[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR NEW SOUTH WALES AND OTHERS . . . . Defendants, } Appellants;

AND

TRETHOWAN AND OTHERS . . . Plaintiffs, Respondents;

AND

ATTORNEY-GENERAL FOR ENGLAND AND ANOTHER . . . . . } Interveners.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Privy Council. 1932.* May 31.

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—Constitution Statute of New South Wales (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:—"(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

* Present—The Lord Chancellor, Lord Blanesburgh, Lord Hanworth, Lord Atkin and Lord Russell of Killowen.

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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." Sec. 5 of the *Colonial Laws Validity Act* 1865 provides :—"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."

Held, that the Legislature of the State of New South Wales has no power to repeal sec. 7A of the New South Wales *Constitution Act* 1902, or to abolish the Legislative Council of the State, except in the manner provided by that section.

Held, therefore, that two Bills which had been passed by both Houses of the New South Wales Parliament—one to repeal sec. 7A of the *Constitution Act* 1902 and the other to abolish the Legislative Council—and which had not been approved by the electors in accordance with sec. 7A, could not be lawfully presented to the Governor for His Majesty's assent.

Decision of the High Court : *Attorney-General for the State of New South Wales* v. *Trethowan*, (1931) 44 C.L.R. 394, affirmed.

APPEAL from the High Court to the Privy Council.

This was an appeal against the decision of the High Court: *Attorney-General for the State of New South Wales* v. *Trethowan* (1).

THE LORD CHANCELLOR delivered the judgment of their Lordships, which was as follows :—

This is an appeal by special leave from a judgment of the High Court of Australia, dated 16th March 1931, affirming by a majority of three Judges to two (*Rich*, *Starke* and *Dixon* JJ., on the one hand ; *Gavan Duffy* C.J. and *McTiernan* J. dissenting) a decree made by the Supreme Court of New South Wales, dated 23rd December 1930, whereby it was declared that a Bill to abolish the Legislative Council, or to repeal or amend the provisions of sec. 7A of the *Constitution Act* 1902, could not be presented to His Excellency the Governor for the royal assent until approved by the electors in accordance with such section, and whereby several injunctions were

(1) (1931) 44 C.L.R. 394.

granted to restrain the presentation of two Bills framed and designed to effect the above purposes until the same had respectively been approved by the electors in accordance with the said section. The plaintiffs in the action are members of the Legislative Council of New South Wales, and have sued upon behalf of themselves and all other the members of the Legislative Council who are not defendants. The defendants in the action, other than Sir John Beverley Peden, are the Ministers of the Crown of New South Wales. The said Sir John Beverley Peden is the President of the Legislative Council, and was a defendant in the action and is a respondent on appeal. The Attorney-General for England and the Attorney-General for the Commonwealth obtained leave to intervene and their Lordships had the advantage of hearing their arguments.

The question to be determined is in substance whether the Legislature of the State of New South Wales has power to abolish the Legislative Council of the State or to alter its Constitution or powers without first taking a referendum of the electors upon the matter. This question depends upon the true construction and effect of certain statutes both Imperial and local, and before dealing with it, it is necessary for the sake of clearness to set out such portions of the said statutes as are material to the present matter.

The history of the legislation is concisely set out in the judgment of Mr. Justice *Dixon*. 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. That Bill contained provisions which it was beyond the powers of the Council to enact, and provisions which the Imperial authorities thought should be omitted. In 1855 an Imperial Act (18 & 19 Vict. c. 54) called in New South Wales *The Constitution Statute* was therefore passed for the purpose of enabling Her Majesty the Queen to assent to the Bill so reserved as amended by the hands of the Imperial authorities. The *Constitution Statute* itself contained, amongst others, the two following sections:—Sec. 4.—"It shall be lawful for the Legislature of New South Wales to make laws

