on the business of dealing in bottles and old metals. I think that the case was, in substance, decided by *Hodges* J. in *Pope* v. *Franklin* (1). The very point was taken that it is not necessary to show that the defendant carried on all the occupations usually carried on in a boiling-down establishment.

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Appeal dismissed with costs.

Solicitor for the appellant, *D. C. Levy.*

Solicitors for the respondent, *D. H. Herald & Son.*

B. L.

(1) 26 A.L.T., 170.

[HIGH COURT OF AUSTRALIA.]

McCAWLEY . . . . . APPELLANT;

AND

THE KING AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Constitutional Law—Queensland—Judge of Supreme Court—Appointment—Tenure of office—Commission—Legislative power of Parliament—Judge of Court of Industrial Arbitration—Qualification—Barrister of five years' standing—Industrial Arbitration Act 1916 (*Qd.*) (7 *Geo. V. No.* 16), *sec.* 6—*Order in Council of* 6*th June* 1859, *clauses* 2, 14, 15, 16, 22—*New South Wales Constitution Act* 1855 (18 & 19 *Vict. c.* 54), *Sched. I., sec.* 38—*Constitution Act* 1867 (*Qd.*) (31 *Vict. No.* 38), *secs.* 2, 15, 16, 17—*Supreme Court Act* 1867 (*Qd.*) (31 *Vict. No.* 23), *secs.* 9, 10—*Supreme Court Acts Amendment Act* 1903 (*Qd.*) (3 *Edw. VII. No.* 9), *sec.* 3—*Colonial Laws Validity Act* 1865 (28 & 29 *Vict. c.* 63), *secs.* 2, 3, 5—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 103.

H. C. OF A. 1918. MELBOURNE, *Sept.* 10, 11, 12, 27. Griffith C.J., Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Sec. 6 of the *Industrial Arbitration Act of* 1916 (Qd.) by sub-sec. 1 establishes the Court of Industrial Arbitration; by sub-sec. 2 directs the Governor in Council, by commission, to appoint a Judge or Judges of that Court, one of

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whom is to be designated the President; and by sub-sec. 6 provides that "Notwithstanding the provisions of any Act limiting the number of Judges of the Supreme Court, the Governor in Council may appoint the President . . . to be a Judge of the Supreme Court. The President . . ., if so appointed as aforesaid, may exercise and sit in any jurisdiction of the Supreme Court, and shall have in all respects and to all intents and purposes the rights, privileges, powers, and jurisdiction of a Judge of the Supreme Court in addition to the rights, privileges, powers, and jurisdiction conferred by this Act, and shall hold office as a Judge of the said Supreme Court during good behaviour, and be paid such salary and allowances as the Governor in Council may direct, which shall not be diminished or increased during his term of office as a Judge of the Supreme Court or be less than the salary and allowances of a Puisne Judge of the Supreme Court; and upon such direction the said payments shall become a charge upon the Consolidated Revenue. The President and each Judge of the Court of Industrial Arbitration shall hold office as President and Judge of the said Court for seven years from the date of their respective appointments, and shall be eligible to be re-appointed by the Governor in Council as such President or Judge for a further period of seven years." By sub-sec. 7 the section further provides that "The President or a Judge of the Court appointed under this Act shall be a barrister or solicitor of not less than five years' standing," &c.

The Queensland Constitution provided (see Order in Council of 6th June 1859, clause 15, and Act 18 & 19 Vict. c. 54, Sched. I., sec. 38) that the commissions of the Judges of the Supreme Court should continue and remain in full force during good behaviour. In 1867 this provision was repealed, and was re-enacted by sec. 15 of the *Constitution Act of* 1867 (Qd.).

Sec. 106 of the Constitution of the Commonwealth provides that "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State." No relevant alteration of the Queensland Constitution has since been made.

The Governor in Council by a commission, which recited the power conferred by the *Industrial Arbitration Act of* 1916, purported to appoint the appellant, who had previously been appointed President of the Industrial Arbitration Court, to be a Judge of the Supreme Court of Queensland "to have, hold, exercise and enjoy the said office . . . during good behaviour."

Held, by *Griffith* C.J. and *Barton*, *Gavan Duffy* and *Powers* JJ. (*Isaacs*, *Higgins* and *Rich* JJ. dissenting), that the commission was unauthorized by law, and that the appointment was, therefore, wholly invalid.

Held, also, by *Griffith* C.J. and *Barton*, *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Higgins* J. dissenting), that sec. 6 of the *Industrial Arbitration Act* purported to authorize an appointment of a Judge of the Court of Industrial Arbitration to be a Judge of the Supreme Court so long only as he retained the office of a Judge of the Court of Industrial Arbitration.

Held, further, by *Barton*, *Isaacs*, *Powers* and *Rich* JJ. (*Griffith* C.J., *Higgins* and *Gavan Duffy* JJ. dissenting), that the commission purported to appoint the appellant to be a Judge of the Supreme Court during good behaviour so long only as he retained the office of President of the Court of Industrial Arbitration.

Held, also, by *Isaacs*, *Higgins*, *Powers* and *Rich* JJ. (*Griffith* C.J. doubting), that the appellant, who had been called to the Bar more than five years before his appointment as President but had never practised as a barrister, was a "barrister of not less than five years' standing" within the meaning of sec. 6 (7) of the *Industrial Arbitration Act*.

Cooper v. *Commissioner of Income Tax for the State of Queensland*, 4 C.L.R., 1304, discussed.

Decision of the Supreme Court of Queensland affirmed.

APPEAL from the Supreme Court of Queensland.

Pursuant to liberty granted by the Supreme Court an information of *quo warranto* was exhibited by George Arthur Carter, Arthur Herman Henry Milford Feez K.C. and Charles Stumm K.C. against Thomas William McCawley, which was in substance as follows:—

1. On 12th January 1917 His Excellency the Governor of the State of Queensland gave approval to a recommendation of the Executive Council of the said State contained in an Executive minute that a commission in His Majesty's name be issued to Thomas William McCawley, the respondent, appointing him to be a Judge of the Court of Industrial Arbitration established pursuant to the provisions of the *Industrial Arbitration Act of* 1916 and designating him the President of the said Court.

2. In pursuance of the said minute a commission was issued by His Excellency the Governor on the said 12th January 1917 to the said Thomas William McCawley purporting to appoint him to be a Judge of the said Court of Industrial Arbitration and designating him the President of the said Court, and the said Thomas William McCawley duly entered upon and discharged the duties of a Judge of the said Court and the President thereof, and has since continued to discharge and still discharges the said duties.

3. The said commission was in the following terms:—"George the Fifth by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith and Emperor of India—To Our Trusty

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and Well-beloved Thomas William McCawley Esquire, Barrister-at-Law—Greeting: Whereas by virtue of the provisions of an Act of Parliament of the State of Queensland intituled the *Industrial Arbitration Act of* 1916 a Court called the Court of Industrial Arbitration has been established And whereas by virtue of the provisions of the said Act the Governor in Council of Our said State, shall, by Commission in His Majesty's name, appoint a barrister or solicitor of the Supreme Court of Our said State of not less than five years' standing or a Judge of Our Supreme Court or District Court of Our said State to be a Judge of the said Court of Industrial Arbitration provided that the number of the Judges so appointed shall not exceed three in number: And whereas the Governor in Council of Our said State shall designate one of such Judges so appointed the President of the said Court of Industrial Arbitration And whereas the Governor of Our said State by and with the advice of the Executive Council of Our said State has seen fit to direct that you Thomas William McCawley being a barrister of the said Supreme Court of such standing as aforesaid shall be appointed a Judge of the said Court of Industrial Arbitration and the President of the said Court: Now know ye that we having taken into consideration your loyalty integrity learning and ability have thought fit to appoint you and do hereby in pursuance of the provisions of the said Act appoint you the said Thomas William McCawley being a barrister of the said Supreme Court of such standing as aforesaid to be a Judge of the Court of Industrial Arbitration and to designate you the President of the said Court of Industrial Arbitration to have hold exercise and enjoy the said office together with all the rights privileges powers and jurisdiction thereunto belonging or appertaining for a period of seven years from the date hereof."

4. (*a*) The said Thomas William McCawley was called to the Bar of the Supreme Court of Queensland on 7th May 1907, being at that time a public servant and a clerk in the Department of Justice, Brisbane. Since the said 7th May 1907 the said Thomas William McCawley has continued to be and still is a barrister-at-law of the Supreme Court of Queensland.

(*b*) From the said 7th May 1907 until the said 12th January 1917 the said Thomas William McCawley was an officer of the Public

Service of Queensland, and employed as such in various capacities in the said Department of Justice.

5. The relators the said Arthur Herman Henry Milford Feez and Charles Stumm further say that the said Thomas William McCawley did not at any time practise as a barrister-at-law.

6. All the relators say as follows: On 12th October 1917 His Excellency the Governor of the State of Queensland gave approval to an Executive minute purporting that pursuant to the provisions of the *Industrial Arbitration Act of* 1916 the respondent Thomas William McCawley, the President of the Court of Industrial Arbitration, be appointed by commission in His Majesty's name to be a Judge of the Supreme Court of Queensland, and that he be paid a salary of two thousand pounds per annum.

7. In pursuance of the said Executive minute a commission was issued by His Excellency the said Governor on the said 12th October 1917 to the said Thomas William McCawley, the President of the said Court of Industrial Arbitration, purporting to appoint him to be a Judge of the Supreme Court of Queensland.

8. The said commission was in the following terms:—"George the Fifth, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, and Emperor of India—To Our Trusty and Well-beloved the Honourable Thomas William McCawley Esquire, President of Our Court of Industrial Arbitration—Greeting: Whereas by virtue of the provisions of an Act of Parliament of Our State of Queensland intituled the *Industrial Arbitration Act of* 1916 a Court called the Court of Industrial Arbitration has been constituted: And whereas by virtue of the provisions of the said Act the Governor in Council of Our said State shall, by commission in His Majesty's name, appoint a Judge, or Judges, not exceeding three in number, of the said Court and shall designate one of such Judges the President of the said Court: And whereas it is further provided by the said Act, that notwithstanding the provisions of any Act limiting the number of Judges of Our Supreme Court, the Governor in Council may appoint the President or any Judge of the Court to be a Judge of Our Supreme Court: And whereas the Governor of Our State of Queensland by and with the advice

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of the Executive Council of Our said State, has seen fit to direct that you Thomas William McCawley, the President of Our Court of Industrial Arbitration, shall be appointed a Judge of Our Supreme Court of Queensland: Now know ye that We, reposing full trust and confidence in your loyalty, learning, integrity, and ability, do by this Our Commission, in pursuance and in exercise of all powers and authorities enabling Us in that behalf, appoint you the said Thomas William McCawley, the President of Our Court of Industrial Arbitration, forthwith to be a Judge of Our Supreme Court of Queensland: To have, hold, exercise and enjoy the said office of Judge of Our Supreme Court of Queensland during good behaviour together with all the rights, powers, privileges, advantages and jurisdiction thereunto belonging or appertaining."

9. On 6th December 1917, at a sittings of the Full Court of the Supreme Court of Queensland, the said Thomas William McCawley presented the commission in par. 8 hereof mentioned to the Honourable the Chief Justice of Queensland, at the same time requesting the said Chief Justice to administer to him the oaths of office required by law to be taken by a Judge of the said Supreme Court and claiming thereafter the right to take a seat upon the Bench of the said Court as a Judge thereof. Upon objections to the validity of the said commission being raised by the relators Arthur Herman Henry Milford Feez and Charles Stumm as *amici curiæ*, and upon hearing the said relators and also counsel on behalf of the said Thomas William McCawley, the said Full Court took time to consider and did on 12th February 1918 deliver its opinion that the said Thomas William McCawley was not entitled to have the oaths of office administered to him and was not entitled to take his seat as a member of the Supreme Court.

10. On 6th March 1918 the said Thomas William McCawley in the presence of his Honor Judge Macnaughton, a Judge of District Courts of the said State, took the oath of office and the oath of allegiance to be taken by Judges of the said Supreme Court, and subscribed the forms of such oaths.

11. From the said 6th March 1918 continually to the time of exhibiting this information, and during all the said time, the said Thomas William McCawley has claimed and still claims to use and

exercise all the privileges and perform all the duties belonging and appertaining to the office of a Judge of the Supreme Court of Queensland.

