[HIGH COURT OF AUSTRALIA.]

ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES AND OTHERS Defendants, Appellants;

AND

TRETHOWAN AND OTHERS . . . . Plaintiffs, Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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MELBOURNE, *Jan.* 20, 21; *Mar.* 16.

Gavan Duffy C.J., Rich, Starke, Dixon and McTiernan JJ.

Constitutional Law (*N.S.W.*)—*Legislative Council of New South Wales*—*Act requiring any Bill to abolish Legislative Council or to repeal such Act to be submitted to a referendum*—*Bills to abolish Legislative Council and to repeal such Act passed by both Houses*—*Bills not submitted to referendum*—*Action to restrain presentation of such Bills to Governor for royal assent until submitted to a referendum*—*Injunction to restrain presentation*—*Power of Parliament of New South Wales to fetter legislation respecting abolition of Legislative Council and repeal or amendment of provisions of Constitution of New South Wales*—"*Manner and form*" *of repeal or amendment prescribed*—*The Constitution Statute* (*N.S.W.*) (18 & 19 *Vict. c.* 54), *sec.* 4—*Colonial Laws Validity Act* 1865 (28 & 29 *Vict. c.* 63), *sec.* 5—*Constitution Act* 1902 (*N.S.W.*) (*No.* 32 *of* 1902), *sec.* 7A—*Constitution* (*Legislative Council*) *Amendment Act* 1929 (*N.S.W.*) (*No.* 28 *of* 1929), *sec.* 2—*Constitution Further Amendment* (*Referendum*) *Act* 1930 (*No.* 2 *of* 1930).

Sec. 7A of the *Constitution Act* 1902-1929 (N.S.W.) provided:—"7A. (1) The Legislative Council shall not be abolished nor, subject to the provisions of sub-section six of this section, shall its constitution or powers be altered except in the manner provided in this section. (2) A Bill for any purpose within sub-section one of this section shall not be presented to the Govern or for His Majesty's assent until the Bill has been approved by the electors in accordance with this section. . . . (6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section."

Held, by *Rich*, *Starke* and *Dixon* JJ. (*Gavan Duffy* C.J. and *McTiernan* J. dissenting), that a repeal of this provision cannot be enacted unless it is submitted to and approved by a majority of the electors because it requires a manner and form in which a law shall be passed respecting powers of the Legislature within the meaning of sec. 5 of the *Colonial Laws Validity Act* 1865; and, further, by *Rich* J., because, *quoad* the power to abolish the Legislative Council, it introduced into the legislative body a new element, namely, the electorate.

Decision of the Supreme Court of New South Wales (Full Court): *Trethowan* v. *Peden*, (1930) 31 S.R. (N.S.W.) 183, affirmed.

APPEAL from the Supreme Court of New South Wales.

By the *Constitution* (*Legislative Council*) *Amendment Act* 1929 the Parliament of New South Wales amended the *Constitution Act* 1902, as amended by subsequent Acts, by inserting after sec. 7 a new section, called sec. 7A, in these terms :—" 7A. (1) The Legislative Council shall not be abolished nor, subject to the provisions of sub-section six of this section, shall its constitution or powers be altered except in the manner provided in this section. (2) A Bill for any purpose within sub-section one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section. (3) On a day not sooner than two months after the passage of the Bill through both Houses of the Legislature the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly. Such day shall be appointed by the Legislature. (4) When the Bill is submitted to the electors the vote shall be taken in such manner as the Legislature prescribes. (5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent. (6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal or amendment of any of the following sections of this Act, namely, sections thirteen, fourteen, fifteen, eighteen, nineteen, twenty, twenty-one, and twenty-two." This amending section was reserved for the royal assent, and afterwards received it.

In consequence of the provisions in sec. 7A that any Bill altering the constitution or powers of the Legislative Council should be referred to the electors for their approval, early in 1930 an Act was

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passed called the *Constitution Further Amendment* (*Referendum*) *Act* 1930, and intituled "An Act to provide for the holding of a referendum upon a Bill intituled 'A Bill to alter the Constitution of the Legislative Council; to amend the *Constitution Act* 1902 and certain other Acts; and for purposes connected therewith'; to provide for certain matters necessary for giving effect to that Bill if approved at the referendum and assented to by His Majesty, including the conduct of elections of members of the Legislative Council; to provide for the conduct of any referendum upon a Bill authorized or directed by law to be submitted to a referendum; to make certain provisions as to the privileges of existing members of the Legislative Council; and for purposes connected therewith." The Act was assented to in March 1930, but before it was given effect to, the Parliament which had passed it came to an end. A new Parliament came into existence and a Bill was passed through both Houses repealing sec. 7A of the *Constitution Act* 1902. Such Bill—intituled "A Bill to repeal the *Constitution* (*Legislative Council*) *Amendment Act* 1929 and the *Constitution Further Amendment* (*Referendum*) *Act* 1930; and to amend the *Constitution Act* 1902, as amended by subsequent Acts; and for purposes connected therewith"—was in the following terms:—"(1) This Act may be cited as the '*Constitution* (*Amendment*) *Act* 1930.' (2) The *Constitution* (*Legislative Council*) *Amendment Act* 1929, and section 7A of the *Constitution Act* 1902, as amended by subsequent Acts, and the *Constitution Further Amendment* (*Referendum*) *Act* 1930 are repealed." In addition, a Bill abolishing the Council was before Parliament when this suit was instituted, and has since been passed through both Houses. Such Bill—intituled "A Bill to abolish the Legislative Council; to amend the *Constitution Act* 1902, and certain other Acts; and for purposes connected therewith"—was in the following terms:—"1. This Act may be cited as the '*Constitution Further Amendment* (*Legislative Council Abolition*) *Act* 1930' and shall be read with the *Constitution Act* 1902 as amended by subsequent Acts. 2. (1) The Legislative Council of New South Wales is abolished. (2) The seat of every member of the said Legislative Council shall, on and after the commencement of this Act, be vacant; and the office of member of the said Legislative Council is abolished. (3) All offices constituted

or created in or in connection with the said Legislative Council are abolished and all appropriations in respect thereof are repealed. (4) Any reference in any Act, ordinance rule regulation instrument or writing whatsoever to the Legislature or to the Parliament or to both Houses of Parliament or of the Legislature or to each House of Parliament or to either House of Parliament or other reference which if this Act had not been passed would be deemed to include a reference to the Legislative Council shall be construed to refer only to His Majesty The King with the advice and consent of the Legislative Assembly of New South Wales or only to the said Legislative Assembly as the context may require."

Neither of these Bills was submitted to the electors for their approval as required by sec. 7A, and this suit was instituted by two members of the Council, on behalf of themselves and all other members except those who were defendants, against the President of the Council and the Ministers of the Crown for New South Wales, seeking to restrain them from taking any steps to have either Bill presented to the Governor for His Majesty's assent until the will of the electors had been ascertained.

The statement of claim alleged (*inter alia* and in effect) that the plaintiffs were members of the Legislative Council of New South Wales; that the defendant the Hon. Sir John Beverley Peden, K.C.M.G., M.L.C., was the President of the said Legislative Council; that the defendants other than the Hon. Sir John Beverley Peden were Ministers of the Crown of the State of New South Wales; that the *Constitution* (*Legislative Council*) *Amendment Act* 1929 was duly passed and commenced on 1st October 1930; that the Bill to repeal the *Constitution* (*Legislative Council*) *Amendment Act* 1929, which was initiated in the Legislative Council, was passed by the Legislative Assembly on 10th December 1930; that such Bill had not been approved by the electors in accordance with sec. 7A of the *Constitution Act* 1902; that the defendant the Hon. Sir John Beverley Peden as President of the Legislative Council is the officer appointed by the standing orders of such Legislative Council to present to the Governor for His Majesty's assent Bills initiated in such Legislative Council after the same have been finally passed by both Houses; that in contravention of sec. 7A of the *Constitution*

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Act 1902 the defendant the Hon. Sir John Beverley Peden was threatening to present such Bill to the Governor for His Majesty's assent although such Bill had not been approved by the electors in accordance with sec. 7A of the *Constitution Act* 1902. The statement of claim also alleged that the *Bill to Abolish the Legislative Council*, initiated in the Legislative Council, was passed by the Legislative Council on 9th December 1930; that the defendants, other than the Hon. Sir John Beverley Peden, claimed to be entitled to have each of such Bills if and when the same should have been passed by the Legislative Council and Legislative Assembly presented to the Governor for His Majesty's assent without any prior approval of the electors, and did not intend to submit the same or either of them to the electors for approval and threatened and intended to cause the same to be presented to the Governor for His Majesty's assent without such prior approval of the electors; that the plaintiffs feared that unless the defendants were restrained from presenting the Bills for His Majesty's assent until the same had been respectively approved by the electors in accordance with sec. 7A of the *Constitution Act* 1902 the plaintiffs would be seriously prejudiced and would be impaired in the security of their status, rights and privileges. The plaintiffs claimed (*a*) that it may be declared that a Bill to abolish the Legislative Council or repeal or amend the provisions of sec. 7A of the *Constitution Act* of 1902 cannot be presented to the Governor for His Majesty's assent until approved by the electors in accordance with such section; (*b*) that the defendant the Hon. Sir John Beverley Peden, K.C.M.G., M.L.C., may be restrained from presenting to the Governor for His Majesty's assent the *Bill to Repeal the Constitution (Legislative Council) Amendment Act* 1929 until the same has been approved by the electors in accordance with sec. 7A of the *Constitution Act* 1902; (*c*) that the defendants, other than the Hon. Sir John Beverley Peden, K.C.M.G., M.L.C., their servants and agents may be restrained from presenting or endeavouring or causing or procuring to be presented to the Governor for His Majesty's assent either of the Bills above mentioned until the same have been respectively approved by the electors in accordance with sec. 7A of the *Constitution Act* 1902; (*d*) that the

costs of this suit may be provided for; (*e*) that the plaintiffs may have such further or other relief as the nature of the case may require.

The matter having come before *Long Innes* J. on an *ex parte* application for an interim injunction, he referred the matter to the Full Court of New South Wales under the powers contained in the *Equity Act*; and as the defendants other than the President of the Council (who did not appear) refused to give any undertaking, he granted an injunction until the matter could be heard by the Full Court. The matter then came before the Full Court on a motion to continue that injunction, and the statement of claim was demurred to *ore tenus*. Apart from objections to the competence of the suit the principal submission upon which the demurrer was based was that sub-sec. 6 of sec. 7A was void and inoperative, so far as it purported to prevent the Legislature from repealing the section without a referendum, upon the grounds (1) that, as the constitution of New South Wales was, in substance, a flexible or uncontrolled constitution, the Parliament of 1929 had no authority to shackle or control the then existing Parliament, and (2) that sub-sec. 6 of sec. 7A was repugnant to and inconsistent with sec. 4 of the Imperial statute 18 & 19 Vict. c. 54, which conferred a constitution on New South Wales, and with sec. 5 of the *Colonial Laws Validity Act* 1865 (28 & 29 Vict. c. 63).

The Full Court of New South Wales (*Street* C.J., *Ferguson*, *James* and *Owen* JJ., *Long Innes* J. dissenting as to the validity of sec. 7A) ordered that the demurrer be overruled and that the injunctions be continued until the hearing of the suit or further order; and, the parties consenting to the motion being turned into a motion for a decree, the Court declared that the Bill to abolish the Legislative Council or repeal or amend the provisions of sec. 7A of the *Constitution Act* 1902 cannot be presented to his Excellency for His Majesty's assent until approved by the electors in accordance with such section: *Trethowan* v. *Peden* (1).

From this decision the defendants other than the President of the Council appealed, by special leave, to the High Court, which in granting such leave ordered that the appeal to the High Court be limited to the questions whether the Parliament of the State of New

(1) (1930) 31 S.R. (N.S.W.) 183.

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South Wales had power to abolish the Legislative Council of the said State or to alter its constitution or powers or to repeal sec. 7A of the *Constitution Act* 1902 except in the manner provided in the said sec. 7A.

Loxton K.C. (with him *Kitto*), for the appellants. The broad question is whether the State Parliament of New South Wales was competent to fetter its power of amending its own legislation. The Act which imposes this fetter is the *Constitution (Legislative Council) Amendment Act* 1929 (No. 28 of 1929), clause 6, which added sec. 7A to the *Constitution Act* 1902. Parliament cannot denude itself of the power to restrict its power to amend, and certainly could not fetter any subsequent Parliament. Parliament was never given power to lose its independence, and could not submit its volition to the volition of a third person. The present Parliament has full plenary powers as to territory and as to the subject matter of the legislation. The powers were as plenary as those possessed by the donor of the powers, that is, by the Imperial Parliament, and those powers connote the right of the Legislature to whom those powers were entrusted to repeal and to give expression to any change of mind which may take place or to any change of intention.

[GAVAN DUFFY C.J. It all amounts to this: You say that Parliament has a perfect right to re-alter that which had been altered by this former Act of Parliament.]