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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." Sec. 9. —" In the construction of this Act the term ' Governor ' shall mean the person for the time being lawfully administering the Government of New South Wales ; and the word ' Legislature ' shall include as well the Legislature to be constituted under the said reserved Bill and this Act, as any future Legislature which may be established in the said Colony under the powers in the said reserved Bill and this Act contained." The Bill so amended was annexed in a schedule to the *Constitution Statute*, and in that statute was described as " the said reserved Bill," but it was known for many years in New South Wales as the *Constitution Act*. It 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 the conditions as to majorities contained in sec. 36, to alter the constitution of the Second Chamber. From this date, therefore, the Parliament of New South Wales consisted of two Chambers—a Legislative Council and a Legislative Assembly—and within the Colony Her Majesty had power by and with the advice and consent of the said Council and Assembly to make such laws. By an Act in 1857 (20 Vict. No. 10) the New South Wales Legislature repealed sec. 36, which prescribed the majorities necessary for such alteration of the Constitution as was therein mentioned, and that Act, after being reserved for Her Majesty, received the royal assent. By the *Colonial Laws Validity Act* 1865, which applied generally to the colonies, and therefore to New South Wales, a " representative legislature " was defined as follows :—" ' Representative legislature ' shall signify any colonial legislature which shall comprise a legislative body of which one half are elected by inhabitants of the colony." The Legislature of New South Wales has always been a representative legislature within this definition. Secs. 5 and 6 of the Act are as follows :—Sec. 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." Sec. 6.—"The certificate of the clerk or other proper officer of a legislative body in any colony to the effect that the document to which it is attached 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, shall be prima facie evidence that the document so certified is a true copy of such law or Bill, 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 presented to the Governor; and any proclamation purporting to be published by authority of the Governor in any newspaper in the colony to which such law or Bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved Bill as aforesaid, shall be prima facie evidence of such disallowance or assent." In the year 1902 New South Wales by an Act, No. 32 of that year, altered its Constitution, and its new constitution was defined by the new Act. "The Legislature" was defined as meaning "His Majesty the King, with the advice and consent of the Legislative Council and Legislative Assembly." The powers of the Legislature were set out in sec. 5 of the Act, and such portion of the *Constitution Act* of 1855 as still remained was repealed. It should be stated here, although perhaps rather interrupting the narrative, that it was contended on behalf of the present respondents that the effect of the 1902 Act repealing the *Constitution Act* of 1855 was entirely to put an end to the 1855 Act, and that therefore the purposes of sec. 4 of the *Constitution Statute* of the same year became exhausted. In 1929 the New South Wales

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Legislature enacted (Act No. 28 of that year) a new Constitution Act, which subsequently received the assent of His Majesty and is known as the *Constitution (Legislative Council) Amendment Act* 1929 (New South Wales). Sec. 2 is as follows :—" The *Constitution Act* 1902 as amended by subsequent Acts is amended by inserting next after section seven 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.' " Towards the end of 1930 the Government then in power were anxious to get rid of this legislation, and they promoted two Bills for this object, both of which passed both Houses of the Legislature. The first Bill enacted that sec. 7A above referred to was repealed, and the second Bill enacted by clause 2, sub-clause 1, " The Legislative Council of New South Wales is abolished." It is in respect of these two Bills that an injunction was granted restraining them from being presented to the Governor-General until they had been submitted to the electors and a majority of the electors voting had approved them.

It is now possible to state the contentions on either side. The appellants urge (1) that the King, with the advice and consent of the Legislative Council and the Legislative Assembly, had full

power to enact a Bill repealing sec. 7A ; (2) that sub-sec. 6 of sec. 7A of the Constitution is void, because sec. (*a*) the New South Wales Legislature has no power to shackle or control its successors, the New South Wales Constitution being in substance an uncontrolled Constitution ; (*b*) it is repugnant to sec. 4 of the *Constitution Statute* of 1855 ; (*c*) it is repugnant to sec. 5 of the *Colonial Laws Validity Act*. For the respondents it was contended (1) that sec. 7A was a valid amendment of the Constitution of New South Wales, validly enacted in the manner prescribed, and was legally binding in New South Wales ; (2) that the Legislature of New South Wales was given by Imperial statutes plenary power to alter the constitution, powers and procedure of such Legislature ; (3) that when once the Legislature has altered either the Constitution or powers and procedure, then the Constitution and powers and procedure as they previously existed ceased to exist, and were replaced by the new Constitution and powers ; (4) that the only possible limitations of this plenary power were (*a*) it must be exercised according to the manner and form prescribed by any Imperial or Colonial law, and (*b*) the Legislature must continue a representative legislature according to the definition of the *Colonial Laws Validity Act* ; (5) that the addition of sec. 7A to the Constitution had the effect of (*a*) making the legislative body consist thereafter of the King, the Legislative Council, the Assembly and the People for the purpose of the constitutional enactments therein described, or (*b*) imposing a manner and form of legislation in reference to these constitutional enactments which thereafter became binding on the Legislature by virtue of the *Colonial Laws Validity Act* until repealed in the manner and mode prescribed ; (6) that the power of altering the Constitution conferred by sec. 4 of the *Constitution Statute* 1855 must be read subject to the *Colonial Laws Validity Act* 1865, and that in particular the limitation as to manner and form prescribed by the 1865 Act must be governed by subsequent amendments to the Constitution, whether purporting to be made in the earlier Act or not.

Such are the facts and such the contentions of the parties.

It is obvious that these varying contentions overlap and impinge upon one another, and indeed each party claimed to be the protector of the rights and powers of the Parliament of New South Wales,

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and asserted that it was his opponent who was seeking to fetter or restrict them. Many hypothetical cases were put before their Lordships, and the Board were invited to express an opinion upon many different situations which might arise, but they do not conceive it to be their duty to go outside the point involved in the case, which is really a short one: namely, whether the Legislature of the State of New South Wales has power to abolish the Legislative Council of the said State, or to repeal sec. 7A of the *Constitution Act* 1902, except in the manner provided by the said sec. 7A. It will be sufficient for this Board to decide any other question if, and when, it arises.