12. The number of Judges of the said Supreme Court of Queensland was on the said 12th October 1917 and has ever since been five, the said Judges being the Honourable Sir Pope Alexander Cooper, Chief Justice, the Honourable Patrick Real, Senior Puisne Judge, the Honourable Charles Edward Chubb, the Honourable William Alfred Byam Shand and the Honourable Lionel Oscar Lukin, Puisne Judges.

13. The relators submit and contend (1) that the said commission of 12th October 1917 purporting to appoint the said Thomas William McCawley to be a Judge of the Supreme Court of Queensland was and is ineffectual for that purpose and void on the ground following, that is to say: that sub-sec. 6 of sec. 6 of the said *Industrial Arbitration Act of* 1916 is contrary to the provisions of the *Constitution Acts* of Queensland and *ultra vires*.

14. The relators the said Arthur Herman Henry Milford Feez and Charles Stumm further submit and contend that the said commission of 12th October 1917 purporting to appoint the said Thomas William McCawley to be a Judge of the Supreme Court of Queensland was and is ineffectual for that purpose and void on the grounds following, that is to say: (1) that if and in so far as the said commission of 12th October 1917 purports to appoint the said Thomas William McCawley a Judge of the said Supreme Court for life, the Governor in Council had no power or authority to issue the said commission either under sub-sec. 6 of sec. 6 of the said *Industrial Arbitration Act of* 1916 or at all; (2) that neither on the said 12th January 1917 nor on the said 12th October 1917 was the said Thomas William McCawley a barrister of five years' standing or otherwise qualified to be appointed a Judge of the said Court of Industrial Arbitration or a Judge of the Supreme Court of Queensland; (3) that on the said 12th October 1917 the said Thomas William McCawley was not the lawfully appointed President of the said Court of Industrial Arbitration or a lawfully appointed Judge thereof.

Therefore the said George Arthur Carter, Arthur Herman Henry

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Milford Feez and Charles Stumm pray that the said Thomas William McCawley may be ousted of the said office of a Judge of the Supreme Court of Queensland usurped by him as aforesaid.

The defendant demurred to the information on the grounds (1) that the facts alleged did not show that the defendant in any way usurped the office of Judge of the Supreme Court of Queensland, or call upon him to answer why he should not be ousted from the said office, and (2) that the facts alleged in the information establish that the defendant is entitled to the said office. The demurrer was heard by the Full Court and was overruled, and thereupon a judgment of ouster against the defendant was pronounced.

From that decision the defendant appealed to the High Court.

Ryan A.-G. for Qd. and *Sir Edward Mitchell* K.C. (with them *Macrossan*), for the appellant. The authority conferred by sec. 6 (6) of the *Industrial Arbitration Act of* 1916 is to appoint the President of the Court of Industrial Arbitration to be a Judge of the Supreme Court having a life tenure as provided by sec. 15 of the *Constitution Act of* 1867. The power is to appoint a designated person, and not to appoint a person by virtue of his office. The object of sec. 6 (6) is to give the President security of tenure. The enactment of sec. 6 (6), even if the tenure be only during seven years, is authorized by sec. 5 of the *Colonial Laws Validity Act* 1865. The first paragraph of the latter section is an absolute authority to a colonial legislature to establish Courts of judicature and to alter the constitutions of such Courts. That section gets rid of the reasoning based on *Cooper* v. *Commissioner of Income Tax for Queensland* (2). Sec. 6 (6) is not an amendment of the *Constitution Act*, but it is legislation under the power conferred by sec. 2 of the *Constitution Act of* 1867. Sec. 6 (6) is authorized by clause XXII. of the Order in Council of 6th June 1859, which gives power to the Parliament to make laws altering or repealing any provision of the Order in Council in the same manner as any other laws for the good government of Queensland. A law may be amended under that clause by passing a provision inconsistent with it, and so bringing about a repeal by implication. Even if sec. 6 (6) would otherwise

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

have been invalid as being at variance with the provisions of the *Constitution Act of* 1867, sec. 5 of the *Colonial Laws Validity Act* renders it valid (*Taylor* v. *Attorney-General of Queensland* (1)). The dicta in *Cooper* v. *Commissioner of Income Tax for Queensland* (2) to the effect that the Parliament cannot pass Acts inconsistent with the *Constitution Act* do not apply here because sec. 5 of the *Colonial Laws Validity Act* is an answer, and that section was not and could not be raised in that case. In addition to that, the enactment with which the Act then under consideration was said to be in conflict was contained in the original Order in Council of 6th June 1859, while sec. 15 of the *Constitution Act of* 1867, with which sec. 6 (6) of the *Industrial Arbitration Act* is said to be in conflict, was an ordinary Act passed under the power to make laws conferred by that Order in Council. Clause 15 of the Order in Council does not incorporate sec. 38 of the Act 17 Vict. No. 41 (N.S.W.) (set out in Schedule I. of the Act 18 & 19 Vict. c. 54), which section is in the same terms as sec. 15 of the *Constitution Act of* 1867, for the words "the said last mentioned Act" refer to the Act 5 & 6 Vict. c. 76. Even if that is not so, by the *Supreme Court Act of* 1861, which does not profess to be part of the Constitution of Queensland, the Legislature intended to take the provisions of sec. 38 of 17 Vict. No. 41 out of the Constitution and enact them in sec. 5 as part of an ordinary Act of Parliament, which could be altered or repealed in the ordinary way.

Mahony, for the respondent Carter. Sec. 6 (6) of the *Industrial Arbitration Act* is contrary to the provisions of secs. 15, 16 and 17 of the *Constitution Act of* 1867. The appointment under sec. 6 (6) to the office of a Judge of the Supreme Court attaches to the office of President of the Court of Industrial Arbitration. If sec. 5 of the *Colonial Laws Validity Act* authorizes a repeal of a provision of the *Constitution Act* by means of legislation in conflict with it, then there is no Constitution.

[RICH J. referred to *Campbell's Case* (3); *Taylor* v. *Pilsen Joel and General Electric Light Co.* (4).

(1) 23 C.L.R., 457, at p. 469.
(2) 4 C.L.R., 1304.
(3) L.R. 9 Ch., 1, at p. 21.
(4) 27 Ch. D., 268, at p. 275.

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[ISAACS J. referred to *In re "The Lundon and Whitaker Claims Act* 1871" (1); *Fielding* v. *Thomas* (2).]

If sec. 6 (6) were valid as authorizing an appointment for life, then there would be power in the Governor in Council to fix the number of Judges notwithstanding that the number was fixed by the *Supreme Court Acts Amendment Act of* 1903. The more reasonable interpretation is to limit the tenure to one during the tenure of the office of President.

Starke (with him *McGill*), for the respondents Feez and Stumm. The Order in Council of 6th June 1859 and the *Constitution Act of* 1867 are intended to give power of self-government to the inhabitants of Queensland. It is immaterial whether the one or the other is taken as the governing document. In either case the document is the only authority which confers upon the Parliament of Queensland any legislative authority whatever. It is in the same position as the memorandum and articles of a company. One of its provisions, that contained in sec. 15 of the *Constitution Act of* 1867, is that the tenure of Judges of the Supreme Court shall be a life tenure. That section is intended to be a restriction upon the power conferred by sec. 2 on the Parliament to make laws for the peace, welfare and good government of Queensland. Any power that Parliament might thereafter have to appoint Judges having a different tenure must come into existence before the power is exercised. The power cannot come into existence and be exercised at one and the same moment or by the same instrument (*Imperial Hydropathic Hotel Co., Blackpool*, v. *Hampson* (3); *In re Patent Invert Sugar Co.* (4)). The tenure of the Judges of the Supreme Court provided for in sec. 15 of the *Constitution Act of* 1867 cannot be changed except by due course of procedure. It cannot be altered by mere general legislation, or by passing a law inconsistent with it (*Cooper* v. *Commissioner of Income Tax for Queensland* (5); *Baxter* v. *Ah Way* (6)). Sec. 5 of the *Colonial Laws Validity Act* was not intended to deal with the Constitution of a colony. That section must be read with sec. 2, and should be interpreted as giving a power where otherwise it would not exist.

(1) 2 N.Z. App. Cas., 41, at p. 57.
(2) (1896) A.C., 600, at p. 610.
(3) 23 Ch. D., 1.
(4) 31 Ch. D., 166.
(5) 4 C.L.R., 1304.
(6) 8 C.L.R., 626, at p. 643.

Sec. 6 (6) of the *Industrial Arbitration Act* is repugnant to the Order in Council of 6th June 1859, and to the *Constitution Act of* 1867, and is therefore invalid under sec. 2 of the *Colonial Laws Validity Act*. The words "order or regulation . . . having . . . the force and effect of such Act" (that is, an Act of the Imperial Parliament extending to the particular colony) in sec. 2 of the last mentioned Act are not to be limited to an order or regulation made directly under the Act referred to, but should be interpreted as including an Act or a regulation or a legislative provision which has in the colony the effect of the Act referred to. They would therefore include the *Constitution Act of* 1867. The tenure of the office of a Judge of the Supreme Court provided for by sec. 6 (6) is for seven years only. *Primâ facie* the section makes the holding of the office of President the *discrimen* of the appointment as a Judge of the Supreme Court, and in such a case the Court should not hold that a freehold tenure is intended to be given (*R.* v. *Guardians of the Poor of St. Nicholas, Rochester* (1)). The appellant was not a barrister of five years' standing within the meaning of sec. 6 (7). That term means a barrister who has been practising as such for five years. If sec. 6 (6) authorizes an appointment as Judge of the Supreme Court for seven years only, then the commission is invalid, for it purports to appoint the appellant for life. It cannot be assumed against the Crown that by the commission it has granted no more than it could legally grant.

Sir Edward Mitchell K.C., in reply, referred to *R.* v. *Marais*; *Ex parte Marais* (2); *Woodstock Central Dairy Co.* v. *The Commonwealth* (3); *Ex parte Grant* (4).

[During argument reference was also made to 9 Geo. IV. c. 83; 18 & 19 Vict. c. 54; 19 Vict. No. 31 (N.S.W.); 20 Vict. No. 25 (N.S.W.); *Repealing Act of* 1867 (Qd.) (31 Vict. No. 39), secs. 2, 3; *Supreme Court Act of* 1867 (Qd.) (31 Vict. No. 23); *Order in Council* of 30th June 1860; *Webb* v. *Outtrim* (5); *Co. Litt.*, 42a; *Lindley on Companies*, 6th ed., vol. I., p. 476; *Farwell on Powers*,

(1) 4 M. & S., 324.
(2) (1902) A.C., 51, at p. 53.
(3) 15 C.L.R., 241.
(4) 9 N.S.W.W.N., 77.
(5) (1907) A.C., 81; 4 C.L.R., 356.

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3rd ed., p. 242; *Jenkyn's British Rule and Jurisdiction beyond the Seas*, p. 73; *Keith's Responsible Government in the Dominions*, vol. I., pp. 425, 426.]

Cur. adv. vult.

Sept. 27.

The following judgments were read :—

GRIFFITH C.J. The appellant claims to be a Judge of the Supreme Court of Queensland for life during good behaviour. The validity of his alleged appointment is impeached as being contrary to the Constitution.

All Constitutions granted to British colonies have been conditional, that is, they have contained conditions and limitations imposed upon the legislative powers granted by them. The legislative power was usually, as in the case of the Queensland Constitution, contained in the Order in Council of 6th June 1859, expressed to be conferred in general terms; but the Constitutions also contained certain limitations or conditions upon the exercise of some of the powers conferred by them. It is, of course, impossible to contend that in such a case the general terms must prevail, and that the limitations may be disregarded.

Amongst the limitations of the Queensland Constitution, one was expressed in clause 15 as follows: "The provisions of the said last mentioned Act respecting the commissions removal and salaries of the Judges of the Supreme Court of New South Wales shall apply and be in force in the Colony of Queensland so soon as a Supreme Court shall be established therein."

Secs. 38 and 39 of that Act (17 Vict. No. 41) were as follows:—"38. The commissions of the present Judges of the Supreme Court of the said Colony" (New South Wales) "and of all future Judges thereof shall be continue and remain in full force during their good behaviour notwithstanding the demise of Her Majesty (whom may God long preserve) or of her heirs and successors any law usage or practice to the contrary thereof in anywise notwithstanding. 39. It shall be lawful nevertheless for Her Majesty her heirs or successors to remove any such Judge or Judges upon the address of both Houses of the Legislature of this Colony."