That is so; and no Parliament can prevent a subsequent Parliament, or even prevent itself, from subsequently repealing its own legislation. That is really the invalidity that is attacked so far as this measure is concerned. No authority has been produced that indicates that it ever has been successfully attempted on the part either of the Imperial Parliament or of a Dominion legislature to limit its own inherent powers of repeal. To support a claim to fetter such as is here set up by the respondents there must be either clear judicial authority, clear legislation or clear appearance of necessity to support it (per Earl of *Birkenhead* in *Birkdale District Electricity Supply Co.* v. *Southport Corporation* (1)). Part of the strength of the appellants' argument lies in the fact

(1) (1926) A.C. 355.

that although the Imperial Parliament has been in existence, practically speaking, from time immemorial, and although the Australian Colonies and States having responsible government were in existence at all events as far back as 1855, there has never been a successful attempt by either the Imperial Parliament or by any of the Dominion Parliaments to place a fetter on the right to legislate such as is placed upon the Parliament of New South Wales in this Act.

[GAVAN DUFFY C.J. I appreciate the fact that there may not have been a successful attempt to do this; but has there been an unsuccessful attempt?]

So far as an unsuccessful attempt is concerned, the only instance is the proposal to grant Home Rule to Ireland in 1866 when it was proposed to prohibit an alteration except in the presence of Irish members. The question for decision is one of construction not of one Act of Parliament alone but of at least three Acts, two of them being Imperial Acts and one a State Act. First, there is sec. 2 of Act No. 28 of 1929 to be considered; then the Imperial Act 18 & 19 Vict. c. 54, and then, in dealing with the effect of that Act, the *Colonial Laws Validity Act* 1865 (28 & 29 Vict. c. 63). First, the Act 18 & 19 Vict. c. 54 is in full force and operation, and assuming (which the appellants do not admit) that the *Colonial Laws Validity Act* is not as wide in its terms as 18 & 19 Vict. c. 54, the Act 18 & 19 Vict. c. 54 is still in force in the State of New South Wales, even if the later Act 28 & 29 Vict. c. 63 is not as wide as the former, and under the Act 18 & 19 Vict. c. 54 legislation such as that now in question would be absolutely invalid. Then as to the *Colonial Laws Validity Act*, that is an explanatory and also an enabling Act, but in no sense does it cut down 18 & 19 Vict. c. 54. They are perfectly consistent with one another, and the *Colonial Laws Validity Act* purports to explain certain things in respect of which doubt had been cast by some of the Judges of the Dominion Courts, and that doubt necessitated the passing of that particular Act. The *Colonial Laws Validity Act*, apart from 18 & 19 Vict. c. 54, shows in itself that sec. 2 (6) of the State Act is invalid as attempting to impose a fetter on legislation which the Legislature could not impose. Sub-sec. 6 differs from the preceding sub-sections because it purports to control the Legislature's right to change its

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own mind. The section requires a delay of at least two months before the referendum is submitted to the people, and the taking of a referendum also involves an expenditure of money. Both of these are fetters on the powers of Parliament. The requirement of a referendum also destroys the volition and independence of Parliament by subordinating its volition to that of a third person, namely, the electors. The Imperial Legislature never conferred on the State Legislature the right to destroy its own independence either in part or in whole. What the Imperial Parliament gave, it gave completely and unequivocally (*McCawley* v. *The King* (1)). The Imperial Parliament had the fullest power to reconsider its own determinations, and this power it conferred on the Dominion legislature. Had sec. 2 of Act No. 28 of 1929 stopped at sub-sec. 5 it would have been valid, because it would still have been within the competence of Parliament to alter it. The Legislature of New South Wales is in all respects similar to the Imperial Legislature so far as this present litigation is concerned (*Dicey* on the *Law of the Constitution*, 8th ed., p. 62; *Wilberforce* on *Statute Law*, p. 34). The suggestion that the law can be repealed only in a certain way is in conflict with the theory that a sovereign body cannot limit its powers to legislate either in part or completely. The crux of the matter is this: Can the State Legislature deprive itself of the right to alter its mind? And that does not raise the question whether it has got to do it in one particular form or another. Sec. 4 of 18 & 19 Vict. c. 54, giving the Legislature of New South Wales power to repeal the provisions of the reserved Bill, described as the *Constitution Act* by the *Acts Interpretation Act* 1897 (N.S.W.), was itself subsequently repealed by the Act 20 Vict. No. 10. Sec. 4, however, is not thereby rendered inoperative (see the *Despatch of Lord John Russell* in the *Parliamentary Handbook* (N.S.W.), p. 228; *Taylor* v. *Attorney-General of Queensland* (2)).

[DIXON J. Clause 22 of the Queensland Order in Council is equivalent to sec. 4 of the Imperial statute.]

McCawley v. The King (3); *Cooper* v. *Commissioner of Income Tax for the State of Queensland* (4), and 18 & 19 Vict. c. 54, Sched. I.,

(1) (1920) A.C. 691: 28 C.L.R. 106.
(2) (1917) 23 C.L.R. 457, at p. 472.
(3) (1918) 26 C.L.R. 9, at p. 38.
(4) (1907) 4 C.L.R. 1304, at p. 1314.

sec. 9, also show that sec. 4 is not wholly inoperative. The legislature referred to in sec. 9 consists of the three component parts, the Upper House, the Lower House and the Crown, and this section contemplates that the State Legislature will, in exercise of the powers conferred upon it by sec. 4 of 18 & 19 Vict. c. 54, alter the constitution of that Legislature.

As to the *Colonial Laws Validity Act*, 28 & 29 Vict. c. 63, having regard to the preamble of that Act, it is clear that it is a law of general application, and, as it is a law dealing with general matters, it does not cut down the specific right created by the Act 18 & 19 Vict. c. 54, because the latter Act was the charter dealing with the special conditions prevailing in the State of New South Wales, which was not open to the doubts to which some of the constitutions of the other Dominions were open. Secs. 1, 2 and 4 of 28 & 29 Vict. c. 63 support this view, and so far as there is inconsistency the provisions of 18 & 19 Vict. c. 54 should prevail. Sec. 5 of 28 & 29 Vict. c. 63, which is the crucial section, means, merely, that whatever law was applicable to the passing of a statute, every valid law that was applicable at the time must be complied with, but the provision for a referendum takes from Parliament the power to do as it likes and makes its will dependent on the volition of a body it is unable to control, and this is not a matter relating to the "manner and form" required by any Act of Parliament within the meaning of sec. 5, but is a matter of substance. Even if it were a matter of "manner and form" the Legislature was just as competent to change its mind as to that as to any other matter, because it comes within the scope of the term "peace, order and good government." Parliament cannot hand over control to a third person in such a manner as provided in the statute No. 28 of 1929 (N.S.W.) (*Birkdale District Electricity Supply Co.* v. *Southport Corporation* (1); *Powell* v. *Apollo Candle Co.* (2); *Hodge* v. *The Queen* (3)). It is inherent in the Imperial Parliament that it cannot bind future legislators or future Parliaments, and this applies to powers conferred on the Parliament of New South Wales. Dealing with sec. 7 and sec. 7A of the *Constitution Act* 1902, it is clear that the Legislature is the same body

(1) (1926) A.C., at pp. 363-366. (2) (1885) 10 App. Cas. 282, at pp. 287, 288.
(3) (1883) 9 App. Cas. 117.

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in each case, and the referendum does not create a new constituent part of the Legislature, and in the *Colonial Laws Validity Act* it is the same body that is recognized. As to the question of "manner and form," if the Legislature is going to part with its volition, or make its volition subject to the volition of a third person, that is not a matter dealing merely with "manner and form" but with substance; then it is necessary to see whether the purporting to perform that act, which is a matter of substance, is something which is consistent with what the Imperial Legislature has given—a complete and unequivocal power of legislation which has been given to this new creation.

[DIXON J. In the discussion which has taken place upon sec. 3 of the *Colonial Laws Validity Act* there has been some difference of opinion, but I think the result now is that sec. 3 applies to the Commonwealth Constitution, and the Commonwealth Constitution is not to be treated as a later inconsistent law. That leaves the question of sec. 5 completely open; but it affords some ground at least for saying that the whole of the provisions of the *Colonial Laws Validity Act* are of general application to any existing and future constitution of every British possession. If that is so, then, as it seems to be conceded on all hands that sec. 5 does not clothe the Federal Parliament with any power to amend the Constitution inconsistently with sec. 128, there appear to be only two ways of getting at that result: one is to say that sec. 5 does not apply because sec. 128 of the Constitution is a later Imperial law inconsistent with it, and the other is to say that it does not apply, or it only applies *sub modo*, because the words "manner and form" in the proviso of sec. 5 requiring that laws with respect to the constitution, powers and procedure of the legislature shall be passed in the manner and form prescribed by the law in force for the time being, afford a description which is answered by the referendum provisions of sec. 128. But there has been a judicial tendency to say that the *Colonial Laws Validity Act* does apply generally to all present and future constitutions, and you are not to treat the fact that the Constitution is later in point of date as militating against the conclusion that it applies to the Constitution.]

Referring to an earlier contention, even if the *Colonial Laws Validity Act* is to be given a narrower construction than that contended for, the Act 18 & 19 Vict. c. 54 specially regulates the Constitution of New South Wales, and, as is pointed out in *McCawley's Case* (1) and also in *Taylor* v. *Attorney-General of Queensland* (2), that Act and the *Colonial Laws Validity Act* are two separate and distinct fountains of legislative authority. No doubt they cover the same ground to some extent, but to the extent to which they do not cover the same ground the later statute does not repeal the earlier. In the Act 18 & 19 Vict. c. 54 the same word "manner" is used. The expression "manner and form" in the *Colonial Laws Validity Act* amounts only to this: that when you pass laws you must pass laws which are regarded as laws by the competent authorities. It is necessary to comply with the requirements which a Court would say were necessary for the purpose of making it a law, but that does not in any way cut down the inherent right of a legislature to reconsider its determination and cease to act upon a former determination. When it is found that the Legislature has passed these laws or these Bills in accordance with the standing orders of the House, which have the operation of law, then you have the full effect of manner and form.

[DIXON J. There is a theoretical discussion of Soveregnity in Appendix II. to *Salmond* on *Jurisprudence*, 8th ed., p. 524, in which the question is considered whether, in virtue of Sovereignty, limitations upon Sovereignty may be prescribed.]

Maughan K.C. (with him *E. M. Mitchell* K.C. and *Nicholas*), for the respondents. The issue before the Court on this appeal is whether sub-sec. 6 of sec. 7A of the *Constitution Act* 1902, introduced by the Act No. 28 of 1929, was *intra vires* the Parliament of New South Wales; and that question is rather one with regard to the powers of the 1929 Parliament. If an Act says that it shall not be repealed except in a particular way, such a provision is either good or bad; and when the time comes to repeal it, if it can be repealed in some other way, then to all intents and purposes it was

(1) (1920) A.C. 691; 28 C.L.R. 106. (2) (1917) 23 C.L.R. 457.

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bad from the beginning. Ultimately, the question turns on the true construction of sec. 5 of the *Colonial Laws Validity Act*. The question is really rather one of the powers of the 1929 Parliament than of the powers of the 1930 Parliament. To put the problem in a colloquial way: Can the New South Wales Parliament embody the compulsory referendum in its Constitution effectively and effectually, or must it go to the Imperial Parliament if it desires to embody that principle in its Constitution? It would appear that the powers of the New South Wales Parliament are so complete and unequivocal that it can do this very thing effectually. There is a substantial distinction between the powers of the Imperial Parliament and the powers of the Dominion Parliaments. The position of the Dominion Parliaments is stated by Lord *Birkenhead* in *McCawley's Case* (1). It was the intention of the Imperial Parliament to make these colonial Parliaments their own constitution-makers. It is both the letter and the spirit of our constitutions that the legislatures mentioned either in 18 & 19 Vict. c. 54 or in the *Colonial Laws Validity Act* were intended to be their own constitution-makers. They were intended to be the architects of their own fortunes, and were to make their own constitutions; and there were only two limitations placed upon them, one was that they must observe the manner and form then required, and the other is that probably the legislature must continue to be a representative legislature. With those two limitations the words contained in the Constitution are so very full that the Legislature in question can mould its own constitution, completely alter its nature, and do anything it wishes in the way of constitution-making provided it observes those two limitations, and can, in effect, turn that which is a flexible constitution into a rigid constitution, and that is what has been done in this instance. The power given to the Dominion Parliaments is a power to do something which will bind future Parliaments, and the very object of the *Colonial Laws Validity Act* is to enable the Dominion legislature to do such an act as the introduction of a referendum. The provision which controls the present position is sec. 5 of the *Colonial Laws Validity*

(1) (1920) A.C. 691; 28 C.L.R. 106.