The answer depends in their Lordships' view entirely upon a consideration of the meaning and effect of sec. 5 of the Act of 1865 read in conjunction with sec. 4 of the *Constitution Statute*, assuming that latter section still to possess some operative effect. Whatever operative effect it may still possess must, however, be governed by and be subject to such conditions as are to be found in sec. 5 of the Act of 1865 in regard to the particular kind of laws within the purview of that section. Sec. 5 is therefore the master section to consider for the purpose here in hand. It will be observed that the second sentence of the section contains an enacting part with a proviso, and it was vehemently contended by the appellants that the effect of the proviso was not to cut down the operative part of the sentence, and that any construction of the words "manner and form," which are contained in the proviso, which cut down the powers previously granted, was repugnant to the power so granted. In their Lordships' opinion it is impossible to read the section as if it were contained in watertight compartments. It must be read as a whole, and read as a whole the effect of the proviso is to qualify the words which immediately precede it. The powers are granted *sub modo*. Reading the section as a whole, it gives to the Legislature of New South Wales certain powers, subject to this, that in respect of certain laws they can only become effectual provided they have been passed in such manner and form as may from time to time be required by any Act still on the Statute Book. Beyond that, the words "manner and form" are amply wide enough to cover an enactment providing that a Bill is to be submitted to the electors

and that unless and until a majority of the electors voting approve the Bill it shall not be presented to the Governor for His Majesty's assent.

In their Lordships' opinion the Legislature of New South Wales had power under sec. 5 of the Act of 1865 to enact the *Constitution (Legislative Council) Amendment Act* 1929, and thereby to introduce sec. 7A into the *Constitution Act* 1902. In other words, the Legislature had power to alter the constitution of New South Wales by enacting that Bills relating to specified kind or kinds of legislation (e.g., abolishing the Legislative Council or altering its constitution or powers, or repealing or amending that enactment) should not be presented for the royal assent until approved by the electors in a prescribed manner. There is here no question of repugnancy. The enactment of the Act of 1929 was simply an exercise by the Legislature of New South Wales of its power (adopting the words of sec. 5 of the Act of 1865) to make laws respecting the constitution, powers and procedure of the authority competent to make the laws for New South Wales. The whole of sec. 7A was competently enacted. It was *intra vires* sec. 5 of the Act of 1865, and was (again adopting the words of sec. 5) a colonial law for the time being in force when the Bill to repeal sec. 7A was introduced in the Legislative Council.

The question then arises, could *that* Bill, a repealing Bill, after its passage through both Chambers, be lawfully presented for the royal assent without having first received the approval of the electors in the prescribed manner? In their Lordships' opinion, the Bill could not lawfully be so presented. The proviso in the second sentence of sec. 5 of the Act of 1865 states a condition which must be fulfilled before the Legislature can validly exercise its power to make the kind of laws which are referred to in that sentence. In order that sec. 7A may be repealed (in other words, in order that *that* particular law "respecting the constitution, powers, and procedure" of the Legislature may be validly made) the law for that purpose must have been passed in the manner required by sec. 7A, a colonial law for the time being in force in New South Wales. An attempt was made to draw some distinction between a Bill to repeal a statute and a Bill for other purposes and between "making"

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laws, and the word in the proviso, "passed." Their Lordships feel unable to draw any such distinctions. As to the proviso they agree with the views expressed by *Rich* J. in the following words (1):— "I take the word 'passed' to be equivalent to 'enacted.' The proviso is not dealing with narrow questions of parliamentary procedure"; and later in his judgment (2): "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."

Again no question of repugnancy here arises. It is only a question whether the proposed enactment is *intra vires* or *ultra vires* sec. 5. A Bill, within the scope of sub-sec. 6 of sec. 7A, which received the royal assent without having been approved by the electors in accordance with that section, would not be a valid Act of the Legislature. It would be *ultra vires* sec. 5 of the Act of 1865. Indeed, the presentation of the Bill to the Governor without such approval would be the commission of an unlawful act.

In the result, their Lordships are of opinion that sec. 7A of the *Constitution Act* 1902 was valid and was in force when the two Bills under consideration were passed through the Legislative Council and the Legislative Assembly. Therefore these Bills could not be presented to the Governor for His Majesty's assent unless and until a majority of the electors voting had approved them.

For these reasons, their Lordships are of opinion that the judgment of the High Court dismissing the appeal from the decree of the Supreme Court of New South Wales was right and that this appeal should be dismissed with costs. In accordance with the usual practice the interveners will not receive any costs.

They will humbly advise His Majesty accordingly.

(1) (1931) 44 C.L.R., at p. 418. (2) (1931) 44 C.L.R., at p. 419.