The Order in Council contained other limitations, as for instance in clause 18, which forbade the imposition of customs duties on goods imported for the use of the Sovereign. The Order in Council also, as was usual, gave power to the Colony to alter its Constitution. Clause 22 provided that "The Legislature of the Colony of Queensland shall have full power and authority from time to time to make laws altering or repealing all or any of the provisions of this Order in Council in the same manner as any other laws for the good government of the Colony . . . ."

In my opinion, the effect of this provision was that if in the execution of the power of amendment the provisions of the Constitution should be altered or amended, the alterations or amendments would be read with and would have the same effect as if they had been part of the original Order in Council, and have the same authority.

In 1867 the Legislature of Queensland, in the asserted exercise of this power to amend the Constitution, thought fit to consolidate, with some variations, and with the exception of arts. 14 (which is irrelevant) and 22, the existing provisions of the Constitution, and formally to re-enact them in an Act which was called the *Constitution Act of* 1867. The original Order in Council was formally repealed by a Repealing Act passed on the following day, which came into force on 31st December following.

In my opinion it is immaterial whether a proposed amendment of a Constitution is expressed to be an amendment of an existing and continuing law, part of which remains unrepealed, or is made in the common form of a re-enactment, with or without amendment, the former provision being wholly repealed.

The Act of 1867 enacted, *totidem verbis*, the provisions of clauses 38 and 39 already quoted, as secs. 15 and 16 respectively. It follows, in my opinion, that the limitations upon the power of the Parliament which had been imposed by these clauses were still imposed by the Constitution of Queensland; and that the Parliament of Queensland had no authority under the Order in Council to enact any law inconsistent with them. It was so held by four members of this Court in *Sir Pope Cooper's Case* (1). If there were

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

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any room for doubt on the point, it is removed by sec. 106 of the Australian Constitution, which provides that "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State"—thus giving them the force of an Imperial Statute.

These limitations, it will be observed, introduced as part of the Constitution granted to Queensland what has always been regarded as a great constitutional principle introduced by the *Act of Settlement*, namely, that the tenure of office of the Judges of the superior Courts should be for life during good behaviour. The law of 1867 is still part of the Statute law of Queensland. The Parliament of Queensland had not, therefore, in my opinion, any authority under the Order in Council as so amended, any more than before the amendment or before the Australian Constitution, to enact any law providing for the appointment of a Judge of the Supreme Court with any other tenure of office; and any attempt to do so must be, in the words of the *Colonial Laws Validity Act* (sec. 2), "void and inoperative." The Legislature has, however, power, subject to the Order in Council and the Constitution of Queensland, to alter that tenure.

The point raised in this appeal is that an alteration of the tenure of office of a Judge of the Supreme Court of Queensland without a previous amendment of the Constitution is, nevertheless, valid. It is said that since the Legislature has power both to amend the Constitution and to pass laws under it, it may effect both purposes by a single Act without reference to the Constitution. This is, of course, contrary to the well known rule that two powers or estates of different natures cannot be merged in one another. It is boldly contended, however, that an act done by a Parliament in violation of a Constitutional law which the Parliament has power to alter, may be construed as an amendment of the Constitution itself, and is therefore authorized by it as so amended.

An exactly similar point was considered by the Court of Appeal in *Hampson's Case* (1), which was the case of a joint stock company

(1) 23 Ch. D., 1.

which had not by its constitution any power to dismiss its directors, but had power to amend its constitution by acquiring power to dismiss them. The company, without amending its constitution, passed resolutions dismissing directors, and it was contended that the action was valid. The attempt failed. *Cotton* L.J. said (1):—"Now in my opinion it is an entire fallacy to say that because there is power to alter the regulations, you can by a resolution which might alter the regulations, do that which is contrary to the regulations as they stand in a particular and individual case. It is in no way altering the regulations. The alteration of the regulations would be by introducing a provision, not that some particular director be discharged from being a director, but that directors be capable of being removed by the vote of a general meeting. It is a very different thing to pass a general rule applicable to every one who comes within it, and to pass a resolution against a particular individual, which would be a *privilegium* and not a law. Now here there was no attempt to pass any resolution at this meeting which would affect any director, except those who are aimed at by the resolution, no alteration of the regulations was to bind the company to those regulations as altered; and assuming, as I do for the present purpose, as the second meeting seems to have been regular according to the notice, that everything was regularly done, what was done cannot be treated in my opinion as an alteration first of the regulations, and then under that altered regulation as a removal of the directors." He then referred to and distinguished *Alison's Case* (2). *Bowen* L.J. said (3):—"It seems to me that . . . the appellants . . . are treating what has been done at this meeting as if it amounted to an alteration of the regulations, whereas it is only a displacement of individuals. I do not think it is possible to find language that would more happily express my view than that of Lord Justice *Cotton*. It is a mistake to suppose that a law and a *privilegium* are the same, or that you are really altering the regulations when you are attempting to deprive an individual of the benefit of them." *Jessel* M.R. was of the same opinion.

In the case of *In re Patent Invert Sugar Co* (4), which was an

(1) 23 Ch. D., at p. 11.
(2) L.R. 9 Ch., 1.
(3) 23 Ch. D., at p. 13.
(4) 31 Ch. D., 166.

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appeal from *Kay* J., a similar decision was given. *Lindley* L.J., delivering the judgment of the Court, said (1):—"A company may pass a special resolution to reduce its capital if authorized to do so by its regulations as originally framed, or as altered by special resolution. At the time when the meeting of October was held the company was not so authorized, and the meeting had no power to entertain the proposal for reducing the capital. I am of opinion that Mr. Justice *Kay* was right."

A rule founded on precisely the same principle had been laid down in the case of *Pomfret* v. *Perring* (2), in which *Turner* L.J. said (3):—"Here an actual appointment has been made with a power of revocation, and that appointment was to be undone, before the power of new appointment would arise. To show that a power of this description has been exercised, it is not, I think, enough to show an intention to appoint; an intention to revoke the former appointment ought, I think, also to be shown."

It is plain that if A.B. has power to appoint amongst a class X, and another power to extend that class to include the members of class Y, an attempted appointment amongst the members of class Y before the power of extension has been executed is inoperative.

It is suggested that a difference may arise from the form in which a power to amend the Constitution is exercised, so that if it is exercised by repeal and re-enactment the legal effect is a total and irrevocable destruction of the provision itself. Queensland on this view has been left without a Constitution. I do not think so.

I take it to be indisputable that a power must exist before it is exercised, and that it cannot be created by a mere attempt to do something inconsistent with it. The reasoning of the Judicial Committee of the Privy Council in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (4) strongly supports this view.

The *Colonial Laws Validity Act* provides (sec. 2) that any attempted legislation which is repugnant to any English Act of

(1) 31 Ch. D., at p. 168.
(2) 5 D. M. & G., 775.
(3) 5 D. M. & G., at p. 780.
(4) (1914) A.C., 237; 17 C.L.R., 644.

Parliament in force in the colony in question, or to any statutory order or regulation shall be void. In my opinion the term "order" includes an order as lawfully amended under any power of amendment conferred by the Statute or Order in Council. Even if it does not technically do so, I am of opinion that the law which would thus be expressed is merely declaratory. Further, I think that the doctrine of implied amendment by subsequent inconsistent legislation is not applicable to the case of an Act which is forbidden by an Order in Council or other equally authoritative instrument, and which does not purport to amend that instrument, or to deal with it as the subject of legislation. Sec. 5 of that Act does not carry the matter any further. It cannot, in my opinion, be construed as overriding the express provisions of a colonial Constitution, nor can it be construed as overriding the express provision already quoted of the Australian Constitution, which is later in date by thirty-five years.

I am therefore of opinion that, if the appellant's commission which is impeached is a commission for a less term than his good behaviour during life, it is unauthorized by the Constitution of Queensland and is void.

The *Industrial Arbitration Act*, which is intituled "An Act to provide for the regulation of the conditions of industries by means of industrial conciliation and arbitration; to establish a Court of Industrial Arbitration and certain subsidiary tribunals, and define their jurisdiction; and for purposes consequent thereon or incidental thereto," is divided into Parts, of which Part II. deals with the Court and the Judges thereof. The Act does not refer to the Constitution of Queensland, and does not purport to be an amendment of it.

Sec. 6 establishes the Court and authorizes the appointment of a Judge or Judges by commission in His Majesty's name. One of them is to be designated the President of the Court.

Provisions are made for the appointment of a "permanent" Judge of the Supreme Court or a District Court to act as Judge, in which case he is to have all the jurisdiction and powers of a Judge of the Court in addition to his jurisdiction and powers as a Judge of the Supreme Court or District Court.

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Sub-sec. 5 provides that "For all purposes of status the Court of Industrial Arbitration shall be deemed to be a branch of the Supreme Court . . . ," whatever that provision may mean.

Sub-sec. 6 provides that " . . . the Governor in Council may appoint the President or any Judge of the Court to be a Judge of the Supreme Court." It goes on: "The President or any Judge of the Court, if so appointed as aforesaid, may exercise and sit in any jurisdiction of the Supreme Court, and shall have in all respects and to all intents and purposes the rights, privileges, powers, and jurisdiction of a Judge of the Supreme Court in addition to the rights, privileges, powers, and jurisdiction conferred by this Act, and shall hold office as a Judge of the said Supreme Court during good behaviour, and be paid" &c. It goes on: "The President and each Judge of the Court of Industrial Arbitration shall hold office as President and Judge of the said Court for seven years . . . and shall be eligible to be reappointed . . . for a further period of seven years."

Sub-sec. 7 is as follows: "The President or a Judge of the Court appointed under this Act shall be a barrister or solicitor of not less than five years' standing, or a Judge of the Supreme Court or District Court."

It is plain that the limit of the tenure of office of the President and Judges of the Court is a term of seven years, which may be renewed by reappointment or terminated at any time by resignation. It is suggested that if the President or a Judge of the Court is appointed to be a Judge of the Supreme Court his tenure of office becomes extended, so as to be tenure for life, which is the only tenure that can under the Queensland Constitution be conferred upon a Judge of the Supreme Court.

This argument is founded upon the words "during good behaviour," which, it is suggested, operate as an implied extension of the term of seven years for which he is appointed. In my opinion, the term of an office is one thing; the conditions of its tenure are another. If a man is appointed *simpliciter* to the office of Judge, his tenure is probably for life, but it may be conditioned upon good behaviour. These words do not operate, in any case, to extend a tenure which is shorter than a life tenure, but to indicate that it may

be terminable, for want of good behaviour, at a date earlier than that expressly limited. The word has been used in this sense by the Legislature of Queensland on more than one occasion in the Acting Judges Acts. The question whether those Acts are impeachable on other grounds does not affect the construction of the language used in them.

I do not think it necessary to discuss the provisions of sec. 6 at greater length.

In my opinion, the authority which it professes to confer upon the Governor to appoint the President or a Judge of the Court to be a Judge of the Supreme Court, is an authority to confer an additional, not an independent office upon the Judge so appointed, contingent upon his retention of the original office by virtue of which it is conferred, and expires upon the termination, for any reason, of that office. The use of the words "during good behaviour" does not affect this construction.

It follows that even if the appellant could be appointed a Judge of the Supreme Court for his term of seven years he could not under the Act be appointed for any longer term, and any commission which purports so to appoint him is unauthorized by that law, and not being authorized by any other law, is void.

In my opinion, however, the commission under which the appellant claims purports to appoint him to be a Judge of the Supreme Court for life. It is therefore, in my judgment, unauthorized and void; whether a valid commission could or could not have been issued for a shorter period.

But, in my opinion, for the reasons given in the earlier part of this judgment, an appointment for a shorter term than life is unauthorized by the Queensland Constitution and is also void.

The commission cannot, therefore, be supported on any ground.

I do not think that the provisions of the *Acts Shortening Act* have any application to the case. That Act is a mere dictionary, and does not mean that a commission can be construed in any sense contrary to its plain meaning, so as to convert an attempted invalid appointment for life into a valid appointment for a term of years.

In either view the *quo warranto* should issue.