Act, which " defines " the powers previously given. The expressions used by *Isaacs* J. and *Rich* J. in *McCawley's Case* (1) show that sec. 5 must be regarded as being written into the constitution and as being a component part of the constitution. Doubts had arisen as to the meaning of sec. 4 of 18 & 19 Vict. c. 54 and of similar provisions in other colonial constitutions, particularly in South Australia and Tasmania, and the Imperial Parliament, in order to set those doubts at rest, passed the *Colonial Laws Validity Act* of 1865, which, by sec. 5, said what sec. 4 of the Act 18 & 19 Vict. c. 54 meant. In effect the *Colonial Laws Validity Act* replaced or expounded the earlier Act. If what was done in 1929 was authorized by sec. 5 of the *Colonial Laws Validity Act*, that is sufficient. Moreover, sec. 4 of the Act 18 & 19 Vict. c. 54 gave the Legislature of New South Wales power to legislate as to manner and form, and also power to alter the Constitution, that is, to transfer that power to some other body or group of bodies which would still be the representative legislature, and if sec. 5 of such Act is a charter for us and has the meaning alleged, sec. 7A of the *Constitution Act* is *intra vires* the Parliament of New South Wales. There is no rule that one colonial Parliament cannot bind another, and no authority or principle to support such a rule. Although one Parliament cannot make a law which is unrepealable, it can define the manner and form in which the law must be repealed. There are two ways, which are quite distinct from each other, in which one Parliament can tie the hands of a succeeding Parliament. One is as to the manner and form, and if a particular manner and form are prescribed that must be observed. Such manner and form may be prescribed for all Bills including a Bill to repeal the Bill, and if there is any restriction passed by one Parliament as to the way in which constitutional Acts must be repealed, that restriction must be observed and cannot be got rid of by an Act passed in the ordinary way. It was the ignoring of those very restrictions that led to the passing of the *Colonial Laws Validity Act*, and the letter of the law officers to the Secretary of State to the Colonies describes the matters that gave rise to the *Colonial Laws Validity Act*. One of those matters was the ignoring of forms which they thought were not

(1) (1918) 26 C.L.R., at p. 49.

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imperative and which the *Colonial Laws Validity Act* has intended to make imperative. That is not taking away or destroying the power, but is merely doing what the Imperial Legislature intended should be done.

[GAVAN DUFFY C.J. In other words, it amounts to this: that in order to make a repealing Act effective it must be passed in a way which is effective in the then existing law.]

That is so; and that is the issue in this case. The other method by which one Parliament can tie the hands of its successor resides in the power which the New South Wales Parliament has to alter its own constitution. That is independent of manner and form. It can alter its own constitution and transfer the law-making power to a different group of bodies or to a group of bodies differently constituted. If it does so, that then becomes the new group and the new units that have power to alter the law, and they still have the full power given in the Act. In order to ascertain what sort of thing the Legislature meant when it spoke of manner and form, the matter can be viewed from three angles. One is historical, to see what drew the attention of the Imperial Parliament to the necessity for the legislation; the second is authority, the statements either of Justices of the Court or of text-book writers; and the third is the natural meaning of the words. Sub-sec. 6 of sec. 7A of the *Constitution Act* is clearly a law respecting the powers of the Legislature whatever that Legislature is or is not, because it restricts the powers. Sub-sec. 6 of sec. 7A is a law respecting the power of the Legislature to repeal sub-sec. 6—that is to say, it is a law respecting the power of the Legislature to make that particular law; therefore, it is within the description given there, and it is authorized. Sec. 7A is a law respecting the constituents, because it adds, for this particular class of law, a new body to the law-making element.

The next step is that it is a law respecting the powers of such Legislature because sub-sec. 6 of sec. 7A is a law which says that the power shall only be exercised in a certain way. Therefore, it is a law respecting the powers of the New South Wales Legislature, and is justified because it relates to manner and form. A further view is that the law here in question is one relating to manner and form, and it is necessary to see what sort of things could be

prescribed as manner and form in the Constitution of New South Wales as it existed in 1855. There are several restrictions on the very ample power contained in sec. 4 of the Act 18 & 19 Vict. c. 54; such as the reservation for the King's assent, the lying on the table of both Houses of the Imperial Parliament, and the requirement of unusual majorities. Two of them have nothing to do with the Houses of Parliament and one of them has nothing to do with any of the units of the Legislature. If these restrictions are not observed the law will be invalid. (See *Blackmore* on the *Law of the Constitution of South Australia*, pp. 57, 62; 25 & 26 Vict. c. 11.) The letter of the law officers giving rise to the passing of the *Colonial Laws Validity Act* is quoted in *Blackmore* on the *Law of the Constitution of South Australia*, at pp. 67-68. This letter treats the two things, majorities and non-reservation, in the same category as forms necessary in the making of the law. So that what preceded the *Colonial Laws Validity Act* was this failure to observe the forms—not only the forms as to things happening in the House but happening outside the House and happening in regard to units not part of the Legislature. What happened was that the law officers advised that an Act should be passed for the purpose of empowering the legislature of any Colony which might be in like circumstances to South Australia to alter its own constitution, and in the resultant Act they put this provision that laws of the class mentioned must have been passed in such manner and form as may be required, &c. That is a recognition of the colonial legislature to legislate as to manner and form as to things which are not only inside the Houses but outside the Houses of Parliament (*McCawley's Case* (1)). If any of the matters of manner and form are not observed, the Bill is not well passed and invalid even if it got on the Statute Book. The Dominion Parliaments working under the *Colonial Laws Validity Act* can make special restrictions binding upon themselves (*McCawley's Case* (2); *Berriedale Keith* on *Responsible Government in the Dominions* (1927 ed.), vol. I., pp. 350, 352). If Parliament has laid down a restriction on the manner of repealing a particular Act, succeeding Parliaments must obey

(1) (1918) 26 C.L.R., at pp. 54, 61.
(2) (1920) A.C., at pp. 704, 710, per Lord *Birkenhead* L.C.; 28 C.L.R., at pp. 115, 121.

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that restriction; they cannot ignore it. Only two conditions are necessary: first, the law must, as to subject matter, answer the description, and, secondly, it must have been passed in manner and form as required by the law of the Colony relating to the passing of laws. If it is laid down in the Constitution of any Dominion that Parliament must observe any special manner and form for repealing any given Act, then that manner and form must be obeyed. Consequently, if there was power in 1929 to impose the restrictions under sec. 5 of the *Colonial Laws Validity Act*, no construction of sec. 4 of 18 & 19 Vict. c. 54, which would allow Parliament to undo them in 1930, can prohibit the observance of such restrictions (*Berriedale Keith* on the *Sovereignty of the British Dominions*, pp. 46, 198). Sec. 128 of the Commonwealth Constitution is an illustration of a similar restriction, but one imposed by an Imperial Act, and there is a similarity between that section and sec. 7A of the *Constitution Act* 1902 (N.S.W.). *Taylor's Case* (1) establishes, first, that a law setting up a referendum of the electors as a step in making laws is a law respecting the powers of the legislature, and, secondly, that it is not outside the scope or intention of the *Colonial Laws Validity Act* to incorporate the electors as part of the law-making machine, and in the present instance the electors are made part of the law-making machine, and Parliament has thus altered the constitution of the legislature (*In re Initiative and Referendum Act* (2); *Dicey* on the *Law of the Constitution*, 8th ed., pp. 65, 66). In addition, the respondents rely upon the reasoning of the various judgments in the Supreme Court. Moreover, in the *Birkdale Case* (3), which related to the duties of a justice, there is nothing established which will give the Court any assistance in this case. The conclusion to be drawn is that sec. 7A is right for these two reasons, namely, that this is a law relating to manner and form which the Imperial Parliament recognizes the colonial Parliament by the *Colonial Laws Validity Act* as having power to pass, and that is quite independent of what the word "legislature" means in sec. 5; and, secondly, the New South Wales Legislature has altered the constitution of the Legislature by bringing a new unit into the law-making body for the

(1) (1917) 23 C.L.R. 457.
(2) (1919) A.C., at pp. 939, 943, 945.
(3) (1926) A.C. 355.

purpose of making this particular class of law, and that is capable of being done under the powers conferred by the *Colonial Laws Validity Act*, sec. 5, and the appeal should, consequently, be dismissed.

Cur. adv. vult.

Mar. 16.

The following written judgments were delivered :—

GAVAN DUFFY C.J. In the year 1929 the Legislature of New South Wales enacted the *Constitution (Legislative Council) Amendment Act* 1929. Sec. 2 of that Act raises the questions for discussion in the present case, and is in the following terms : "The *Constitution Act*, 1902, as amended by subsequent Acts is amended by inserting next after sec. 7 the following new section :—'7A. (1) The Legislative Council shall not be abolished nor, subject to the provisions of sub-section six of this section, shall its constitution or powers be altered except in the manner provided in this section. (2) A Bill for any purpose within sub-section one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section. (3) On a day not sooner than two months after the passage of the Bill through both Houses of the Legislature the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly. Such day shall be appointed by the Legislature. (4) When the Bill is submitted to the electors the vote shall be taken in such manner as the Legislature prescribes. (5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent. (6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal or amendment of any of the following sections of this Act, namely, sections thirteen, fourteen, fifteen, eighteen, nineteen, twenty, twenty-one, and twenty-two." It does not appear whether in making this enactment Parliament purported to exercise the powers conferred on it by the Imperial Act 18 & 19 Vict. c. 54, or those conferred on it by the *Colonial Laws Validity Act* 1865. But in order to face the difficulties raised in this case, I shall assume that it

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acted under sec. 5 of the latter Act, and subject to the proviso contained in that section. The section is as follows: "5. Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish Courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and 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."

In my opinion sec. 2 of the *Constitution (Legislative Council) Amendment Act* 1929, which inserted sec. 7A into the *Constitution Act*, was within the powers conferred on the Legislature by sec. 5 of the *Colonial Laws Validity Act* 1865 because it was a law respecting the powers of the Legislature. The question for consideration is whether the section which authorized its enactment also authorized its repeal in the circumstances now to be stated. In the year 1930 a Bill was introduced and passed through both Houses of Parliament for the repeal of sec. 7A of the *Constitution Act*; and these proceedings are brought for the purpose of restraining the presentation of this Bill to His Excellency the Governor of New South Wales for his assent on the ground that the Bill has not been approved by the electors in pursuance of the provisions of that section. It is to be observed that sec. 7A, while requiring the approval of the electors to enactments coming within the scope of the section, does not affect the constitution of the Legislature, which remains as it was before the passing of that section. It was, and it remains, the body to exercise the powers conferred by sec. 5 of the *Colonial Laws Validity Act* 1865, and we are relieved from the consideration of any question which might have arisen, had the constitution of the Legislature been altered for all purposes, or merely for the purpose of dealing with some specific subject or subjects. I have no doubt that the same authority which imposed the condition of approval by the

electors can now alter the law and remove such condition. It is said that sub-sec. 6 of sec. 7A of the *Constitution Act* imposes a law as to "manner and form" within the meaning of the proviso to sec. 5 of the *Colonial Laws Validity Act* 1865, inasmuch as it requires a "manner and form" which must be adopted in repealing that section, and that that law can be altered only in the manner prescribed by the section. Let us assume for the moment that it does impose such "manner and form," the result is that that "manner and form" must be followed as long as the requirement exists. If Parliament had erected a new authority within the meaning of the *Colonial Laws Validity Act* 1865 to take its place either wholly or for the purpose of the repeal of sec. 7A, it might well be that that authority could alone repeal the section; but it has not done so, and though the Legislature as it existed in 1929 could exercise all the powers conferred on it by the *Colonial Laws Validity Act* 1865, it could not derogate from those powers in the hands of the Legislature as it existed in 1930. Sec. 7A has no more binding force than any other enactment of the Parliament of New South Wales, and the power to make laws respecting its own "constitution, powers, and procedure" as fully authorized the removal of the referendum machinery as it authorized its introduction. That Legislature can prescribe what "manner and form" shall be necessary, and so cease to require what has theretofore been necessary. For the purposes of the argument which I have already stated, I have assumed that sec. 7A prescribes a "manner and form" in which a law shall be passed within the meaning of sec. 5 of the *Colonial Laws Validity Act* 1865. But a careful examination of both enactments has satisfied me that this is not so. It is legislation with respect to the "powers" of the Legislature within the meaning of sec. 5 of the Imperial statute and not with respect to its "constitution" or "procedure." Again, when the Imperial statute deals with the making of a law as a whole it uses the word "make" or "enact," but when it deals with any integral part of the making it uses an expression appropriate to that integral part, such as "passed," "presented to the Governor," "assented to by the Governor," and the antithesis between the words "make" and "pass" appears to be preserved in the language of sec. 5 itself.

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It may well be that the words "shall have been passed in such manner and form" in sec. 5 mean nothing more than "passed by the House or Houses of Parliament." But in any case it seems clear to me that the proviso has application only to acts of the Legislature or of some branch of the Legislature. Thus, it might include all that is to be done in the course of legislation by any branch of the legislative body, but it cannot include an act required to be done by some person, or persons outside the legislative body, as a condition precedent to any act of the legislative body.

In my opinion the appeal should be allowed.

