule in favour of validity, which would exclude from the repeal clause 14 and, with it, clause 22.

The *Constitution Act of* 1867 was to come into force when the corresponding provisions of the Order in Council and the amending Acts—all consolidated in the *Constitution Act of* 1867—went out of operation. But neither did the Legislature intend, nor in my opinion