A further point was taken under sub-sec. 7 of sec. 6 of the Act.

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In the view that I take of the case this point is immaterial. But I am strongly inclined to think, unless I am compelled by binding authority, with which I am not acquainted, that the words of qualification were intended to operate as a real and not as a nominal qualification; and that the principles which are applied in construing the law requiring in certain cases a true statement of the addition of the maker of a bill of sale, and the rules requiring a true statement of the addition of a deponent to an affidavit, indicate a better rule of construction than that which makes the words "a barrister of not less than five years' standing" equivalent to "a person who has for five years been entitled to practise as a barrister." If, during the period, the person in question was generally known as a mere clerk and not as a barrister, I doubt whether he has the necessary qualifications. This point would also affect the appellant's right to retain the office of President of the Arbitration Court, but I need not further refer to it.

BARTON J. In my opinion the following propositions are sound and govern this case:—(1) The Constitution of Queensland, in the sense of its fundamental or organic law, to use a term familiar to text-writers, is now contained in the Constitution Consolidating Act of 1867, with any valid amendments since made, and in arts. 14 and 22 of the Order in Council of 6th June 1859. In this case we are not concerned with art. 14. (2) While that Constitution subsists, it must be the test of the validity of legislation. (3) The *Industrial Arbitration Act of* 1916, sec. 6, on its true construction provides for the appointment of certain Judges of the Arbitration Court as Judges of the Supreme Court of Queensland, in certain cases, for a time conterminous only with the duration of office of such Judges in the Arbitration Court. In so providing the enactment transgresses the limits of the Constitution, and to that extent is not a valid law. I proceed to develop these three propositions.

The Parliament of the United Kingdom in 1855 conferred a Constitution on New South Wales by the Act 18 & 19 Vict. c. 54, to which was appended as a schedule the Act of the New South Wales Legislature 17 Vict. No. 41. By sec. 6 of the covering Act the Queen was authorized, in exercise of a power given to her in the

scheduled colonial Act, to alter the northern boundary of New South Wales by separating territory from that colony. By sec. 7 she was authorized to erect the severed country into a new colony or colonies by Letters Patent, and she was further authorized to provide in such Letters Patent or by Order in Council for the government of any such new colony and for the establishment of a legislature therein and to give full power to such legislature to make further provision in that behalf. A restriction requiring the form of government and legislature to resemble as nearly as practicable those established in New South Wales at the time of the exercise of the power was repealed by the *Australian Colonies Act* 1861 (24 & 25 Vict. c. 44, sec. 4). In pursuance of the authority granted, an Order in Council was issued on 6th June 1859. In the preamble it recited the Act of 18 & 19 Vict. and the provisions above mentioned; and also recited an Order in Council of 13th May 1859 approving the draft of Letters Patent for separating certain territories from New South Wales and for erecting them into the Colony of Queensland.

The Order in Council of 6th June 1859 made provision for the government of the new colony in its legislative, executive and judicial branches. It was ordered in art. 15 that the provisions of the Act of the Legislature of New South Wales (17 Vict. No. 41) respecting the commissions, removal and salaries of the Judges of the Supreme Court of New South Wales should apply and be in force in the Colony of Queensland so soon as a Supreme Court should be established in that colony. Art. 16 prescribed that the salaries settled by law upon the then Judges and also such salaries as should or might be in future granted for any future Judge or Judges of the Supreme Court should "in all time coming" be paid and payable as long as the patents or commissions of such "Judge and Judges" or any of them should remain in force.

The provisions referred to in arts. 15 and 16 are contained in secs. 38, 39 and 40 of the Act 17 Vict. No. 41.

Art. 22, with an exception and a proviso, neither of which need be fully set out, provides as follows: "The Legislature of the Colony of Queensland shall have full power and authority from time to time to make laws altering or repealing all or any of the provisions of

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this Order in Council in the same manner as any other laws for the good government of the Colony." This is a power to amend the provisions by law, not to ignore them.

Under art. 20 judicial offices, *inter alia*, except for abolition, or inconsistency with the Order in Council, were to continue to exist till other provision should be made, and successive enactments were passed in that regard. The *Supreme Court Constitution Amendment Act of* 1861 recited that provision *inter alia*, and recited also the expediency of repealing arts. 15 and 16 of the Order in Council and certain Acts of the Queensland Parliament, but the Act did not repeal the articles in question. It re-enacted them. This Act made full provision for the constitution and business of the Supreme Court of Queensland, and in secs. 5 and 6 repeated the provisions of secs. 38, 39 and 40 of 17 Vict. No. 41. In its third section it provided that Judges should be appointed by the Governor in Council by commission in the Queen's name. and also that only one Judge should receive a commission until the number of Judges should be increased by the Legislature. The Legislature increased them to two by an Act passed in 1862 (26 Vict. No. 9). The enactments relating to the Supreme Court were consolidated in 1867 by the Act 31 Vict. No. 23. Secs. 9 and 10 again enacted the provisions of secs. 38, 39 and 40 of 17 Vict. No. 41. By sec. 8 of this Act the Supreme Court was to consist of not more than three Judges, but by an amendment Act passed in 1903 the number is not to be less than four or more than five, and apparently this is the provision to which the opening words of sub-sec. 6 of sec. 6 of the *Industrial Arbitration Act* relate. That provision need not be further mentioned just now.

Now in 1867 "An Act to consolidate the laws relating to the Constitution of the Colony of Queensland" (31 Vict. No. 38) was assented to on the same date as the Supreme Court consolidating Act of the same year, namely, 28th December 1867. They were both consolidating Acts, and, in the *Constitution Act*, secs. 15, 16 and 17 repeated the provisions of secs. 38, 39 and 40 of 17 Vict. No. 41, already adopted by the Order in Council. The provisions of this Act in most particulars correspond with those of the Order in Council. At the same time assent was given to the *Repealing Act of* 1867

(31 Vict. No. 39), which was to take effect on 31st December 1867. The consolidating process of 1867 was comprehensive, embracing twenty-nine Acts, and the repeals involved included the whole of the Order in Council except arts. 14 and 22, the latter of which is very material to this case. The new enactments were to take effect on 31st December 1867, already mentioned, up to which time all the laws to be repealed were kept alive.

It appears to me that the *Constitution Act of* 1867, together with the unrepealed parts of the Order in Council and any valid amendments of the Act, is the Constitution of Queensland. No amendment touches secs. 15, 16 and 17. As already stated, these sections repeat the judicature provisions of the Act 17 Vict. No. 41, which had been adopted by the Order in Council. They are set out in full in the Appendix to the Record, and it will be seen that their correspondence with the sections of the *Constitution Act of* 1867 is complete.

But it is said that the *Constitution Act of* 1867 is not a Constitution, in the sense of the fundamental or organic law of Queensland, but is merely an ordinary legislative Act in no wise distinguishable from any other part of the common body of legislation. It is true that it is in the form common to legislative enactments, in the sense that it is enacted by the Sovereign by and with the advice and consent of the two Chambers of the Legislature. That is the only form in which the Parliament of Queensland is able to pass any Act, of however high authority, and it is the form sanctioned by art. 22 for amendments. It recites the Order in Council and various Imperial Acts relating to the Constitution of Queensland, which it declares the expediency of consolidating. It was passed under the authority of the unrepealed art. 22 of the Order in Council, but I should add that the exception to that article modifies the area of the power in one particular not now material, and the proviso requires the reservation of Bills relating to the Legislative Council. The words "in the same manner as any other laws for the good government of the Colony" do not in any way impair the necessity, if the necessity exists, of making by law an amendment of the Constitution authorizing any new legislation which but for such prior amendment would be a violation of the Constitution. I take

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the argument mentioned above to mean that the alteration and repeals made by the *Constitution Act* deprive the resultant Statute of the quality of a fundamental law. I cannot see how this may be;- for I am of opinion that art. 22 gave powers of remodelling the Constitution, framed by the Order in Council, but so that the new law should be the Constitution of Queensland. If this were not so, there would be no escape from the conclusion that by executing in part a power which is still alive Queensland has deprived itself of any Constitution. It is said that art. 22 is exhausted or satisfied —whichever be the correct term—by the enactment, in place of the greater part of it, of a new Constitutional Statute : so that in fact any law thereafter to be passed, without a prior amendment to authorize it, could not infringe the Constitution however much it might be at variance therewith. This argument must depend on a contention that Queensland no longer had a Constitution in the sense of a fundamental law. The authority to make laws amending provisions of the Order in Council, which at the time of its making was the Constitution, extended to enable the making of laws altering the consolidated Constitution passed in 1867, for unless it so extended there was no reason to keep it alive, and its intention that new laws at variance with the Constitution should not be valid unless the Constitution were previously altered so as to authorize their making, is to my mind quite clear. It is not to the purpose to say that the Constitution of 1867 repealed almost the whole of the Order in Council, of which it re-enacted the greater part. The repeal and re-enactment or new enactment might have extended to one article alone. Would that have put an end to the Constitution as a fundamental law? The real test is whether, in the exercise of the power committed to it, the Queensland Legislature has retained a Constitution, although it may have remodelled it. It had power to do this, but I question whether it had power to leave itself without any fundamental law. Whether that be so or not, it has amply throughout the Act manifested its intention that the thing it has framed is a Constitution, and, if it is so, amendments to cover excesses of the authority it grants must precede, so as to render valid, legislation which would otherwise be in excess.

The provisions of the Constitution as to the commissions, removal

and salaries of the Judges of the Supreme Court are also to be found, as already pointed out, in the *Supreme Court Constitution Amendment Act of* 1861 and in the consolidating *Supreme Court Act of* 1867. It may be said that, standing in those Acts, they may be disregarded by any ordinary law. The fact, however, that a provision in the Constitution is repeated in ordinary legislation cannot possibly detract from its force and effect while it is part of the Constitution.

These judiciary provisions are, in expanded form, the same as those of the *Act of Settlement* in that behalf.

Before leaving this part of the case it is necessary to advert to a further argument. Sec. 2 of the *Constitution Act*, like art. 2 of the Order in Council, gives power to make laws for the peace, welfare and good government of the Colony "in all cases whatsoever." It is said that the words last quoted are an authority to make all such laws as seem good to the Legislature without regard to the remainder of the Constitution. The answer to that contention is that the Constitution, including this provision, must be read as a whole. Sec. 2, when read with the remainder of the Act, is subject to several restrictions or limitations, which the learned Chief Justice has clearly pointed out. Among these are the judicature provisions adopted from the New South Wales Constitution, which are equally with sec. 2 provisions of the fundamental law of Queensland. If the Legislature wishes to make other provisions in substitution for these, it has only to give itself first the legal power to do so.

It seems that the Parliament of Great Britain and Ireland did not, as late as July 1900, regard Queensland as being without a fundamental law; for sec. 106 of the Constitution granted to the Commonwealth and appended to sec. 9 of the Act 63 & 64 Vict. c. 12, by which Act Queensland was erected into a State of the Commonwealth of Australia, provided as follows: "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

I now come to my second proposition.

While that Constitution subsists it must be the test of the validity

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of legislation. Eleven years ago this Court heard the case of *Cooper* v. *Commissioner of Income Tax for Queensland* (1). A claim of income tax was resisted by the appellant on the ground that a tax levied in respect of his judicial salary was repugnant to the Constitution of Queensland and to that extent invalid. This Court decided against the appellant, on the ground that the income tax did not conflict with the constitutional provision (sec. 17) that the salaries of Judges of the Supreme Court should "in all time coming" be payable throughout the duration of their commissions. In other words, the Court decided that the tax was no diminution of the Judge's salary, as it operated on that salary only after it had passed to the enjoyment of the recipient. As the Income Tax Act was not preceded by an amendment of the Constitution in respect of sec. 17, it was one of the points for the appellant that it was merely an attempted enactment in violation of the Constitution so far as it touched any salary secured under sec. 17. Although the Court dismissed the appeal on the ground previously stated, four of the five Justices thought it right, in view of the fact that the point had been fully argued, to express their opinion on the assumption that the Income Tax Act operated in diminution of the salaries settled on Judges of the Supreme Court by the Constitution. *Higgins* J. refrained from giving an opinion upon the matter. Of the four Justices who expressed opinions, *Isaacs* J., having read the judgment of the learned Chief Justice, expressed his agreement with the reasons there stated, and had nothing to add. The reasons given by the other Justices are quoted at some length in the judgment now appealed from, and they were substantially identical. I make no quotation except to say, for the sake of convenience, that I adhere to the following statement, which is in accordance with the reasoning of the learned Chief Justice and of the late Mr. Justice *O'Connor*: —"Legislation, which could not be undertaken at all without the antecedent authority of the fundamental law, cannot overstep the bounds set for it by that law and yet stand good. Before it can avail, the bounds must have been lawfully extended. That is a condition precedent, even if the makers of the disputed law had

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

power to make the extension themselves. They cannot omit to make it, and at the same time proceed as if it had been made" (1). Where the fundamental law is first amended to give additional power, the law which would have been a violation becomes a valid one, if it is within the power given by the amendment.