RICH J. This is an appeal by special leave from a decree of the Supreme Court of New South Wales in Equity by which it is declared that a Bill to abolish the Legislative Council of New South Wales or repeal or amend the provisions of sec. 7A of the *Constitution Act* 1902 of New South Wales cannot be presented to His Excellency the Governor for His Majesty's assent until approved by the electors in accordance with that section, and the defendants are restrained from presenting for His Majesty's assent, or endeavouring or causing or procuring to be so presented, unless they have been so approved, two Bills, namely, a Bill passed by both Houses of the Legislature for the repeal of sec. 7A of the *Constitution Act* 1902, and a Bill passed by both Houses for the abolition of the Legislative Council. The defendants so restrained are the President of the Legislative Council, the Attorney-General for the State of New South Wales, the Premier and the other Ministers of the Crown for the State of New South Wales. The provisions of sec. 7A, which were inserted in the *Constitution Act* 1902 by an amendment adopted in 1929, are as follows:—"7A. (1) The Legislative Council shall not be abolished nor, subject to the provisions of sub-section six of this section, shall its constitution or powers be altered except in the manner provided in this section. (2) A Bill for any purpose within sub-section one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section. (3) On a day not sooner than two months after the passage of the Bill through both Houses of the Legislature the Bill shall be submitted to the electors qualified

to vote for the election of members of the Legislative Assembly. Such day shall be appointed by the Legislature. (4) When the Bill is submitted to the electors the vote shall be taken in such manner as the Legislature prescribes. (5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent. (6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal or amendment of any of the following sections of this Act, namely, sections thirteen, fourteen, fifteen, eighteen, nineteen, twenty, twenty-one, and twenty-two."

A manner for taking the vote of the electors when a Bill is submitted to them was prescribed by an Act of 1930. The Government of the day having announced its intention of taking measures to procure the passage through both Houses of Bills to repeal sec. 7A and to abolish the Legislative Council, the Legislative Council itself, relying apparently upon the belief that such Bills could not be lawfully assented to without a referendum, originated and passed the Bills which are the subject of the decree. It thus became unnecessary for the Government to adopt any of the measures announced, and upon the Bills being passed by the Legislative Assembly the controversy was reduced to the questions of law whether the Bills could lawfully be presented to the Governor, and whether, if presented, lawfully or unlawfully, the royal assent could validly be given unless the Bills were first submitted to and approved by the electors at a referendum. The suit was instituted by two members of the Legislative Council suing on behalf of themselves and all other members except the President and those members who, being Ministers of the Crown, were joined as defendants. The plaintiffs maintained that sec. 7A was a valid and effectual restraint upon the power of the two Houses of Parliament and the Crown to abolish the Legislative Council or to repeal or amend the provisions of sec. 7A imposing that restraint. The defendants, as well as denying this contention, objected to the form of the suit which, they said, disclosed no ground for equitable relief, and to the relief claimed which, they said, was designed to prevent the free access to the Sovereign of the representatives of

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Parliament. These objections were overruled in the Supreme Court. The person to whose lot it would fall to present Bills originated in the Legislative Council is the President of that Chamber, and the Court inferred that unless restrained the President would present the Bills which had been passed to the Governor for the royal assent although neither of them was first submitted for the approval of the electors. The members of the Supreme Court were further of opinion that, having regard to the terms of sec. 7A and to the consequences which might ensue if the President took this course, an injunction should be granted unless sec. 7A was ineffectual. The majority of the Court, consisting of *Street* C.J., *Ferguson*, *James* and *Owen* JJ., *Long Innes* J. dissenting, held that sec. 7A was valid and effectual and precluded its own repeal without a referendum. Upon the application to this Court for special leave to appeal from their decision, this Court considered that, in the exercise of its discretion to permit an appeal to it, it should impose conditions upon the appellants which would confine the appeal to the substantial questions "Whether the Parliament of the State of New South Wales has power to abolish the Legislative Council of the said State or to alter its constitution or powers or to repeal section 7A of the *Constitution Act* 1902 except in the manner provided by the said section 7A."

The first ground which the appellants took for attacking the correctness of the conclusion of the majority of the Supreme Court was that sec. 4 of the Imperial Act 18 & 19 Vict. c. 54 (the *Constitution Statute* as it is called in New South Wales) conferred upon the Parliament of New South Wales a power, which it could not abridge or condition and of which it could not divest itself, enabling it at any time to make and to repeal a law relating to any of the matters governed by the *Constitution Act*. It was pointed out from the Bench that all this section expressly provided was that the Legislature of New South Wales might make laws altering or repealing the Bill contained in the Schedule in the same manner as any other laws for the good government of the Colony, and that this power had been exercised once and for all when the Bill contained in the Schedule was repealed and the *Constitution Act* 1902 was substituted for it as an instrument of government. This

appears to be a formidable criticism of the argument, but I am prepared to assume that the powers given by sec. 4 of the *Constitution Statute* were not all thereby spent, and that, if no more had occurred, a power of constitutional amendment would belong to the Parliament of New South Wales in virtue of this section. The argument leaves out of account an occurrence of great constitutional importance to the Dominions. It ignores the passing of the *Colonial Laws Validity Act* 1865. Sec. 5 of that Act confers upon representative legislatures in the Dominions full power to make laws respecting the constitution, powers and procedure of such legislatures, 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 therein. This is a parallel power, but it is not alternative. It is the final and authoritative expression of every colonial representative legislature's power to make laws respecting its own constitution, powers and procedure. In the judgment of *Isaacs* J. (as he then was) and myself in *McCawley's Case* (1), which obtained the approval of the Judicial Committee (2), we said the *Colonial Laws Validity Act* was intended obviously to end for ever all doubts as to matters with which it dealt. In answer to an argument that the Constitution of Queensland impliedly restricted the power of amendment, we said that, in effect, that view disregarded the fifth section of the Act. The argument was, in the words of the judgment, "If the power exists independently of theAct, the Act was unnecessary. If it does not, then . . . the Act does not apply" (3). In dealing with this contention we said (4):—"Whatever colonial restrictions existed immediately prior to the passing of the *Colonial Laws Validity Act* must yield to the later will of the Imperial Parliament as expressed in sec. 5. . . . At the moment, therefore, of the passing of the *Colonial Laws Validity Act* 1865, sec. 5 was, so far as its language extends, an absolute charter, no matter what the British Legislature had previously said. It is as if the Imperial Parliament had said: 'Notwithstanding anything contained in or omitted from the constitutional law of any Colony, be it

(1) (1918) 26 C.L.R., at pp. 64-65.
(2) (1920) A.C., at p. 701; 28 C.L.R., at p. 112.
(3) (1918) 26 C.L.R., at p. 50.
(4) (1918) 26 C.L.R., at pp. 50, 51.

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enacted' &c." I regard it as clear that in so far as sec. 5 enables the Legislature of New South Wales to fetter, restrain, or condition the exercise of its power of constitutional alteration, no prior statute of the Imperial Parliament can operate to enable it to ignore or set at nought any restraint, fetter, or condition it has seen fit to impose in the exercise of that power. On the other hand, in so far as sec. 5 confers a power of constitutional alteration which it does not authorize the Legislature so to fetter, restrain, or condition, that power may be exercised in complete disregard of any fetter, restraint, or condition which may have been attempted. How far, then, does sec. 5 permit of constitutional alterations which have the effect of controlling the future action of the Legislature? Two methods of controlling the operations of the Legislature appear to be allowed by the express terms of the section. The constitution of the legislative body may be altered; that is to say, the power of legislation may be reposed in an authority differently constituted. Again, laws may be passed imposing legal requirements as to manner and form in which constitutional amendments must be passed. In my opinion the efficacy of sec. 7A depends upon the answer to the questions—does it fall within the proviso as to a requirement of manner and form? and does it introduce into the legislative body a new element? If the true answer to either of these questions is Yes, then the Legislative Council cannot be abolished without a referendum unless and until sec. 7A is repealed, and sec. 7A cannot be repealed except by a Bill approved at a referendum before it is presented for the royal assent. I think the whole matter is determined by the answer to these questions. They arise upon the text of the constating instrument, the *Colonial Laws Validity Act*. The Legislature of New South Wales is not sovereign, and no analogy can be drawn from the position of the British Parliament. The question is one of construction, and not of general reasoning as to the inherent right of a sovereign legislature to undo all that it has done. The first question is whether sub-sec. 6, which is a colonial law for the time being in force, requires a manner and form in which a law repealing sec. 7A must be passed. In my opinion it does. I take the word "passed" to be equivalent to "enacted." The proviso is not dealing with narrow questions of parliamentary

procedure. At the time when the *Colonial Laws Validity Act* was passed, the matters of principal concern were prescribed majorities, reservation of Bills for the signification of the Queen's pleasure and the laying of colonial Bills before both Houses of the Imperial Parliament (see sec. 36 of the *Constitution Bill*, Schedule to 18 & 19 Vict. c. 54). It may be noticed that the reservation and tabling of Bills in both Houses of the Imperial Parliament are matters quite extrinsic to the process of passing measures through the Houses of the local Parliament and, even if the Crown be included within the language of sec. 5 of the *Colonial Laws Validity Act* as part of the colonial legislature, the tabling of Bills to which the Governor has assented, forms no part of the process of assent or disallowance. In my opinion the proviso to sec. 5 relates to the entire process of turning a proposed law into a legislative enactment, and was intended to enjoin fulfilment of every condition and compliance with every requirement which existing legislation imposed upon the process of law-making. This view is enough to dispose of the case ; but if what is done under sub-sec. 6 did not fall under the proviso, the question would still remain whether for the purpose of abolishing the Legislative Council and the purpose of repealing sec. 7A a new element is not introduced into the legislative authority. It was conceded that under sec. 5 it was competent to the legislature to establish a third Chamber whose assent would be required to complete any legislative act. It could not be denied that, if a third Chamber could be introduced, a body of persons of another character might also be created a constituent element of the legislature. It was said, however, that the definition of "colonial legislature" in sec. 1 of the *Colonial Laws Validity Act* confines the signification of that term to the authority competent to make laws for the Colony upon general matters, and that if upon matters in general the two Houses with the assent of the Sovereign could legislate, sec. 5 gave them the power of constitutional amendment in spite of the attempt to incorporate the electorate in the legislative system for the purpose of particular legislation. But no reason appears to exist for applying the definition of colonial legislature in such a manner. If the legislative body consists of different elements for the purpose of legislation upon different

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subjects, the natural method of applying the definition would be to consider what was the subject upon which the particular exercise of power was proposed, and to treat sec. 5 as conferring upon the body constituted to deal with that subject authority to pass the law although it related to the powers of the legislature. An examination of sec. 7A shows that a legislative body has been created for the purpose of passing or co-operating in passing a particular law. There is no reason why this authority need extend to all laws. It is enough to turn to the *Commonwealth of Australia Constitution Act* to find in sec. 128 of the Constitution the prototype of sec. 7A. The electors are called upon to approve or not of a certain class of Bill. In so doing they discharge a function of law-making. It is not necessary for them to have a power of altering or amending a proposal submitted to them. According to the practice of the Legislature of New South Wales, the Legislative Assembly will not proceed further if the Council amend a money-bill. In the Federal Parliament the Senate has no power to amend money-bills (sec. 53 of the Commonwealth of Australia Constitution). It must accept or reject a Bill. But when it has expressed its approval or disapproval it has discharged its function as a legislative body. The legislative part played by the electorate in the referendum is recognized by *Bryce*, who describes it in his *American Commonwealth* (1911 ed.), vol. I., c. 39, p. 467, as "A transference of legislative authority from a representative body, whether the Parliament of the nation or the parish vestry or municipal council of the town (as the case may be), to the voters at the polls."

McCawley's Case (1) reaffirms the full power of such a legislature as that of New South Wales, which passed sec. 7A, to regulate its own constitution. Such a power naturally extends to the enactments of safeguards aimed at restraining improvident or hasty action. There is no reason why a Parliament representing the people should be powerless to determine whether the constitutional salvation of the State is to be reached by cautious and well considered steps rather than by rash and ill considered measures. *McCawley's Case* (2) establishes that there is no difference in this respect between a

(1) (1920) A.C. 691; 28 C.L.R. 106.
(2) (1920) A.C., at pp. 703, 704; 28 C.L.R., at pp. 114, 115.

unitary and a federal system. Either may be rigid and controlled or flexible and uncontrolled. The only question is whether, on the construction of the constating instrument, the Imperial Parliament made a grant of power to the representative Legislature of New South Wales to prescribe to their successors a particular mode by which and by which alone constitutional changes may be effected. In my opinion, for the reasons given the constating instrument enabled that Legislature to introduce the referendum as such a mode because it constitutes a manner and form of legislation and includes the electorate as an element in the legislative authority in which the power of constitutional alteration resides.

I am, therefore of opinion that neither of the Bills in question may be lawfully presented to the Governor for the royal assent, and be validly assented to, until it is approved by a majority of the electors.

I think the appeal should be dismissed.

STARKE J. The action brought by the respondents to this appeal is certainly novel in form, but in this Court we have not to consider whether the Supreme Court of New South Wales had jurisdiction to entertain, or the respondents sufficient interest to maintain, the action, for the order granting to the Attorney-General and others leave to appeal to this Court limited their appeal to the questions whether the Parliament of the State of New South Wales has power to abolish the Legislative Council of the State, or to alter its constitution or powers, or to repeal sec. 7A of the *Constitution Act* 1902, except in the manner provided by that section.

Substantially, the provisions of sec. 7A enacted that the Legislative Council of New South Wales should not be abolished nor its constitution or powers altered except in the manner provided in the section, which went on to provide that no Bill for any such purpose should be presented to the Governor for His Majesty's assent until it had been submitted to the electors qualified to vote for the election of members of the Legislative Assembly and approved by them. (See *Constitution Further Amendment* (*Referendum*) *Act* 1930, No. 2, of New South Wales.) Then sub-sec. 6 of sec. 7A safeguarded, or attempted to safeguard, the Legislative Council from abolition by providing in substance that any Bill for the repeal or amendment of the section

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(other than in certain cases, immaterial to this appeal) should not be presented to the Governor for His Majesty's assent until the Bill had been submitted to and approved by the electors qualified to vote for members of the Legislative Assembly. In 1930 two Bills were introduced into the Parliament of New South Wales, and passed both the Legislative Council and the Legislative Assembly. Neither Bill has yet been submitted to the Governor for His Majesty's assent, but the defendants in the action threaten and intend, according to the pleadings, to cause the same to be so submitted without any prior approval of the electors. This allegation must be accepted in the present litigation, for the Attorney-General and others demurred *ore tenus* to the plaintiffs' statement of claim.

The constitutional power of the Parliament of New South Wales to use the referendum in the manner provided by the *Constitution Act* 1902, sec. 7A, cannot be questioned in this Court (*Taylor's Case* (1)). It is a form of conditional legislation, and very different from the legislation the subject of decision in the *Initiative and Referendum Case* (2) and *R.* v. *Nat Bell Liquors Ltd.* (3). Nor, since *Taylor's Case*, can the constitutional power of that Parliament to abolish the Legislative Council be here questioned. All we have to consider is whether the fetter imposed by the *Constitution Act* 1902, sec. 7A, sub-sec. 6, is one that the Parliament "cannot break" save in the manner prescribed by the Act.

Much reliance was placed upon the sovereignty or omnipotence of Parliament, and the undoubted rule that "the Imperial Parliament cannot bind itself: it can fetter itself as much as it pleases, but it can cut its fetters asunder at pleasure." But the Parliaments of the Dominions or Colonies are not sovereign and omnipotent bodies. They are subordinate bodies; their powers are limited by the Imperial or other Acts which create them, and they can do nothing beyond the limits which circumscribe those powers. Yet they are not agents or delegates of the Imperial Parliament, and within their limits they have as plenary powers of legislation, as large and of the same nature, as the Imperial Parliament itself (*R.* v. *Burah* (4)). Moreover, the Imperial Acts conferring constitutions upon the

(1) (1917) 23 C.L.R. 457.
(2) (1919) A.C. 935.
(3) (1922) 2 A.C. 128.
(4) (1878) 3 App. Cas. 889, at p. 904.

Dominions or Colonies frequently—as has been done in the case of New South Wales—confer constituent powers upon their legislatures, that is, powers of making laws effecting changes in the constitutions. Such laws might make the particular constitution more flexible or they might make it more rigid. In New South Wales, by the Act 18 & 19 Vict. c. 54, sec. 4, power was conferred upon the Legislature to make laws altering or repealing all or any of the provisions of the *Constitution Act* set forth in the Schedule, and sec. 36 of the *Constitution Act* conferred upon the Legislature full power and authority from time to time by any Act or Acts to alter the provisions or laws for the time being in force under that Act or otherwise concerning the Legislative Council, subject to certain restrictions prescribed by the section. Further, the *Colonial Laws Validity Act*, 28 & 29 Vict. c. 63, sec. 5, provided 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." The Legislature of New South Wales was a representative legislature within the meaning of this Act. The *Constitution Act* 1902 and its amendments, including sec. 7A, were passed by the Legislature of New South Wales pursuant to these powers, and are colonial laws in force in the Colony within the meaning of the *Colonial Laws Validity Act*. And it may be noted that the *Constitution Act* (sec. 7) preserved the power of the Legislature to alter the laws for the time being in force concerning the Legislative Council, subject to certain restrictions in the proviso; sec. 7A prescribed a further restriction. The greater the constituent powers granted to the Legislature, the clearer, it seems to me, is its authority to fetter its legislative power, to control and make more rigid its constitution. But, however that may be with regard to the Act 18 & 19 Vict. c. 54 and the *Constitution Bill* scheduled to that Act, the proviso to sec. 5 of the *Colonial Laws Validity Act* puts the matter, in my opinion, beyond

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doubt. Ordinarily, a law is made when it has been passed in accordance with the regular procedure of the legislative body, and has received the royal assent. But the "manner and form" whose observance is required by the proviso to sec. 5 of the *Colonial Laws Validity Act* is the method prescribed by the Imperial Act or colonial law for the making of the law respecting the constitution, powers or procedure of the legislature which is in question.

The position is stated clearly, and I think accurately, by Professor *Berriedale Keith* in his work *Imperial Unity and the Dominions*, at pp. 389-390 :—"Any rule whatever," he says, "which has been laid down by any legislative authority with regard to the mode of modifying the constitution is a fetter on the freedom of the Dominion Parliament which it cannot break save in the way appointed by the Act imposing the fetter. If a Dominion Parliament enact to-morrow that any Act which it passes must be passed by a two-thirds majority to take effect as an alteration of the constitution, then this condition becomes one which, so long as the Act in question stands, cannot be undone by the Parliament save in the prescribed manner, that is to say if the Act has been careful to make it clear that this provision itself is to be protected in this way. In Queensland, indeed, in 1908, it was found possible to evade a difficulty that no alteration of the constitution of the Legislative Council could be made except by a two-thirds majority in the Council by repealing the proviso in the *Constitution Act* of 1867, which made this necessary, as the proviso itself was not covered by the requirement, but the really effective method of requiring that the majority should apply also to any alteration of the law affecting the principle would secure the effectiveness of the rule. The limit thus put on the powers of the Dominion Parliaments is at first sight rather curious, but it follows inevitably from the express provision in the *Colonial Laws Validity Act* 1865." (See also *Responsible Government in the Dominions*, by the same author, 2nd ed., pp. 352-353 ; *McCawley* v. *The King* (1).)

Consequently, in my opinion, this appeal should be dismissed.

DIXON J. The Legislative Council and the Legislative Assembly of New South Wales have passed a Bill for the repeal of sec. 7A of

(1) (1920) A.C., at pp. 711, 714 ; 28 C.L.R., at pp. 122, 125.

the *Constitution Act* 1902 to 1929, and a second Bill to abolish the Legislative Council. Neither of these Bills has yet been presented to the Governor for the royal assent. The question to which this appeal is confined is whether they may lawfully be presented for the assent of the Sovereign and, upon such assent being given, become valid laws of New South Wales, although neither of the Bills has first been submitted to the electors qualified to vote for the election of members of the Legislative Assembly and approved by a majority of such electors.

Sec. 7A of the *Constitution Act* assumes to require the approval of the majority of the electors as a condition which must be fulfilled before either a Bill for the abolition of the Legislative Council, or a Bill for the repeal of the provisions of sec. 7A which prescribe this requirement, may be presented for the royal assent or become a valid law. If sec. 7A were repealed, the Bill to abolish the Legislative Council might at once be presented to the Governor and, upon the assent of the Sovereign being signified, it would take effect as an Act of the New South Wales Parliament which must in this Court be admitted to be within its competence (*Taylor* v. *Attorney-General of Queensland* (1)). Thus the case depends upon the question whether the Bill for the repeal of sec. 7A may be presented for the royal assent and become a valid law without compliance with the condition which that section itself prescribes requiring that a Bill for its repeal shall first be approved by a majority of the electors. This question must be answered upon a consideration of the true meaning and effect of the written instruments from which the Parliament of New South Wales derives its legislative power. It is not to be determined by the direct application of the doctrine of parliamentary sovereignty, which gives to the Imperial Parliament its supremacy over the law. It is the law, derived mediately or immediately from the Imperial Parliament, which gives to the Legislature of New South Wales its powers, and it is that law which determines the extent of those powers and the conditions which govern their exercise. The incapacity of the British Legislature to limit its own power otherwise than by transferring a portion or abdicating the whole of its sovereignty has been accounted for by

(1) (1917) 23 C.L.R. 457.

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the history of the High Court of Parliament, and has been explained as a necessary consequence of a true conception of sovereignty. But in any case it depends upon considerations which have no application to the Legislature of New South Wales, which is not a sovereign body and has a purely statutory origin. Because of the supremacy of the Imperial Parliament over the law, the Courts merely apply its legislative enactments and do not examine their validity, but because the law over which the Imperial Parliament is supreme determines the powers of a legislature in a Dominion, the Courts must decide upon the validity as well as the application of the statutes of that legislature. It must not be supposed, however, that all difficulties would vanish if the full doctrine of parliamentary supremacy could be invoked. An Act of the British Parliament which contained a provision that no Bill repealing any part of the Act including the part so restraining its own repeal should be presented for the royal assent unless the Bill were first approved by the electors, would have the force of law until the Sovereign actually did assent to a Bill for its repeal. In strictness it would be an unlawful proceeding to present such a Bill for the royal assent before it had been approved by the electors. If, before the Bill received the assent of the Crown, it was found possible, as appears to have been done in this appeal, to raise for judicial decision the question whether it was lawful to present the Bill for that assent, the Courts would be bound to pronounce it unlawful to do so. Moreover, if it happened that, notwithstanding the statutory inhibition, the Bill did receive the royal assent although it was not submitted to the electors, the Courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside. But the answer to this question, whether evident or obscure, would be deduced from the principle of parliamentary supremacy over the law. This principle, from its very nature, cannot determine the character or the operation of the constituent powers of the Legislature of New South Wales which are the result of statute. It is true that these constituent powers were meant to give to the constitution of New South Wales as much of the flexibility which in Great Britain arises

from the supremacy of Parliament as was thought compatible with the unity of the Empire, the authority of the Crown and the ultimate sovereignty of the Imperial Parliament. But this consideration, although generally of importance, affords small help in a question whether the constituent authority of a legislature in a Dominion suffices to enable it to impose a condition or a restraint upon the exercise of its power. The difficulty of the supreme Legislature lessening its own powers does not arise from the flexibility of the constitution. On the contrary, it may be said that it is precisely the point at which the flexibility of the British constitution ceases to be absolute. Because it rests upon the supremacy over the law, some changes which detract from that supremacy cannot be made by law effectively. The necessary limitations upon the flexibility of the constitution of New South Wales result from a consideration of exactly an opposite character. They arise directly or indirectly from the sovereignty of the Imperial Parliament. But in virtue of its sovereignty it was open to the Imperial Parliament itself to give, or to empower the Legislature of New South Wales to give, to the constitution of that State as much or as little rigidity as might be proper.

Two Imperial statutes only need be considered in deciding whether the Legislature of New South Wales has in fact been thus empowered to make the constitution of its State sufficiently rigid to require the approval of the electors as a necessary condition of the repeal of sec. 7A of the *Constitution Act*.

In 1853 the then Legislative Council of New South Wales, purporting to exercise a power which it possessed to establish in its stead a bicameral parliament and to confer upon it the powers and functions of that Council, passed a Bill for a *Constitution Act* which was reserved for the Queen's assent. It contained provisions which were beyond the powers of the Council to enact and provisions which the Imperial authorities thought should be omitted. The Imperial Act 18 & 19 Vict. c. 54, called in New South Wales the *Constitution Statute*, was therefore passed for the purpose of enabling the Queen to assent to the Bill so reserved as amended by the hands of the Imperial authorities. The Bill, so amended, was annexed in a Schedule to the *Constitution Statute*, and in that statute was

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described as "the said reserved Bill." The Bill empowered the new Legislature to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever, and expressly authorized it, subject to conditions as to majorities, to alter the constitution of the second Chamber. "But the framers of the Constitution appear to have omitted, altogether, any special provision reserving to the future Legislature power to alter any other provisions of the Bill whatsoever. Of course, if this Bill had been passed in the exercise of the legitimate functions of the Council, and required only the assent of the Crown to give it force, this power would have been implied. The new Legislature might alter anything done by the former, but, inasmuch as the sanction of Parliament was required, the several provisions of the Bill would have become, in a legal point of view, sections of an" (*sc.*, Imperial) "Act of Parliament, and it might be very doubtful at least whether, in the absence of special provision, the new Legislature could have in any way meddled with them." (Despatch of Lord *John Russell* to the Governor transmitting the *Constitution Statute* and Bill after the royal assent had been given.) Accordingly, by sec. 4 of the *Constitution Statute* the Imperial Parliament expressly enacted that it should be lawful for the Legislature of New South Wales to make laws altering or repealing the said reserved Bill in the same manner as any other laws for the good government of the Colony.

By the *Constitution Act* 1902 ("An Act to consolidate the Acts relating to the Constitution") the Legislature of New South Wales did repeal the "said reserved Bill" (see sec. 2 (1) and First Schedule; cf. sec. 24 (4) of the *Interpretation Act* 1897). When this was done the express power contained in sec. 4 of the *Constitution Statute* was exhausted. No doubt the express power to repeal "the said reserved Bill" implied that a constitution might be enacted in its place. This implication would enable the Legislature to supersede the old by a new constitutional enactment, which then would become the source of its legislative power. In fact, such a course was adopted in passing the *Constitution Act* 1902. Perhaps, if the constituent power of the Legislature depended upon this instrument and upon sec. 4 of the *Constitution Statute* only, it would remain doubtful, in

spite of *Taylor's Case* (1), whether the second Chamber could be abolished. But if the constitution, ascertained from these sources, is flexible enough to allow of the abolition of the Legislative Council, why should its flexibility be insufficient to enable the Legislature to adopt effectively the provision of sec. 7A of the *Constitution Act* as amended in 1929? The power expressly given by sec. 4 of the *Constitution Statute* is spent. What implication does the section contain which prevents the Legislature adopting sec. 7A as an effective part of the Constitution?