It is true that so far as the judgments dealt with this part of the appeal in *Cooper's Case* they were technically *obiter dicta*, but they were not *obiter dicta* in the sense of expressions beyond the matters argued, for the Court heard full argument on the point, and decided the matter with as much care and elaboration as if the point had been vital. In consenting to deal with the case, the Court, in my view, sought to lay down a reasoned opinion for future guidance. It does not, however, bind the Court in this case. The question is solely as to the soundness of the reasons of the Justices, and these I adopt and follow.

There is an analogy between the position here presented and that dealt with by several English decisions under the *Companies Acts*. One of these is *Imperial Hydropathic Hotel Co., Blackpool*, v. *Hampson* (2). In that case a strong Court of Appeal, consisting of *Jessel* M.R. and *Cotton* and *Bowen* L.JJ., decided that if the articles of association of a company contain no power to remove directors before the expiration of their period of office, but authorize the shareholders to alter any of the articles by special resolution, there must be a separate special resolution altering the articles so as to give power to remove directors before a resolution can be passed to remove any of them: in other words, that, subject to the *Companies Acts*, the articles of the company were the test of the validity of domestic legislation attempted under them. *Jessel* M.R. said (3):—"It is suggested that under clause 44 the Company can by resolution remove two directors. In my opinion they cannot. They can only alter the articles of association. On the contrary, by the resolution which was passed, they left the articles alone. The articles remained, prescribing the whole term of office, three years, or whatever it might be. They have not altered them in the least, but they have passed a simple resolution that two specially named directors shall be removed from office. In my opinion that is not in the purview of

(1) 4 C.L.R., at p. 1317.
(2) 23 Ch. D., 1.
(3) 23 Ch. D., at p. 8.

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clause 44 at all. If they wanted to act under clause 44 they should have had passed a clause enabling the Company to remove the directors, and then when they had conferred on themselves that power they might have acted upon it. That, I think, disposes of the whole matter."

The decision in that case is in no wise an attempt to overrule *Campbell's Case* (1). That was a very different case. It decided that in substance the Company had already given themselves the necessary powers under which they acted. That it was a different case is shown by the approval which Lord *Selborne* L.C., whose judgment was concurred in by the rest of the Court, gave to the case of *In re West India and Pacific Steamship Co.* The decision was that of *Giffard* V.C., and was given in 1868. The case is reported in a note to *Campbell's Case*, at p. 11. It was a petition for an order approving of the reduction of capital and shares. The 66th article of association stipulated that any extraordinary meeting of the shareholders, by a majority of two-thirds, should have power from time to time to vary the amount and number of the present shares, or of any new or substituted shares, and for that purpose to consolidate or divide the present or any new or substituted shares in such manner as should be deemed expedient, and to do other acts incidental or necessary thereto. At an extraordinary general meeting held in February 1868 it was unanimously resolved that the capital should be reduced from £1,250,000 to £625,000, and the shares from £50 to £25 each. This resolution was unanimously confirmed at another meeting held in March 1868. No resolution had been passed to alter the Company's regulations so as to authorize the Company to modify the conditions contained in its memorandum of association in conformity with the *Companies Act* 1867, sec. 9. The Vice-Chancellor was clearly of opinion that he had not jurisdiction. There must be a special resolution altering the Company's regulations according to the terms of the Act. Even if the resolutions were binding on the existing members, they would not, in his Honor's opinion, bind future shareholders.

The case of *Taylor* v. *Pilsen Joel and General Electric Light Co.* (2) was decided by *Pearson* J. He distinguished *Imperial Hydropathic*

(1) L.R. 9 Ch., 1.

(2) 27 Ch. D., 268.

Hotel Co., Blackpool, v. *Hampson* (1) upon some words used by *Cotton* L.J., but I respectfully question the distinction, especially in view of the passage I have quoted from the judgment of *Jessel* M.R., than which nothing can be more explicit. But His Lordship did not question the authority of *Hampson's Case*, and I think it clear that the principle of the decision in that case is applicable here.

The case of *In re Patent Invert Sugar Co.* (2) has been cited by the learned Chief Justice, who has quoted the judgment of the Court of Appeal (*Lindley* and *Fry* L.JJ.). In the judgment which they affirmed, *Kay* J. expressed the opinion that the special resolution for the reduction of capital must be subsequent to the resolution altering the regulations.

It is unnecessary to cite further authority in this line. I think the analogy of the present case is obvious. It is said that the relevant sections of the Constitution do not relate to legislative power: I retain the opinion that while they remain they restrict the legislative power, and until they are lawfully removed they cannot be treated as if they did not exist.

On the question raised as to the effect of the *Colonial Laws Validity Act*, *O'Connor* J., in his judgment in *Cooper's Case*, pointed out that the *Constitution Act of* 1867, having been enacted by virtue of an Order in Council issued under an Imperial Act extending to the Colony, clearly comes within the express provisions of sec. 2 of the *Colonial Laws Validity Act*, and he said (3): "It follows that a law of the Queensland Parliament which is repugnant to any provision of the Queensland *Constitution Act* 1867 is, by virtue of the *Colonial Laws Validity Act* 1865, void and inoperative." The learned Chief Justice is, I observe, of a similar opinion, holding that the term "order" includes an order as lawfully amended under any power conferred by the Statute. Did sec. 2 of the Act intend to protect against subsequent repugnancies the Queensland Constitution, then contained in an Order in Council made under the authority of the Imperial Act 18 & 19 Vict. c. 54? If it did, can it be said that the protection is lost in respect of provisions

(1) 23 Ch. D., 1. (2) 31 Ch. D., 166.
(3) 4 C.L.R., at p. 1329.

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in a consolidating *Constitution Act* simply because those provisions, having been repealed for the purpose of consolidation, have been embodied *totidem verbis* in the form of a *Constitution Act* authorized by the Order in Council? I think sec. 2 is a re-enactment, or rather a declaration, of existing law, and a mere repugnancy to a Constitution is as "void and inoperative" as it was before the *Colonial Laws Validity Act* was passed. Now, sec. 2 and sec. 5 must be read together. It could not be intended that the one should be repugnant to the other, and I cannot believe that sec. 5 was intended to do away with the law which existed before sec. 2, and was partly declared therein. The terms of that section clearly include the Order in Council, and are not intended to abrogate the pre-existing law as it affected the Queensland Constitution, or to ordain a new law which would exclude it from the operation of the pre-existing principle.

Reference has been made to my judgment in *Taylor's Case* (1). The main question on which the Court was there asked to pronounce was this: "Is the *Parliamentary Bills Referendum Act of* 1908 a valid and effective Act of Parliament?" If it was, the question which followed that one had to be answered in the affirmative. The purpose of the Act of 1908 was to give the Governor in Council power, after a second rejection of a Bill by the Legislative Council, to direct that the rejected Bill should be submitted by referendum to the electors, and to prescribe that a referendum poll should accordingly be taken thereon at a time to be appointed. There were subsidiary provisions to facilitate the carrying out of the process. The measure was entitled "An Act to amend the Constitution of Queensland by providing for the submission of certain Parliamentary Bills to the electors of Queensland" &c. It clearly described itself as an amendment of the Constitution, and then took certain powers which did not previously exist. It was to be read and construed with and as an amendment of the *Constitution Act of* 1867. In execution of the powers so given a Bill was submitted in 1915 to the Parliament of the State and twice rejected by the Legislative Council. Its purpose was the abolition of that Chamber. After the second rejection the Governor in Council issued the

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

necessary proclamation, and a referendum poll was taken, the result of which is immaterial to the present case. Now that second Bill called itself "A Bill to amend the Constitution of Queensland by abolishing the Legislative Council." That was scarcely a correct title, because the Constitution had been already amended by the Act of 1908, so as to allow of legislation by referendum in the case of Bills rejected a second time. The Court held the Referendum Act of 1908 to be a valid and effective law, and the questions as to the Acts of 1908 and 1915 were accordingly answered in the affirmative. That decision was based by all the Justices on sec. 5 of the *Colonial Laws Validity Act*, but my learned brother *Isaacs*, rightly if I may say so, rested his decision also on the power given by art. 22 of the Order in Council. He held that the Legislature did not intend, nor in his opinion had it the power, to alter or repeal art. 22. He thought that if it had power to repeal that article *in toto* it had power to repeal it in part, and, if so, it had power to alter it by excising the exception or the proviso, or both—which his Honor considered unthinkable. He went on to say (1):—"Therefore, clause 22 stood, and in my opinion still stands, as a permanent power of the Queensland Legislature outside the express working provisions of the Constitution for the time being. This is the view taken by *Griffith* C.J. in *Cooper's Case* (2). I concurred in that opinion, and still think it correct."

Although I did not rest my own judgment on that ground, I did not negative it, and subsequent consideration of the matter causes me wholly to concur with my learned brother's opinion just quoted. But I frankly confess that the force which I then attributed to sec. 5 of the *Colonial Laws Validity Act* was greater than I now think it to possess. I do not think it intended to validate past or future repugnancies to the Constitution in legislative form. What I have above said on that subject need not be expanded. I agree with the Full Court of Queensland in its suggestion that in *Taylor's Case* (3) I did not sufficiently direct my mind to the express provisions of sec. 2, or to the improbability that sec. 5, when read with it, was intended to validate mere repugnancies to the Constitution.

(1) 23 C.L.R., at p. 476. (2) 4 C.L.R., at p. 1314.
(3) 23 C.L.R., 457.

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But the question as to my own judgment is not now important, because if the *Parliamentary Bills Referendum Act of* 1908 is a valid amendment of the Constitution, as I think it is, independently of the *Colonial Laws Validity Act*, my remarks on that Act do not affect the correctness of our actual decision.

My third proposition is that the *Industrial Arbitration Act of* 1916 does not satisfy the test of validity in respect of sec. 6, sub-sec. 6. No question was raised as to the validity of the other provisions apart from this one regarding the judicature. The construction of that section is in some degree aided by the full title of the Act, which reads as follows: "An Act to provide for the regulation of the conditions of industries by means of industrial conciliation and arbitration; to establish a court of industrial arbitration and certain subsidiary tribunals, and define their jurisdiction; and for purposes consequent thereon or incidental thereto." The title fairly describes the subject matter and scope of the Act as disclosed by the subsequent provisions. The Court of Arbitration and subsidiary tribunals were established, and their jurisdiction defined, for the more effective regulation of the conditions of industries by means of industrial conciliation and arbitration. The main purpose of the Act is that regulation of industrial conditions. If the Legislature had not had that as its main design, it would not have needed the Court of Arbitration or its subsidiary tribunals. For this Act repeals (by sec. 3) and supplants the *Industrial Peace Act of* 1912. Any other legislation in the Act is avowedly for purposes consequent on or incidental to the purpose of regulation by the means indicated, including the establishment of these Courts. It is no objection in law to a provision in an Act that it is outside the subject matter and scope of the Act, if it is express and unambiguous. But in construing a difficult provision it is of importance in doubtful cases to consider whether the Legislature intended to travel beyond them and deal with subject matter extraneous to them. What was the declared purpose of the Legislature, and is the provision in question designed to assist that purpose, or is it plainly for further purposes? Sec. 6 establishes a Court of Industrial Arbitration, and gives the Governor in Council power to appoint a Judge or Judges of the Court by commission in His Majesty's name. One of them is to be the