The case must have depended upon the answer to these questions if it were not for the second of the two Imperial statutes which need consideration—the *Colonial Laws Validity Act* 1865. But it was a declared object of that Act to remove doubts respecting the powers of colonial legislatures and these questions depend upon considerations out of which such doubts arose. Upon the subjects with which it deals, the statement of the law contained in the *Colonial Laws Validity Act* was meant to be definitive, and a subject with which it deals is the constituent power of such legislatures and the manner in which that power shall be exercised. Sec. 5 provides: "... every representative legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law for the time being in force in the said Colony." This provision both confers power and describes the conditions to be observed in its exercise. It authorizes a representative legislature to make laws respecting its own constitution, its own powers and its own procedure. This authority does not extend to the executive power in the constitution. But it is plenary save in so far as it may be qualified by a law which falls within the description of the proviso. The power to make laws respecting its own constitution enables the legislature to deal with its own nature and composition. The power to make laws respecting its own procedure enables it to prescribe rules which have the force of law

(1) (1917) 23 C.L.R. 457.

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for its own conduct. Laws which relate to its own constitution and procedure must govern the legislature in the exercise of its powers, including the exercise of its power to repeal those very laws. The power to make laws respecting its own powers would naturally be understood to mean that it might deal with its own legislative authority. Under such a power a legislature, whose authority was limited in respect of subject matter or restrained by constitutional checks or safeguards, might enlarge the limits or diminish or remove the restraints. Conversely, the power might be expected to enable a legislature to impose constitutional restraints upon its own authority or to limit its power in respect of subject matter. But such restraints and limitations, if they are to be real and effective and achieve their end, must bind the legislature. If the legislature, nevertheless, continues to retain unaffected and unimpaired by its own laws the power given by this provision to legislate respecting its own powers, it is evident that it may always repeal the limitations and restraints which those laws purport to impose. Moreover, this means, as *McCawley's Case* (1) establishes, that no formal repeal is necessary to resume the power and the legislature remains competent to make laws inconsistent with the restraints or limitations which its former statutes have sought to create. If and in so far, therefore, as sec. 5 confers a superior and indestructible power to make laws with respect to the legislature's own powers, it cannot enable it to impose upon those powers any effective restraints or restrictions. How far is the power which it gives of this character ? In other words, how far does sec. 5 allow a constituent legislature to adopt a rigid constitution ? There is no logical reason why the authority conferred over its own powers should not include a capacity to diminish or restrain that very authority. But, in giving every representative legislature the power to make laws respecting its own powers, sec. 5 provides not only that the power shall subsist, but also shall be deemed at all times to have subsisted.

Considered apart from the proviso, the language in which this provision is expressed could not reasonably be understood to authorize any regulation, control or impairment of the power it describes. It does not say that the legislature may make laws

(1) (1920) A.C. 691 ; 28 C.L.R. 106.

respecting its own powers including this power. But the proviso recognizes that the exercise of the power may to some extent be qualified or controlled by law. It describes the kinds of legislative instrument by which this may be done, and, with Acts of the Imperial Parliament, letters patent and orders in council, it includes a colonial law for the time being in force in the Colony. The expression "colonial law" is defined to include laws made for any Colony by the authority, other than the Imperial Parliament or His Majesty in Council, competent to make laws for the Colony (sec. 1). The extent is limited to which such a law may qualify or control the power to make laws respecting the constitution, powers and procedure of the Legislature. It cannot do more than prescribe the mode in which laws respecting these matters must be made. To be valid, a law respecting the powers of the legislature must "have been passed in such manner and form as may from time to time be required by any . . . colonial law" (*sc.*, a law of that legislature) "for the time being in force." Its validity cannot otherwise be affected by a prior law of that legislature. In other words no degree of rigidity greater than this can be given by the legislature to the constitution.

The law proposed by the Bill to repeal sec. 7A of the *Constitution Act* 1902 to 1929 answers the description "a law respecting the powers of the legislature" just as the provisions of sec. 7A itself constitute a law with respect to those powers. But the proposal cannot be put into effect save by a law which "shall have been passed in such manner and form as may be required by any" prior law of the New South Wales Legislature. Unless it be void, sec. 7A is undeniably a prior law of the New South Wales Legislature. It is no less a law of that Legislature because it requires the approval of the electors as a condition of its repeal. But it is not void unless this requirement is repugnant to sec. 5 of the *Colonial Laws Validity Act*. No requirement is repugnant to that section if it is within the contemplation of its proviso, which concedes the efficacy of enactments requiring a manner or form in which laws shall be passed. If, therefore, a provision that a particular law respecting the powers of the Legislature may not be made unless it is approved by the electors, requires a manner or form in which such a law

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shall be passed, then sec. 7A is a valid law and cannot be repealed without the approval of the electorate.

I have arrived at the conclusion that such a provision is properly described as requiring a manner in which the law shall be passed, and falls within the category allowed by the proviso. The language of the proviso may be susceptible of an interpretation which confines its application to the procedure by and the form in which a Bill is to be dealt with in the Chambers of the Legislature and possibly by the Sovereign and his representative. Those who contend for this interpretation emphasize the word "pass," to which they give a meaning more restricted than would be expressed by the word "made." It could not be denied that submission to and approval by the electorate, if required in order that a proposal may become law, would aptly and properly be described as part of the manner in which the law must be made. But it is suggested that the word "pass" relates to the passage through the House or Houses of the Legislature and was not meant as a general word like "made," which would include whatever was necessary for the enactment of the law.

It is not perhaps clear whether the word "legislature" in sec. 5 includes the Crown, although *Isaacs* J. (as he then was) was of the opinion that it did not (*Taylor's Case* (1); cf. Sir *Harrison Moore, The Powers of Colonial Legislatures, Journal Soc. Comp. Leg.* (1922), vol. IV., at p. 19). But the law governing the reservation of Bills and the laying of copies before the Houses of the Imperial Parliament were matters prominently in view when sec. 5 was framed. It is evident that these matters are included within the proviso, and that, if and in so far as the law for the time being in force purported to make them imperative, a law could not be said to have passed unless they were fulfilled. An interpretation which restricts the application of the words of the proviso to conditions occurring, so to speak, within the representative legislature confines to matters of procedure part of a constitutional provision basal in the development of the self-governing Colonies. The more natural, the wider and the more generally accepted meaning includes within the proviso all the conditions which the Imperial Parliament or

(1) (1917) 23 C.L.R. 457, at pp. 473-474.

that of the self-governing State or Colony may see fit to prescribe as essential to the enactment of a valid law. Upon this interpretation a full constituent power is given to the representative legislature, but it may determine what shall be necessary to constitute an exercise of that or any other legislative power.

For these reasons I think sec. 7A is valid and effective, and the appeal should be dismissed.

McTIERNAN J. The gravity of the issues of law to be decided is emphasized by briefly noting the consequences which would flow from the success or failure of this appeal. In the former event, the Bill to repeal sec. 7A of the *Constitution Act* 1902, which has been passed by the Legislative Council and the Legislative Assembly of New South Wales, may be forthwith presented to the Governor for the royal assent. When His Majesty's assent would have been signified, there would be no shadow of an obstacle to the presentation to the Governor for the royal assent of a Bill to abolish the Legislative Council of New South Wales which has been passed by the Legislative Council and Legislative Assembly. Should the appeal be dismissed, the Parliament of New South Wales would be held to have effectively shackled its power to repeal or amend one of its own Acts, by enacting that a Bill to repeal or amend such Act shall not be presented to the Governor for the royal assent until it has been approved by a majority of the electors or by any person or number of persons, who are not members of the Legislative Council or the Legislative Assembly. It would, in effect, be held to be capable of doing what the Imperial Parliament cannot accomplish without surrendering its sovereignty to a new body. "One thing no Parliament can do: the omnipotence of Parliament is available for change, but cannot stereotype rule or practice. Its power is a present power, and cannot be projected into the future, so as to bind the same Parliament on a future day, or a future Parliament" (*Anson, Law and Custom of the Constitution*, 5th ed., vol. I., pp. 7-8).

By the order granting special leave to appeal, this appeal is limited to the questions whether the Parliament of the State of New South Wales has power to abolish the Legislative Council of the said State, or to alter its constitution or powers or to repeal sec. 7A of the

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Constitution Act 1902, except in the manner provided by sec. 7A. The controversy has centred upon the second question. Sub-sec. 6 of sec. 7A purports to direct that it shall be compulsory to observe the "manner" provided in sec. 7A, for the repeal of this section. The "manner" which is to be observed consists of the following provisions:—After the passage of the Bill to repeal sec. 7A through both Houses of the Legislature, the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly. The electors vote as the Legislature prescribes and on a day which the Legislature appoints. The day so appointed must not be sooner than two months after the passage of the Bill through both Houses. If the electors do not approve of the Bill, it shall not be presented to the Governor for His Majesty's assent. The Bill to repeal sec. 7A, which has been passed by the Legislative Council and the Legislative Assembly, was initiated in the Council. The Standing Orders of the Legislative Council provide that every Bill initiated in the Council, after having been finally passed by both Houses, shall be presented to the Governor for His Majesty's assent by the President. The electors' disapproval, therefore, would, in effect, prevent the Legislature from proceeding with the Bill to its final stage.

Counsel for the appellants, who are the Ministers of the Crown in New South Wales, described sub-sec. 6 of sec. 7A as novel legislation. The power of the Parliament of New South Wales to put a fetter, which is legally binding, on its power to repeal one of its own Acts cannot be denied on the ground that the Parliament of New South Wales enjoys those attributes of sovereignty which reside in the Imperial Parliament. It is the creature of the Imperial Parliament and subordinate to it. The powers of the Parliament of New South Wales and the rules governing their exercise must be sought in the statutes by which its creator and sovereign gave it life and vested it with power. The Imperial Parliament as a sovereign is supreme over its own Acts. It does not necessarily follow that the legislature which is created by one of those Acts, can attract to itself a legal supremacy over every law which it enacts, so that every one of those laws may be repealed or set aside by a later enactment. Nor does it follow that the Parliament of

New South Wales has power to enact a law which binds itself because it is not a sovereign legislature. It cannot by taking thought add one cubit to its stature. The determination of the questions argued in this appeal must depend upon the true meaning and effect of the Imperial statutes by which the Imperial Parliament conferred a constitution upon New South Wales and legislated with respect to its Legislature.

Those statutes are 18 & 19 Vict. c. 54 and the *Colonial Laws Validity Act* 28 & 29 Vict. c. 63. By the *Interpretation Act* No. 6 of 1897, enacted by the Parliament of New South Wales, the reserved Bill as amended by the Imperial Authorities which is contained in Schedule 1 to the statute 18 & 19 Vict. c. 54 is cited as the *Constitution*, and the statute itself, as the *Constitution Statute*. In 1902 the Legislature enacted an Act to consolidate the Acts relating to the *Constitution*. This Act, No. 32 of 1902, may be cited as the *Constitution Act* 1902 (sec. 1). The provisions of the reserved Bill which had not been altered or repealed, and the Acts which had altered or repealed certain of its provisions, were repealed and consolidated by this Act, except to the very small extent mentioned in the first Schedule. The unrepealed portion of sec. 36 of its reserved Bill is sec. 7 of this Act. An Act of the Parliament of New South Wales, 20 Vict. No. 10, had repealed that part of sec. 36 which said that it should be unlawful to present to the Governor for Her Majesty's assent any Bill to alter the system of representation, or to alter any of the provisions of the reserved Bill in force for the time being concerning the Legislative Council, unless such Bill had obtained the special majorities mentioned in sec. 36, when it passed the second and third readings. Sec. 7A was inserted in the *Constitution Act* 1902 by the *Constitution (Legislative Council) Amendment Act* 1929. It is noticeable that neither the long title nor the short title of the *Constitution (Legislative Council) Amendment Act* foreshadows the direction contained in sub-sec. 6 with respect to its repeal or amendment. The language of sub-sec. 2 of sec. 7A bears a similarity to that part of sec. 36 of the reserved Bill which had been repealed. There was no provision in the reserved Bill that it should not be lawful to present to the Governor for the royal assent a Bill to repeal the proviso in sec. 36 relating to special

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majorities unless the Bill had obtained the majorities therein mentioned. Sub-sec. 6 of sec. 7A, however, purports to require the same "manner" for a Bill to repeal or amend sec. 7A as for a Bill to abolish the Legislative Council or, subject to the exceptions in sub-sec. 6, to alter the constitution or powers of the Legislative Council.