President. The Governor in Council may, if and as he deems it necessary, appoint in like manner an additional Judge or Judges of the Court. I pause here to say that it is scarcely necessary to present purposes to discuss the construction of sub-secs. 2 and 3. I pass over the provisions of sub-secs. 4 and 5, merely remarking that I share the learned Chief Justice's difficulty in understanding the meaning of "purposes of status" as used in the latter sub-section. But it should be mentioned that in that sub-section every Arbitration Judge is to have the "status" of a Judge of the Supreme Court, which in any meaning can scarcely have been intended to endure after the cesser of his office as Arbitration Judge. Sub-secs. 6 and 7 have been sufficiently quoted by the learned Chief Justice. I am of opinion that sub-sec. 6 does not authorize that the President or any Judge of the Court be appointed a Judge of the Supreme Court with a life tenure. For the purposes which the Legislature had in view it might have been in their judgment helpful to give power to appoint to the position of Supreme Court Judge the President or any Judge of the Industrial Court while he remained such. But it could not well have been considered an aid to those purposes that he should remain a Judge of the Supreme Court after his period of office in the Arbitration Court had determined. When that period has expired, his retention of office as a Judge of the Supreme Court cannot have been considered advantageous for regulating industrial conditions by conciliation and arbitration through the medium of a Court of which he has ceased to be a member and upon whose jurisdiction he would be an intruder. Nor was there conceivably any purpose consequent upon or incidental to those mentioned in the title which his presence in a Court and jurisdiction different from those which he had relinquished could appreciably subserve. When it is said that the President or any Judge of the Arbitration Court, if appointed to be a Judge of the Supreme Court, may exercise and sit in any jurisdiction of the latter Court, and have the rights, privileges, powers and jurisdiction of a Judge of the Supreme Court in addition to those conferred by the *Industrial Arbitration Act*, it is not reasonable to suppose that it was meant that he should do and possess all these things except so long as he remained a member of the Arbitration Court. The words

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"in addition to" &c. help to show that his tenure of office as a Judge of the Supreme Court was intended to be appendant to or dependent upon his continuance in office as an Arbitration Judge. They suggest rather strongly that the two offices are only to be held together, and the term of seven years is explicit as to one of them. It is said that this construction is excluded by the words "shall hold office as a Judge of the said Supreme Court during good behaviour." I do not think so. Instances are not infrequent in legislation of tenure conditional on good behaviour being given to occupants of judicial offices for a limited time. One of these instances is to be found in the 12th section of the *Commonwealth Conciliation and Arbitration Act*. Where the words "during good behaviour" are used without any controlling context (see *Harcourt* v. *Fox* (1)), or in conjunction with other words forbidding removal except upon an address of both Houses of Parliament, and without any limit of time set, they may be read as applying to persons who are to hold office for life, though in the latter case subject to such an address. But that does not show that the words as used in this sub-section indicate a tenure of office for life. They are rather indicative of a condition of the tenure, as distinguished from the duration indicated by the context. I do not think, therefore, that the mere use of these three words turns an office which upon fair construction is of limited duration into an office for life. That view would make the sub-section in effect self-contradictory. As the office of President or Judge of the Arbitration Court is to be held for seven years, with eligibility to be reappointed for a further seven years, and as the position of Supreme Court Judge, if conferred under this Act, is merely additional during that time, and not independent of the other office, the Supreme Court judgeship can be held under this Act for a time conterminous only with the tenure of office in the Arbitration Court.

Now, this piece of attempted legislation can in no sense be truly said to be an amendment of the Constitution. It does not even profess to be one, and as the legislative power is restricted by the enactments numbered in the Constitution 15 and 16, it can only be regarded as a transgression of the limits of the legislative power.

(1) 1 Show., 426; 506.

But was the appellant, whatever the terms of the Act may be, appointed for life by the Executive? Apart from sec. 6, sub-sec. 6, of the *Industrial Arbitration Act*, there was no power to appoint him as a Judge of the Supreme Court at all without prior statutory authority, because the pre-existing law (see 3 Edw. VII. No. 9) limits the number of Judges of that Court to five, and there are already five such Judges. But if he derives his appointment from the terms of the *Industrial Arbitration Act* contained in the sub-section, it cannot be for a longer time than his office as President or Judge of the Arbitration Court endures, and that is for seven years. It is impossible to separate the first from the second paragraph of sub-sec. 6. The invalidity extends to both, if not further. It follows that he is appointed without warrant of law. For if he was appointed for life, the *Industrial Arbitration Act* on its true construction does not authorize such an appointment, and there is no other authority; and if he was appointed for seven years, the *Industrial Arbitration Act* purports to authorize an appointment for that period, but the provision so purporting is invalid. In either case his appointment cannot be good, and the judgment of ouster should be supported, and this whether the words "during good behaviour" in the commission are, under the *Acts Shortening Act*, sec. 12A, given the meaning which they bear on the true construction of the sub-section impeached, or whether they are given the meaning which they bear in the commissions usually issued to Judges of the Supreme Court. On the first of these meanings they follow the terms of an invalid authority—sub-sec. 6. On the second meaning neither that authority, even if valid, nor any other supports them. So that, however interpreted, the commission is without force.

The point as to the appellant's appointment as President of the Arbitration Court under sub-sec. 7 of sec. 6 of the Act does not, in the view which I take of the case, appear to me to be necessary to decide.

I am of opinion that the appeal ought to be dismissed.

ISAACS AND RICH JJ. The principal question that emerges with

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great distinctness from the circumstances of this somewhat complicated case is one that involves the parliamentary powers of practically every part of His Majesty's Dominions oversea. In 1865, the Imperial Parliament granted to the self-governing Dominions what has been graphically termed by Professor *Dicey* "The charter of colonial legislative independence" (*Law of the Constitution*, 8th ed., p. 101). That was a grant in ambit and simplicity surpassing in certain specified particulars all prior grants and the Parliament of Queensland has acted on that grant, and exercised the powers so purporting to be conferred upon it. The present decision directly concerns Queensland alone, but in effect controls every Australian State, and it is whether the Parliaments of Queensland and the other States of this Commonwealth have powers of the noble character broadly framed by the Parliament of the Empire in 1865, or whether, in disregard of the plainly expressed will of the Imperial Parliament, the powers of the local Parliaments are still open to the embarrassing doubts and technical impediments that according to some opinions fettered the legislative action of a colony over half a century ago.

It is not the question of whether Queensland has a Constitution—for everyone admits she has; but it is whether the law of that Constitution affords as ample means for translating the public will into public law as those who rely on the Imperial grant of 1865 contend she possesses. Putting the question into legal form, it is whether the Constitution of Queensland includes, or does not include, the grant of self-government contained, and as fully described, in sec. 5 of the *Colonial Laws Validity Act* 1865.

Another extremely important question, hardly inferior to the first, is the extent of Queensland parliamentary power, irrespective of the Act of 1865. That is only necessary for decision, because the judgment appealed against has reduced that power to limits that the State Government contends are narrower than the law of the Constitution warrants. This also has to be considered on a principle that affects all the States. The importance of this decision, therefore, cannot well be over-estimated.

The concrete problem relates to the appointment of Thomas William McCawley, as Judge of the Supreme Court of Queensland,

for life, or alternatively during his term as President of the Court of Arbitration. That appointment is challenged on several grounds, which will be considered in logical order.

1. *Presidency of Industrial Arbitration Court.*—Whatever view be taken of the ultimate fate of this appeal, we conceive it to be in the highest interests of the industrial peace of Queensland that it should not be left doubtful, so far as the opinion of this Court is concerned, whether there is or is not a President of the Industrial Court, and whether or not his orders and awards are lawful. On that point we agree with the decision and the reasons of the Supreme Court. At the time of his appointment in 1917, he had the *status* of a barrister from 1907. He was, therefore, in the words of the Act, "a barrister of not less than five years' standing." The first objection therefore fails.

2. *Construction of Sec. 6 of the Industrial Arbitration Act.*—In merely construing an Act of Parliament, we have to remember that it is the duty of the Court only to search faithfully for the intention of the Legislature, and not to speculate as to its motives, or criticize its policy. In *Vacher & Sons Ltd.* v. *London Society of Compositors* (1) the judgments are a recent and valuable reminder of this duty. Lord *Macnaghten* observed (2):—"The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature." No doubt in arriving at the intention of Parliament it must, in the absence of intractable language to the contrary, be assumed that nothing absurd or unjust is intended, but a Judge has no right to brand as absurd or unjust any policy which he personally might not approve. That would be an invasion of the domain of another branch of the Government.

Reading sec. 6 in order simply to ascertain the will of Parliament, we understand it as authorizing the Governor in Council to appoint the President to be a Judge of the Supreme Court for a term which has both a maximum limit and a minimum limit. The maximum limit is the duration of the appointee's tenure of office as President;

(1) (1913) A.C., 107. (2) (1913) A.C., at p. 118.

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the minimum limit is during his good behaviour. The Legislature apparently had in mind the general provision of sec. 17 of the *Acts Shortening Act of* 1867, which enacts that where any Act gives power to the Crown to appoint to any office or place it shall, unless the contrary intention appears, be intended that the Crown shall have power to remove or suspend and to appoint another in place of the person first appointed. This provision, as will be seen later, is the statutory recognition of a common law principle. It apparently was thought that in limiting the Supreme Court judgeship to the duration of the presidency, as a maximum period, the provision of the Constitution respecting life tenure was inapplicable, and that unless some further provision were made in the Act, there would be no security of tenure whatever, with respect to the Supreme Court judgeship. Consequently, the "good behaviour" provision was inserted, which gives that security, without detracting from the maximum limitation. The context qualifies them.

It is "the President" who, if appointed to be a Judge of the Supreme Court, (1) may exercise and sit in any jurisdiction of the Supreme Court, and (2) shall have the rights, privileges, powers and jurisdiction of a Supreme Court Judge in addition to those conferred by the Act, and (3) shall hold office as a Supreme Court Judge during good behaviour. It is the same "personality" in each case, for that is the necessary result of the structure of the paragraph. But as the second case could not exist unless the same person held both offices, it follows inevitably that the third case cannot be satisfied unless the same person fills both offices.

The provisions as to salary tell strongly in the same direction. By sub-sec. 8, the salary of an Industrial Judge who is not appointed a Judge of the Supreme Court must not be *more* than that of a Puisne Judge of the Supreme Court. By sub-sec. 6, his salary, if appointed to the Supreme Court, may be any sum fixed not being *less* than that of a Puisne Judge of the Supreme Court. It may be more; but why? Clearly, because he is doing the work of two offices. It is to be observed that a Judge of the Supreme Court, if appointed temporarily, gets no further salary, but apparently that is because his additional work is only temporary.

On the whole, the appointment to the Supreme Court as authorized

by the Act is fixed, namely, the maximum being the period of the presidency, the minimum being good behaviour during that period. We say nothing as to whether there is a power of removal on address by the Legislature, as that does not arise here. Our observations as to minimum is subject to this.

3. *Validity of Sub-sec. 6 of Sec. 6 so Construed.*—All the learned Judges of the Supreme Court except *Real* J. have held that this sub-section is invalid, because it is inconsistent with secs. 15 and 16 of the *Constitution Act of* 1867. *Real* J. thought that, though the sub-section is inconsistent with those constitutional provisions, it is nevertheless valid, both by virtue of the legislative power contained in the *Constitution Act* itself, and of the power granted by sec. 5 of the *Colonial Laws Validity Act* 1865.

The precise point taken is that secs. 15, 16 and 17 of the *Constitution Act* impliedly prohibit any legislation by the Queensland Parliament contrary to their provisions; and, therefore, in order to acquire the power to pass such legislation either under the Imperial Act or the local Constitution, those sections must first be expressly repealed. Implied repeal by antagonistic legislation of an affirmative character is said to be legally impossible. No doubt is raised as to the competency of the Queensland Parliament to pass the self-same Act in the same terms, in the same way, by the same royal assent. But it is said to be dependent upon the condition that it previously passed an Act expressly labelled as an amendment of the *Constitution Act*, and expressly repealing or altering the sections referred to. All this, it is said, arises because the *Constitution Act of* 1867 is labelled "Constitution." If such efficacy is given to that Act because of its label, then it is self-evident that any other Act passed in the ordinary way, provided no specific manner or form is prescribed for such an Act, will be of equal validity if only it be similarly labelled. And so, ultimately it comes to a question of prefatory label. It is manifest that, if this is sound, many Acts will be of doubtful validity. It will always be open to argument whether some provision of the *Constitution Act* is or is not as it stands at variance with a later Act; and, if that is so, then unless there be a label or announcement required—and even though the necessary majorities are obtained and the necessary reservation takes place—

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the Act will be void. So the position is not merely surprising but serious. The learned Attorney-General, who contested this view, rested his argument on both sources of power—the *Constitution Act of* 1867 and the Imperial Statute of 1865, and principally the latter. We therefore deal with the sources relied on, and in order of their date. Before entering upon this task, we desire to say that, notwithstanding the wealth of argument that has been showered upon the case, we regard the law as affecting the present case to be simple and unattended with any real difficulty. The words of both the Imperial Act of 1865 and the Queensland Constitution of 1867, so far as they affect the present case, are so plain, in our opinion, that but for the respect we feel for the opinions from which we have the misfortune to differ, and but for the enormous importance of the question, our duty could be very briefly performed.

(*a*) *Colonial Laws Validity Act* 1865.—The history of the *Colonial Laws Validity Act* is well known. Difficulties had repeatedly arisen in South Australia between 1861 and 1865, in consequence of the restricted view taken in the Supreme Court of that Province, regarding the power of the local Legislature to alter the Provincial Constitution. The Imperial Parliament found it desirable to pass an Act in 1863 (26 & 27 Vict. c. 84) to confirm certain Provincial Acts declaring or altering the Constitution of the Legislature. Even that Act, when brought before the Court, was declared to be of limited scope. Refined judicial theories were rendering doubtful the action of Parliament.

The difficulties and complications are detailed in *Keith's Responsible Government in the Dominions* (vol. I., pp. 408 *et seqq.*) and in *Blackmore's Law of the Constitution of South Australia* (pp. 64 *et seqq.*). It is sufficient to say here that by some decisions of the Supreme Court, notably *Auld* v. *Murray* (reported in *South Australian Register*, 17th December 1863), the right of the colonial Parliament to establish Courts and create Judges was denied; a conflict arose between Parliament and the Judges, and both Houses of Parliament addressed the Queen to cause steps to be taken for an Imperial Act to set doubts at rest on this and other questions. The decision of *Auld* v. *Murray* was referred to the Imperial Law Officers, who at that time were Sir Roundell Palmer and Sir Robert Collier,

and they reported to the Secretary of State, Mr. Cardwell. That report was the basis of the *Colonial Laws Validity Act* 1865. The report cannot, of course, determine the construction of the Act, but the opinions of the eminent jurists who made it, and which will be stated later, are valuable on some propositions of law disputed in the course of these proceedings, and of extreme importance on the other branch of the case.

It is desirable to state at this point that there was in force at that time in South Australia the Provincial Act No. 2 of 1855-1856. It was intituled "An Act to establish a Constitution for South Australia, and to grant a Civil List to Her Majesty." So there is no doubt it was in the same relation to South Australia as the present *Constitution Act of* 1867 is to Queensland. It recited the Imperial Act 13 & 14 Vict. c. 59, and the power thereunder to alter the provisions and laws for the time being in force under that Act, and the expediency of exercising that power, and then it proceeded to establish the Constitution. It made certain definite provisions as to the electoral law of the Province.

In these circumstances, the *Colonial Laws Validity Act* was passed, which was intended obviously to end for ever all doubts as to matters with which it dealt.

The two learned law officers of England, in the course of their report, observed: "Having in view the unfortunate disposition manifested upon the Bench of South Australia to favour technical objections against the validity of Acts of the colonial Legislature, and the confusion and general sense of insecurity which it must be the tendency of such a state of things to produce, we think it will be very expedient to pass an Imperial Act for the purpose of empowering the Legislature of that Colony (and of any other Colonies or Colony which may be in like circumstances) to alter its own Constitution." One of the technical objections alluded to in the report was that an Act, if at variance with a provision in the *Constitution Act*, must appear to have been passed "with the object" of altering that provision. The observations quoted indicate the evil which existed and needed to be cured. The evil was that the law as it stood occasioned doubt in some judicial minds as to the power of the colonial Legislature to

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legislate by ordinary enactments contrary to the provisions of the Constitutional Act, while they stood unrepealed by any express words or were departed from by any Act professing to alter the Constitution *eo nomine*. The doubt led to conflict between the Legislature and the Bench, and to a general sense of insecurity. This Act was optimistically intituled "An Act to remove doubts as to the validity of colonial laws."

The cure for the evil which we have referred to was sec. 5 of the Act. And it was extended to all colonies irrespective of the nature and provisions of their special Constitutions, and irrespective of whether those Constitutions were effected by Imperial enactments or by colonial legislation ultimately authorized by some Imperial enactment or other Imperial warrant. The words of that section are so ample and unqualified as really to stand in no need of historical explanation. That is offered only because it has been suggested that the section is not to be read in its full natural meaning, but as impliedly restricted in some way by some implications in the law of the Constitution as that otherwise exists prior to the passing of the Act, or as that has been since framed by the colonial legislature under prior existing authority. In effect, that view disregards the 5th section of the Act. If the power exists independently of the Act, the Act was unnecessary. If it does not, then, says the argument, the Act does not apply.

It is (*inter alia*) contended that sec. 5 must be read so as to be consistent with sec. 2. So far we entirely assent. Then the contention proceeds that by sec. 2 no colonial Act can stand if it is in conflict with an Imperial enactment whenever passed. Again we assent, with this addition: that the provisions of the Imperial Act relied on must still be in force. The next step in the contention is that sec. 2 preserves all the legal restrictions on the colonial legislatures as those restrictions existed when sec. 2 was passed. Here we part company with the contention. 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. That section according to all recognized rules of construction works an implied repeal of every prior enactment with which it is inconsistent. The repugnancy to a former Act of a later Act competently passed is fatal to the earlier one.

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 enacted" &c. But sec. 2 does operate to this extent, that if by any later British legislation any provision is made repugnant to sec. 5, then that section must *pro tanto* give way to the later legislation. And if in those circumstances a colony legislates repugnantly to the later enactment, sec. 2 operates to avoid the colonial legislation so far as it is so repugnant.

In the present case the contention has no relevance. It is endeavoured to apply to sec. 2 of the Act the provisions of the Queensland *Constitution Act of* 1867. That is not an Imperial Act, order or regulation; and that ends the matter. The words of the section are clear enough as to this, but they have been expounded. See per *Willes* J. (for the whole Court) in *Phillips* v. *Eyre* (1), and Lord *Halsbury* in *Marais*' *Case* (2). The same view was taken in Victoria at an early date (per *Stawell* C.J. in *R.* v. *Whelan* (3)).

We are unable to reduce sec. 5 to the futility which is suggested by the argument of the respondents, and which is necessary if their argument is to succeed on this branch of the case. Sec. 5, it will be observed, does not confer a general power to amend colonial "Constitutions." Indeed, that would be legally unintelligible, unless the word "Constitution" received legal definition in the particular enactment. Much misunderstanding in this case arises, and has in prior cases arisen, we apprehend, from thinking of the word "Constitution" in a double sense. In English law, where not expressly defined, it has primarily an abstract signification. We speak of the Constitution of England, or of a colony, or of a Court, or of the legislature, meaning the rules by which its action as a recognized entity is regulated. An instance of such a use of the word is found in *Fielding* v. *Thomas* (4). In a secondary sense, it has come, either by express enactment or by popular usage, to denote also in some cases some document in which certain of those rules are

(1) L.R. 6 Q.B., 1, at p. 21.
(2) (1902) A.C., at p. 54.
(3) 5 W. W. & àB. (L.), 7, at p. 19.
(4) (1896) A.C., at p. 611.

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formulated. For the real meaning of the term "Constitution of a colony" we refer to a quotation in *Dicey on the Law of the Constitution*, 8th ed., p. 22, note 1. In a *legal* sense—as shown by the judgment in *Fielding* v. *Thomas* (1)—the Constitution of a colony, in accordance with the view taken in the note referred to, may be looked for wherever any provision is made for the Constitution of any of its great organs of legislation, judicature, or executive power. The Supreme Court Acts of Queensland, though not contained in the document labelled "Constitution," are in a legal sense as much part of the Constitution of the State as the Acts relating to the State Parliament. There is no law of Queensland which draws a distinction between the comparative authority of the two classes of enactments.

Consequently, there is nothing sacrosanct or magical in the word "Constitution"; the expression itself not indicating how far, or when, or by whom, or in what manner the rules composing it may be altered. All those things must depend upon the rules themselves. Sec. 5 of the *Colonial Laws Validity Act*, quite consistently with these considerations, uses terms that have a clear legal meaning, and are therefore capable of definite judicial interpretation. And, what is all-important to remember in this connection, *that Act is itself a component part of the Constitution of Queensland* and of every other part of the King's Dominions to which it applies. Let us, therefore, suppose it written into the *Constitution Act of* 1867, but without being itself subject to alteration by the local Legislature. What would then prevent this impeached enactment being valid? It selects two subject matters, namely, (1) Colonial Judicature and (2) the Colonial Legislature. As to these "full power" is given to make laws, and in each case the word "Constitution" is used in the abstract sense we have indicated. The "full power" is to be exercised subject to any legal requirement as to "manner and form."

The importance of observing this distinction has been exemplified by the confusion of thought manifested in one argument advanced by the respondents. They said, the local Legislature cannot legislate on any given subject until it has already power to do so. And it cannot at one and the same moment pass an Act for acquiring

(1) (1896) A.C., at p. 611, l. 2.

the power, and also legislate as if it already had the power. *Hampson's Case* (1) was invoked as an authority in support. The truth of the proposition may be readily conceded. Its application, however, is foreign to this case. If, for instance, the Queensland Legislature proceeded to enact a Statute on a subject upon which the law of the Constitution as it stands forbids it to legislate, the proposition, in the absence of section 5 of the Act of 1865, would apply. The truth would be that the subject matter was not yet within the sphere of power of that Legislature, and before the Legislature could touch it it must acquire the power.

But by the first branch of sec. 5 of the *Colonial Laws Validity Act*, the Imperial Parliament has itself unconditionally, except so far as otherwise therein expressed, brought the specific subject matter of the judicature within the sphere of legislative power of the Queensland Parliament, and so *Hampson's Case* (1) is beside this question. If, as sec. 5 says, every colonial legislature shall be deemed at all times to have had the full power therein described, the Courts must so "deem," whatever conclusion they otherwise might form on the law as theretofore existing. Whether the prior laws governing those communities were silent on the subject, or prohibited it, or permitted it, is immaterial, since the Imperial Parliament's later command is that it shall be "deemed" that there was "full power" to legislate in the past as described. And although with regard to the past it must be "deemed" that there was power even though there was not otherwise (see *Jenkyns on British Rule and Jurisdiction beyond the Seas*, at p. 280, last paragraph but two), nevertheless, on the principle now urged by the respondents, past Acts of Parliament supposed to be confirmed by sec. 5, as indicated in the passage in *Jenkyns* just referred to, may for similar reasons be regarded as void. But unless that result is to follow as to the past, it must be clear that in the future there is to *be* actual power, though apart from that section there would not have been, for the words are "Every colonial legislature shall have . . . full power" to legislate as described.

One very clear authority exists as to this, which the respondents have not attempted to explain. It is the case of *Fielding v.*

(1) 23 Ch. D., 1.

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Thomas (1). The Nova Scotia Parliament passed a law amending the Constitution of the Province in relation to the Constitution of the Legislature, but from the report, and from the print of the laws of Nova Scotia, dated 1900, the law appears to have been passed as an ordinary Act. It should be observed that sec. 88 in the *British North America Act* 1867 relating to Nova Scotia corresponded to sec. 106 of the Federal Constitution. Lord *Halsbury* L.C., speaking for a very eminent Board, said (2):—"By sec. 5 of the *Colonial Laws Validity Act* (28 & 29 Vict. c. 63) it" (the Legislature of the Province of Nova Scotia) "had at that time full power to make laws respecting its constitution, powers and procedure. It is difficult to see how this power was taken away from it" (that is, by the *British North America Act*), "and *the power seems sufficient for the purpose.*" Only two conditions are necessary. They are: (1) the law must, as to subject matter, answer the description, and (2) it must have been passed in "manner and form" as required by the law of the colony relating to the passing of laws. If no special provision as to the manner and form of passing a particular class of law exists, then the ordinary method may be followed; but if as to any given class of law a specific method is prescribed, it must be followed. For instance, if a certain majority is required, or if reservation for the King's assent is prescribed, such a condition is essential to a valid exercise of the power. An earlier instance is the invalidity of Act No. 10 of 1855-1856 of South Australia, for non-reservation. See the Duke of Newcastle's despatch of 23rd April 1862 to Governor Daly.