Sec. 4 of the Imperial statute, 18 & 19 Vict. c. 54, is in these terms: "It shall be lawful for the Legislature of *New South Wales* to make laws altering or repealing all or any of the provisions of the said reserved Bill, in the same manner as any other laws for the good government of the said Colony, subject, however, to the conditions imposed by the said reserved Bill on the alteration of the provisions thereof in certain particulars, until and unless the said conditions shall be repealed or altered by the authority of the said Legislature." Had the reserved Bill contained a section which provided that a Bill to repeal the proviso in sec. 36 as to special majorities should itself obtain the majorities mentioned in sec. 36, such a section could have been repealed by an Act enacted by the King, by and with the advice and consent of the Legislative Council and Legislative Assembly in Parliament assembled and by the authority of the same, though the Bill for the said Act did not obtain those special majorities.

As I understand the submission of the respondents who were represented, they did not contend that if sec. 4 of 18 & 19 Vict. c. 54 stood alone the *Constitution* of New South Wales would be a controlled or rigid constitution. It was contended, however, that sec. 5 of the *Colonial Laws Validity Act* empowered the Parliament of New South Wales to turn the *Constitution* into a rigid or controlled constitution. The precise statement of counsel for the respondents was that, after the commencement of sec. 5 of the *Colonial Laws Validity Act*, the *Constitution* of New South Wales became "potentially rigid." In support of this submission, it was contended that sec. 5 "extended" the power of the Legislature, so that it became competent to bind itself and its successors by a law requiring that the "manner" therein prescribed for the repeal or amendment of an Act of the Legislature should be observed by itself and its successors. If that view is correct, the Legislature may,

whenever it pleases, become a Constitutional Convention, and make a fundamental law, and after it has done so, the powers of the Legislature and its successors to repeal or amend this law suffer a serious contraction, and the Legislature becomes legally subordinate to the law.

The material question, however, is whether sec. 7A is a rigid part of the constitution of New South Wales. "Those who have suggested that the United Kingdom ought to embody certain parts of what we call the British Constitution in a Fundamental Statute (or Statutes) and to declare such a statute unchangeable by Parliament, or by Parliament acting under its ordinary forms, seem to forget that the Act declaring the Fundamental Statute to be fundamental and unchangeable by Parliament would itself be an Act like any other Act, and could be repealed by another ordinary statute in the ordinary way. All that this contrivance would obtain would be to interpose an additional stage in the process of abolition or amendment, and to call the attention both of the people and the legislature in an emphatic way to the fact that a very solemn decision was being reversed. Some may think that such a security, however, if imperfect, would be worth having. The restraint imposed would be a moral, not a legal one." (*Bryce, Studies in History and Jurisprudence*, vol. I., pp. 175, 176.) If sec. 7A is a mere "contrivance" similar to that described in the quotation, the restraint upon its repeal may be removed by the Legislature acting under the forms by which it enacts a law. But if sec. 7A has been placed outside the power of the Legislature, acting under its forms for making a law, the section is a rigid part of the constitution. "Under any genuinely controlled constitution" there would be "no difficulty in pointing to specific articles in the legislative instrument or instruments which created the constitution, prescribing with meticulous precision the methods by which, and by which alone, it could be altered" (*McCawley* v. *The King* (1)). The said respondents point to sub-sec. 5 of sec. 7A as the specific article which prescribes the only method by which sec. 7A can be repealed, and, as has been stated, they submit that sec. 5 of the *Colonial Laws Validity Act* is the source of the power to give this

(1) (1920) A.C., at p. 705; 28 C.L.R., at p. 116.

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force to sub-sec. 6. If the *Colonial Laws Validity Act* empowers the Legislature of New South Wales to do this, and sub-sec. 6 is a legally binding fetter, from the restraint of which the Legislature cannot escape by the exercise of its power as the Legislature but must rely upon the vote of the majority of the electors to release it, the *Colonial Laws Validity Act* has authorized a radical disturbance in the constitutional position as established by 18 & 19 Vict. c. 54 and explained by the Despatch of the Secretary of State for the Colonies, with which the *Constitution Statute* and the *Constitution* were transmitted to the Governor of New South Wales. Speaking of a constitution which is founded by a statute, Lord *Birkenhead* L.C. said :—"Nor is a constitution debarred from being reckoned as an uncontrolled constitution because it is not, like the British Constitution, constituted by historic development, but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth. It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision" (*McCawley* v. *The King* (1)). Pars. 11, 12 and 13 of the Despatch which I have mentioned, contained the reasons which appeared good to the framers of the *Constitution Statute* for the enactment of sec. 4 of 18 & 19 Vict. c. 54. Those paragraphs are as follows :—"11. By secs. 17 and 42 of the Bill (referring to the original numeration), power was given to the new Legislature to alter the constitution of the Council, subject to certain provisions as to the majority. But the framers of the *Constitution* appear to have omitted altogether, any special provision reserving to the future legislature power to alter any other provision of the Bill whatever. 12. Of course if this Bill had been passed in the exercise of the legitimate functions of the Council (that is to say the Legislative Council, which was the sole legislative chamber in the Colony) and required only the assent of the Crown to give it force, this power would have been implied. The new Legislature might alter anything done by the former, but inasmuch as the

(1) (1920) A.C., at p. 704; 28 C.L.R., at p. 115.

sanction of Parliament was required, the several provisions of the Bill would have become, in a legal point of view, sections of an Act of Parliament, and it might be very doubtful at least whether in the absence of special provisions the new Legislature could have in any way meddled with them. 13. The effect of this provision as now introduced will it is conceived be as follows:—In the first place, the new Legislature will have full power to alter all the provisions of the Bill not specified in clauses 17 and 42 aforesaid. In the next place, it will have power to alter the portions specified in those clauses, subject to the conditions imposed by these clauses. And finally, it will have power to repeal those conditions themselves, if it shall think proper by enactment passed by simple majorities. By this provision Her Majesty's Government conceive that the purpose of the Council will be most effectually answered; because, if the Bill had been passed under their ordinary powers, it is clear that although they might have imposed these conditions, any subsequent Legislature might have repealed the clause imposing them by simple majorities. But, in any case of a Bill being offered for your assent repealing these conditions, you will reserve such Bill for Her Majesty's pleasure." It seems clear that those that took part in implementing the *Constitution* which the Legislative Council had adopted intended to confer on New South Wales an uncontrolled constitution. They wished to grant clear power to the new Legislature to alter or repeal the written provisions of the *Constitution*. In the case last mentioned in par. 13 of the Despatch, the form of the Legislature would be the Legislative Council, the Legislative Assembly and the King; not the King acting by his personal representative, the Governor, as he would act in other cases.

But the Despatch will not aid the contention that the constitution of New South Wales is an uncontrolled constitution, if the true effect of sub-sec. 6 of sec. 7A is to compel the Legislature to observe the "manner" provided in sec. 7A for the repeal of sec. 7A. Sec. 5 of the *Colonial Laws Validity Act* is as follows:—"5. Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish Courts of judicature, and to abolish and reconstitute the same, and to alter the constitution

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thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect of the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law for the time being in force in the said Colony." It is submitted on behalf of the said respondents that sub-sec. 6 is a law within the proviso of sec. 5 requiring the "manner" to be observed in passing a law to repeal sec. 7A, and that, in view of the supremacy of the *Colonial Laws Validity Act* over the Parliament of New South Wales and its legislation, that Parliament can legally compel itself and its successors to observe that "manner" for the repeal of sec. 7A.

It will have been noticed that the subjects of legislative power mentioned in sec. 4 of 18 & 19 Vict. c. 54 are "all or any of the provisions of the said reserved Bill," while those mentioned in sec. 5 of the *Colonial Laws Validity Act* are "the constitution, powers, and procedure of the legislature." This Imperial Act was described in *McCawley* v. *The King* (1) as "explanatory legislation." It is the dominant definition of the powers of a "representative legislature" to make laws respecting its constitution, powers and procedure, which are deemed always to have been, and are vested in it. The Legislature of New South Wales is admitted to be a representative legislature.

Since the commencement of the *Colonial Laws Validity Act* the following authoritative statements, which are applicable to the Parliament of New South Wales, have been made:—"Adhering to their fundamental purpose, which was to remove doubts as to the validity of colonial laws, they" (the Imperial Legislature) "affirmed in terms that every colonial legislature should be deemed at all times to have had full powers in the matters in question" (*McCawley* v. *The King* (2)). Those words of Lord *Birkenhead* apply to the second part as well as to the first part of sec. 5 of the *Colonial Laws Validity Act*.

(1) (1920) A.C. 691; 28 C.L.R. 106.
(2) (1920) A.C., at p. 711; 28 C.L.R., at pp. 121, 122.

"The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted" (*McCawley* v. *The King* (1)). "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe those powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself" (*R.* v. *Burah* (2), quoted in *Powell* v. *Apollo Candle Co.* (3)). "When the *British North America Act* enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sec. 92 it conferred powers, not in any sense to be exercised by delegation, from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plentitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament" (*Hodge* v. *The Queen* (4), quoted in *Powell* v. *Apollo Candle Co.* (5)).

The Legislature cannot deprive itself of any part of the power confirmed to it by sec. 5 of the *Colonial Laws Validity Act*. "No attempt has been made in the judgments below, or in the arguments placed before the Board, to deal with the point made by *Isaacs* and *Rich* JJ. that if secs. 15 and 16 of the *Constitution Act* of 1867 are to be construed as depriving the Legislature of the power to legislate upon the subject of the Judicature they are in conflict with the Imperial Act, already referred to, which gives such power in the plainest possible language" (*McCawley* v. *The King* (1)).

Sec. 7A is a law respecting the powers of the Legislature (*Taylor* v. *Attorney-General of Queensland* (6)). The Legislature of New South Wales may, under sec. 5 of the *Colonial Laws Validity Act*, restore any power to its fullest extent, which it has legislated to

(1) (1920) A.C., at p. 714; 28 C.L.R., at p. 125.
(2) (1878) 3 App. Cas., at p. 904.
(3) (1885) 10 App. Cas., at p. 289.
(4) (1883) 9 App. Cas., at p. 132.
(5) (1885) 10 App. Cas., at pp. 289-290.
(6) (1917) 23 C.L.R. 457.

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diminish. If sub-sec. 6 of sec. 7A had not been enacted, no question would have arisen as to the power of the Parliament to enact a law to repeal sec. 7A by the process or in the form in which laws are passed through the two Houses and assented to by the Governor in the name of His Majesty, or, if it would be necessary in the case, are reserved by the Governor for the assent of His Majesty and are assented to by His Majesty. Sub-sec. 6 diminishes the power of the Legislature to repeal or amend sec. 7A. The sub-section assumes to require that after the passage of a Bill to repeal or amend the section through both Houses the Legislature must take no further step in enacting the Bill into law for at least two months. If the persons designated by the section, who are outside Parliament, do not approve of the Bill, the Legislature is prevented from resuming the process of enacting the Bill into law and the Bill lapses. In my opinion, therefore, sub-sec. 6 of sec. 7A is not in substance a law dictating "manner": it is in substance a law depriving the Legislature of power. The words of the section measure the extent to which the power of the Legislature is cut down. It renders the King, the Legislative Council and the Legislative Assembly assembled in Parliament powerless to repeal the section unless an external body intervenes and approves of the repeal. In my opinion the Legislature, consisting of its three constituent elements in Parliament assembled, may, under sec. 5 of the *Colonial Laws Validity Act*, resume the power to repeal sec. 7A.

It was admitted by counsel for the said respondents that an Act of the Legislature of New South Wales which purported to say that an Act of the Legislature should never be repealed would not stop the Legislature from repealing it. It was argued, however, that if the Legislature said that an Act should not be repealed except in the "manner" required by an Act of the Legislature, the first Act could be repealed only in that "manner." The label "manner" does not conclude the matter: the true nature of the law may be disguised. If a law were made requiring that the draft of any alteration which a testator wished to make in his will must be submitted to the vote of his next-of-kin, and that the testator should not execute the new testamentary instrument until a majority of the next-of-kin had by a secret ballot approved of it, and if the

majority disapproved, the proposal of the testator to alter his will could not proceed any further, such an enactment would clearly be a law depriving the testator of testamentary power. It may be aptly described as a law instituting a new mode of altering a will, but not a law providing a manner in which a testator should exercise his testamentary power. I do not construe the proviso to sec. 5 of the *Colonial Laws Validity Act* as conferring power on a colonial legislature to enact a law prescribing a manner and form, which in effect destroys the plenary powers given by the section to the said legislature in its capacity as a representative legislature. In my opinion the position of the legislature in relation to sub-sec. 6 would be comparable with the position of a testator under such a law as has been mentioned, if that law were subject to some superior law protecting the testamentary capacity of the testator. Sec. 5 of the *Colonial Laws Validity Act* is an overriding charter which keeps the legislature continuously supplied with plenary power to make laws respecting its own constitution, powers and procedure, and no Act of the legislature can destroy or permanently diminish the authority which it derives from the charter.

If the view that I have taken of the provisions of sec. 7A should be incorrect, and if the true view should be that they are in substance "manner and form," the provisions of the section would, in my opinion, be in conflict with sec. 5 of the *Colonial Laws Validity Act* and consequently void. A "colonial law," prescribing "manner and form" as mentioned in the proviso, must be within the powers of the legislature which enacted it. Furthermore, should sub-sec. 6 be purely a law requiring "manner and form," and should it be within the powers of the Legislature to enact it, the Legislature would, in my opinion, have full power under its authority to make laws for the peace, order and good government of New South Wales in all cases whatsoever, and/or under sec. 4 of 18 & 19 Vict. c. 54 to dispense with this "manner and form," by enacting a law in the ordinary way for this purpose.

Reference was made in the course of argument to sec. 128 of the *Commonwealth of Australia Constitution Act* as a law prescribing the "manner" for altering the Constitution of the Commonwealth. The section in question in this appeal was modelled on sec. 128,

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but that section is part of an Imperial statute which conferred a rigid constitution. In enacting a law requiring the manner to be observed in altering the constitution of a Colony possessing a representative legislature, the Imperial Parliament is not bound to avoid conflict with the *Colonial Laws Validity Act*, the *Constitution Statute* 18 & 19 Vict. c. 54 or any other statute extending to the Colony. Although sec. 128 contains the word "manner," its insertion in the Constitution abrogates power, which the Parliament might, subject to other provisions of the Commonwealth Constitution, have had to make laws under sec. 5 of the *Colonial Laws Validity Act* with respect to its constitution, powers and procedure.

The basis of the *Colonial Laws Validity Act* is the report of the Imperial law officers, which was made in 1864. The report referred (*inter alia*) to the doubts and difficulties that had arisen because Bills had been assented to by Governors, which under the provisions of an Act should have been reserved for the royal assent, and Bills which should have obtained special majorities had found their way to the Statute Book, though such majorities had not been obtained. The law officers reported that, in their opinion, failure to observe these requirements was fatal. If sec. 5 of the Act had been passed without the proviso, the legislation referred to might have been validated *ab initio*, and legislation could have been passed in the future without observing the "manner and form" for the time being required by an Imperial law or by a colonial law which the colonial legislature had not altered or repealed. In the absence of the proviso, the Legislature of New South Wales might have been entitled to make laws with respect to its constitution, powers and procedure, without observing legislative methods and forms which it had not altered or repealed under sec. 4 of 18 & 19 Vict. c. 54. In my opinion "manner and form" in the proviso mean the manner and form to be observed in the passing of a Bill by constituent elements in the Legislature, through any stage of law making within the Legislature. Sec. 4 of the *Colonial Laws Validity Act* declares that "No colonial law, passed with the concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be or be

deemed to have been void or inoperative by reason only of any instructions . . . given to such Governor . . . by any instrument other than the letters patent . . . authorizing such Governor to concur in passing or to assent to laws . . . even though such instructions may be referred to in such letters patent or last-mentioned instrument." Sec. 6, which is enacted immediately after the proviso, provides a method of proving that a document is a true copy " of any colonial law assented to by the Governor of such Colony, or of any Bill reserved for the signification of Her Majesty's pleasure by the said Governor . . . and, as the case may be, that such law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and assented to by the Governor." These sections indicate what was within the contemplation of Parliament when it used the word " passed " in the proviso to sec. 5. It was held by *Isaacs* J. (as he then was), in *Taylor* v. *Attorney-General of Queensland* (1), that the word " legislature," in sec. 5 of the *Colonial Laws Validity Act* is not intended to include the Crown. In my opinion " passed " in the proviso means in relation to a colonial law, " passed by the legislature and assented to by the Governor " or " passed by the legislature with the concurrence of the Governor " or " passed by the legislature and reserved by the Governor for the signification of His Majesty's pleasure " as the case may be. In my opinion, therefore, " passed " does not mean made with the approval of any authority other than the constituent elements of the representative legislature.

The conclusions at which I have arrived on this branch of the case are briefly as follows: (1) Sec. 7A of the *Constitution Act* 1902 is in substance a law which diminishes the power of the Legislature; (2) the Legislature may under sec. 5 of the *Colonial Laws Validity Act* resume at will the power which sec. 7A has taken from it; (3) sub-sec. 6 is in substance a law which assumes to diminish the power of the Legislature to resume the power which sec. 7A has taken from it; (4) by reason of the continuous operation of sec. 5 of the *Colonial Laws Validity Act*, sub-sec. 6 cannot prevent the Legislature from fully restoring its power to abolish the Legislative

(1) (1917) 23 C.L.R., at p. 473.

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Council, or to alter the constitution or powers of the Council, and such power is restored by an Act, repealing sec. 7A, which is enacted by the constituent members of the Legislature in Parliament assembled; (5) if sub-sec. 6 is in substance a law requiring the "manner and form" for passing a Bill to repeal sec. 7A, it is in conflict with sec. 5 of the *Colonial Laws Validity Act* and is void for repugnancy; (6) if sub-sec. 6 is in substance a law requiring "manner and form" for the passing of a Bill to repeal sec. 7A, and it is not in conflict with sec. 5 of the *Colonial Laws Validity Act*, it may be repealed or altered under the powers of the Legislature to make laws for the peace, order and good government of New South Wales in all cases whatsoever, and/or under sec. 4 of 18 & 19 Vict. c. 54; (7) if sub-sec. 6 should be construed to be partly a law respecting the powers of the Legislature, and on account of the incorporation of the provisions of the antecedent sub-section, partly a law requiring "manner," what I have said on these two matters respectively would apply to each part of the sub-section; (8) the submission of the Bill to repeal sec. 7A to the electors would be necessary if the electors have been made a part of a Legislature which thereupon became the only authority competent to repeal sec. 7A. In my opinion sec. 7A has not that result.

On the last-mentioned matter I would make these observations:— Sec. 9 of the Imperial statute 18 & 19 Vict. c. 54 provides that the word "legislature," wherever used in that Act or the Schedule to it which contains the reserved Bill, shall include as well the Legislature to be constituted under the said reserved Bill and that statute, any future Legislature which may be established in New South Wales under the powers in the said reserved Bill and the statute contained. Clause 1 of the reserved Bill provided that there should be in place of the Legislative Council then subsisting one Legislative Council and one Legislative Assembly, and, within New South Wales, Her Majesty should 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 New South Wales. Thus the existing Legislature was effaced and its powers transferred to another legislative authority, which became the Legislature. By

sec. 1 of the *Colonial Laws Validity Act*, "legislature" and "colonial legislature" severally signify the authority other than the Imperial Parliament, or Her Majesty in Council, competent to make laws for any Colony, and the term "representative legislature" signifies any colonial legislature which shall comprise a legislative body of which one half are elected by the inhabitants of the Colony. The powers confirmed to every representative legislature are stated by sec. 5 to be in respect to the Colony under its jurisdiction. Sec. 3 of the *Constitution Act* 1902 provides that, unless the context or subject matter otherwise indicates or requires, "the Legislature" means His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly. Sec. 5 of the same Act provides that the Legislature shall, subject to the provisions of the *Commonwealth of Australia Constitution Act*, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever. The submission of the respondents on this branch of the case was that the effect of sec. 7A is to constitute the electors therein designated, a part of the Legislature. They did not submit that the King, the Legislative Council, the Legislative Assembly and the said electors became the only authority competent to exercise the powers of the Legislature of New South Wales, but that it was the only authority competent to repeal sec. 7A of the *Constitution Act* 1902. I understand their submission to mean that by enacting sec. 7A the Legislature transferred its powers to repeal or amend that section to another Legislature which was thereby constituted *ad hoc*. If sub-sec. 6 of sec. 7A should be construed to place this power in another Legislature different from the bicameral Legislature just described, sub-sec. 6 would clearly be in substance a law respecting the power of the Legislature which enacted it. The authority, which enacted it, is the "representative Legislature." Notwithstanding sub-sec. 6, it has sec. 7A completely under its control by virtue of sec. 5 of the *Colonial Laws Validity Act*. It is the Legislature which continues to have New South Wales "under its jurisdiction" and is "competent to make laws" for New South Wales (*vide* sec. 5 and sec. 1 of the *Colonial Laws Validity Act*). Further, it is the Legislature in which, subject to the *Commonwealth of Australia Constitution Act*, resides the power to make laws

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for the peace, welfare and good government of New South Wales in all cases whatsoever. Also it is the Legislature which, under sec. 4 of the Imperial Act 18 & 19 Vict. c. 54, has power subject to the definition of that power by sec. 5 of the *Colonial Laws Validity Act*, so far as it extended to the constitution, powers and procedure of such Legislature, to make laws altering or repealing all or any of the provisions of the reserved Bill in the same manner as any other laws for the good government of New South Wales. Considering the authority now vested in the Legislature which enacted sec. 7A, it has not ceased to be the "representative legislature" mentioned in sec. 5 of the *Colonial Laws Validity Act*. Therefore I do not think it is necessary to submit the Bill to repeal sec. 7A for the approval of the electors before it can be presented for the royal assent. The Legislature of New South Wales in pursuance of its authority as the representative legislature may resume to their full extent any powers which, for the time being, it may have curtailed by enacting sec. 7A.

In my opinion there can only be one Legislature in New South Wales. Any authority which the Legislature creates and vests with legislative power is subordinate to it unless the Legislature has validly transferred its powers as the Legislature to that body. "Sec. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a provincial legislature . . . could, while preserving its own capacity intact, seek the assistance of subordinate agencies" (*In re Initiative and Referendum Act* (1)). In my opinion, however, the Legislature has not assumed by sec. 7A to create a new body answering to the description of a legislature. I do not think that the electors who would vote on the day appointed would be members of a quasi-primary assembly which, with the King, the Legislative Council and the Legislative Assembly, would constitute a tricameral Legislature. "The three-fold expression of assent, advice, and authority may be regarded as the declaration of the function of the estates in legislation" (*Stubbs' Constitutional History of England*, vol. III., p. 502). In my opinion the function of assent, advice and authority

(1) (1919) A.C., at p. 945.

has not been vested in the "qualified electors." In approving or rejecting a Bill submitted to them they would not discharge the function which is enjoyed by the Legislative Council when it agrees or fails to agree to a Bill passed by the Legislative Assembly, or by the Crown when as part of the Legislature it assents or declines to assent to a Bill passed by the Legislative Council and the Legislative Assembly. It may be noted that the traditional links between the Houses of Parliament and the Crown are imitated as far as circumstances allow by the links which the Constitution of New South Wales establishes between the Legislative Council and the Legislative Assembly respectively as parts of the Legislature, and the Crown, through the Governor, who is the personal representative of the Crown. No semblance of any link between the electors and the Crown is established by sec. 7A. In my opinion, if the electors voted under this section, they would vote as members of a primary Constitutional Convention without legislative authority upon a proposal submitted to them by the two Houses of the Legislature.

In the course of argument it was stated by counsel for the said respondents that if sec. 7A is not a rigid part of the constitution the Constitution of New South Wales is defective because the Legislature has not power to place the "compulsory referendum" in the Constitution, and power would have to be sought from the Imperial Legislature to enable the Parliament to do so. Whether such a request would indicate a greater defect in the Constitution than a request for power to enable the Legislature to cut the knot of legislative provisions for two or more referenda, so that it could act as it deemed expedient in an emergency which would not in its judgment permit of the delay involved in taking the referendum or referenda, by which some existing law or new law had been fortified against repeal or amendment, is a speculation which will not decide the issue in this appeal.

Though the Legislature of New South Wales is not sovereign, it would, in my opinion, be operating within the area where it enjoys plenary power in proceeding to complete the enactment of a Bill to repeal sec. 7A of the *Constitution Act* 1902, before the electors have given their approval to the Bill.

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For these reasons I am of opinion that the appeal should be allowed.

Appeal dismissed.

Solicitor for the appellants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondents, *Allen, Allen & Hemsley.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

HUNGERFORD AND ANOTHER . . . APPELLANTS;

AND

THE INSPECTOR-GENERAL IN BANKRUPTCY RESPONDENT.

IN RE NORMAN AND ANOTHER.

APPEAL FROM THE COURT OF BANKRUPTCY.

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SYDNEY, *April* 13, 14, 29.

Gavan Duffy C.J., Rich, Starke and Dixon JJ.

Bankruptcy—Deed of inspectorship—Inspector's remuneration—Lump sum or commission according to scale prescribed in Bankruptcy Rules—Provision in deed—Amount allowable—Resolution of creditors—Costs—Bankruptcy Act 1924-1930 (*No.* 37 *of* 1924—*No.* 17 *of* 1930), *Parts VIII., XI., XII., secs.* 133 (2), 184, 199 (3), 203, 223—*Bankruptcy Rules* 1928 (*S.R.* 1928, *No.* 8), *rr.* 7, 356; *Sched.* 6.

Rule 356 of the *Bankruptcy Rules* 1928, which provides that "where the creditors resolve that the remuneration of the trustee shall be a sum of money, the sum of money shall be fixed in accordance with the scale in the Sixth Schedule," does not apply to the remuneration of inspectors under deeds of inspectorship, or of trustees under deeds of arrangement, because it is inconsistent with the provisions of secs. 184 and 203 of the *Bankruptcy Act* 1924-1930, which, respectively, deal expressly with the matter. Those sections, unlike sec. 133 of the Act, impose no limitations upon the sum of money, as distinguished from the commission, which the creditors may fix.