Now, as to sub-sec. 6 of sec. 6 of the *Industrial Arbitration Act*, it deals with the very subject matter mentioned in the first branch of sec. 5 of the *Colonial Laws Validity Act* 1865. The Supreme Court of Queensland is a Court which was established in 1861, by Act 25 Vict. No. 13 (7th August 1861). That Act recited the expediency of repealing secs. 15 and 16 of the Order in Council of 1859, and by sec. 1 it repealed the Acts which had constituted the Supreme Court of Moreton Bay, and all other laws, ordinances and regulations repugnant to the provisions of the Act of 1861, and established instead of the former Court a new Court called the Supreme

(1) (1896) A.C., 600.

(2) (1896) A.C., at p. 610.

Court of Queensland. The resident Judge of the Supreme Court of Moreton Bay was declared to be a Judge of the new Court, and he was to be the only Judge of the Court until the Legislature increased the number of Judges of the Court. His commission was directed by sec. 3 of the Act of 1861 to be cancelled on receipt of his commission as Judge of the new Court.

It is worthy of note that, according to the respondents' argument, the Act of 1861 violated the doctrine of *Hampson's Case* (1). The enactment to cancel the commission of the Judge of the Moreton Bay Court was made by the same Act as recited the expediency of repealing clause 15 of the Order in Council. We do not stop to consider the effect of that, if the respondents' argument be sound. We pass it by with the impression that the jurists of that day—only two years after the Order in Council was promulgated—had no suspicion of the doctrine now put forward, and the recitals in the preamble of the Act support that view.

The Supreme Court of Queensland having been thus established by the Queensland Legislature, its abolition and reconstitution, and the alteration of its Constitution, all fall within the express words of sec. 5 of the *Colonial Laws Validity Act*, describing the subject matter of "full power" of the legislature. The tenure of office is unquestionably part of that subject matter, and it only remains to be ascertained if any special "manner and form" of dealing with the subject matter is prescribed by Queensland law, so as to require a special heading or descriptive introduction. There is nothing of that nature to be found. True, the Constitution of 1867 repeats in secs. 15 and 16 what the *Supreme Court Act of* 1861 enacted in secs. 5 and 6. As to the validity of these sections construed as contended for by the respondents, something will be said presently. But there is no inhibition on the Legislature altering those provisions, and, if there were, it would, in our opinion, be overriden by the Imperial Act, sec. 5, though the contrary is necessarily the basis of the opposite opinion. No "manner and form" is indicated. It is suggested that there must be first a repeal of secs. 15 and 16 of the *Constitution Act of* 1867. If that be true of those

(1) 23 Ch. D., 1.

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sections, it must be true of other sections, however trivial, such as sec. 56 of that Act.

But there are more important considerations than sec. 56. Sec. 14 of the *Constitution Act of* 1867 provides that the appointment of all public offices, thereafter to be created shall be vested in the Governor in Council, with exceptions not material to our observations. That provision came into operation on 31st December 1867, immediately the old Order in Council ceased to exist. According to the respondents' argument, the Legislature, while that provision stands, is powerless to appoint by its own enactment any particular individual to any office. Nevertheless, when the Act 31 Vict. No. 23 came into operation on 31st December 1867, repealing the old *Supreme Court Constitution Amendment Act*, and created the new offices of Justices of the Supreme Court of Queensland, it assumed by sec. 8 to declare—incompetently, if the argument is right—that the commissions of the then present Judges of the Supreme Court should continue and remain in full force under that Act. It went on to repeat in secs. 9 and 10—superfluously, if the argument is right—the constitutional provisions as to commissions and salaries. By sec. 12 it proceeded to enact—quite invalidly, if the argument is sound—that the office of Judge should be avoided, and the commission should be suspended, and salary should cease, if a Judge performed the duties of any other office or place of profit within Queensland, with certain exceptions. So little did this appear an invalid provision, that in Mr. Justice Mein's case a Validity Act (52 Vict. No. 2) was thought necessary in 1888.

Again, if the argument of the respondents is sound, what can be said for the Act of 1873 (37 Vict. No. 5), the *Acting Judges Act*? That Act, according to the argument, is an open and flagrant breach of the Constitution; and one wonders how many titles rest on judgments incompetently given, and how many persons have been convicted *coram non judice*. Then the Act of 1892 (55 Vict. No. 37) provides, by sec. 12, that in certain cases a District Court Judge or other qualified person may be appointed to act temporarily as a Judge of the Supreme Court. An Acting Judge is a Judge of the Court (*Marais' Case* (1)). He is to get a reasonable salary, but

(1) (1902) A.C., 51.

both commission and salary are temporary. Another instance of supposed constitutional violation is the Act 56 Vict. No. 10, passed in 1892. It is what is known as the *Windeyer Act*, because at a juncture of extreme necessity the services of a Judge of the Supreme Court of New South Wales in a particular case were placed at the disposal of the Colony of Queensland.

These are a few instances which are conspicuous from a perusal of a small collection of Statutes directly bearing on the argument in this case, and consequently bound together and furnished to the Court for use on the appeal. How many more enactments there are open to the same criticism, we know not. But beyond that, how many such supposed violations of constitutional law—and consequently invalid enactments—have been and are acted on in other Australian States, and in other parts of His Majesty's Dominions? Reliance must certainly have been placed on the Imperial Act of 1865, entitled "An Act to remove doubts as to the validity of colonial laws." If a strict adherence to its literal terms is not sufficient compliance, then its title and its enactments are misleading. We cannot conceive it to be a trap for colonial legislatures, to the injury of their constituent communities, and we hold it is sufficient to sustain the enactment challenged in this Court.

The question here is one of "power" to do the thing at all, and not as to the "manner or form" of doing it. And the argument to support the suggestion that prior repeal is necessary rests, as we have said, on a doctrine of implied prohibition arising from the use of the word "Constitution." The suggestion in effect amounts to saying that a colonial legislature, by merely using the word "Constitution" in the title of an Act, may deprive itself of power to enact a different rule of conduct, while the Act so labelled stands. No such condition is found in sec. 5 of the Act of 1865, and no Court has any authority to insert it. We think that no legislature can, by merely using such a word, abdicate the power created for the benefit of the community by the Act of 1865. If in any Act it lawfully passes, and whether it be called a Constitution or not, it creates a law that requires in future some particular manner or form of legislation, that manner or form must be followed until the law requiring it is altered. But the mere enactment of a rule of conduct—

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not being a law as to its own conduct—while the legislature's power of reviewing the subject matter of the rule remains unimpaired, cannot affect the validity of such review, even though the first is labelled "Constitution" and the second is not. We are distinctly of opinion that sec. 5 of the Act of 1865 is sufficient warrant for the enactment challenged.

(*b*) *The Constitution Act of* 1867.—We have now to consider the second branch of the Attorney-General's argument, namely, the support which is given to the *Industrial Arbitration Act* by the power of legislation contained in sec. 2 of the Constitution of 1867 itself. That section, so far as material, is in these terms: "Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace welfare and good government of the Colony in all cases whatsoever." (As to the long recognized amplitude of these words, see the judgment of *Hanson* C.J. in *Dawes* v. *Quarrel* (1) and the judgment of *Chapman* J. in *Robinson* v. *Reynolds* (2).) Now, again, we observe that it is not denied that the Queensland Legislature could validly pass this Act but for the implied prohibition to contradict secs. 15 and 16 as long as they stand unrepealed. To make the position clearer for this branch of the case, the argument is that they are intended to secure the independence of the Judges by protecting them against all interference by the Legislature. With the greatest respect to those who maintain that view, it contains a basic error. Those sections represent an entirely different idea. They contain no syllable cutting down the power of Parliament, or in any way diminishing the unrestricted primary grant of power contained in sec. 2, which is the existing channel of communication of the "full power" mentioned in sec. 7 of the Imperial Act 18 & 19 Vict. c. 54. Before citing the authorities which lay down the proper rules of construction for such a case, a short statement of the origin and historic purpose of those sections ought, we think, to be convincing in itself, that the respondents' view of the effect of secs. 15 and 16 is erroneous.

At common law a Judge held his office at the pleasure of the Crown, except where, as in the case of the Chief Baron (4 Co.

(1) 0 S.A.L.R., 1, at pp. 18 *et seqq.* (2) Mac.N.Z.R., 562, at p. 574.

Inst., 117), his commission was otherwise expressed. Lord *Herschell* in *Dunn* v. *The Queen* (1) stated the rule and the reason for it; in *Gould* v. *Stuart* (2) the Privy Council restates the rule. The *Act of Settlement* altered the common law, and enacted that Judges' commissions should be during good behaviour. The qualification as to removal by the Crown on an address from both Houses was added. The object of all this was to protect the Judges, not from Parliament, but from the arbitrary and uncontrolled discretion of the Crown. The legal result was that the Crown could only interfere with a Judge either (1) for misbehaviour, or (2) if the House of Parliament desired it. This obviously did not decrease the control of Parliament (see *Anson's Law and Custom of the Constitution*, Part 2, The Crown (2nd ed.), at p. 214, ll. 5-6).

When Representative Government was granted to the Australian Colonies, the same system was introduced. (See Act 22 Geo. III. c. 75 (1781) explained by Act 54 Geo. III. c. 61.) In the Letters Patent of 1900 constituting the office of Governor (another illustration of the word "constitute") provision is made by clause VI. that "the Governor may constitute and appoint, in Our name and on Our behalf, all such Judges," &c., "as may be lawfully constituted and appointed by Us." In clause VIII. there is a delegation of the Crown's power of removal from office of any person exercising any office. By the Royal Instructions of the same year, it is provided by clause IX. that "all commissions granted by the Governor to any persons to be Judges," &c.," shall, *unless otherwise provided by law*, be granted during pleasure only." That instruction follows earlier precedent; as, for instance, in the Instructions of 1892 to the Governors of Victoria and South Australia, clause IX. in each case—which again followed still earlier precedent, as, for instance, clause XIV. in the Instructions of 29th April 1879 to the Governor of New South Wales. Consequently, unless the law enacted in secs. 15 and 16 were in existence somewhere, the appointment of a Supreme Court Judge would be at the pleasure of the Crown. Those sections, however, fix the tenure, the first by its self-executing provision of continuing the commission until misbehaviour appears, and the second by the

(1) (1896) 1 Q.B., 116, at pp. 119-120. (2) (1896) A.C., 575, at p. 577.

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qualification of that provision in allowing removal by the Crown on parliamentary address.

Since sec. 16 allows the united action of the Crown acting in its executive capacity, at the request of the two Houses each acting on an ordinary majority by the comparatively informal method of an address, founded on a single resolution in each House—leaving the tenure, as *Anson* says, "as regards Parliament *at pleasure*"; it is a strange construction of the sections which inserts into them an implied prohibition against the Crown acting in its legislative capacity, upon the advice of the two Houses, moving in the more solemn and deliberate and authoritative way of legislation, which requires three readings and consideration in Committees, exercising the power of doing the self-same thing. We think that would be attributing absurdity, in the true sense, to the Legislature. How does such a prohibition protect the Judges, if the same end may be attained more quickly and easily by the very same authorities? Parliament may desire not simply to remove a Judge, but to make special provision for him at the same time, and yet leave the general provision standing in the *Constitution Act*. Why should this be considered forbidden?

But apart from the special purpose and history of secs. 15, 16 and 17, what is there in the character of the *Constitution Act of* 1867 which would in any case raise such an implied prohibition as is relied on. It is said that the Act is a "fundamental" or "organic" law. But it contains no such negative provision as that in the Federal Constitution. We have already adverted to the confusion which arises from thinking all so-called Constitutions are of the same character. Learned counsel for the respondents relied greatly on *Cooper's Case* (1), as did the Supreme Court. The observations quoted from that case founded themselves ultimately on the Order in Council of June 1859. We think it desirable in the circumstances, even at the expenditure of a little time, to review the matter further.

It was that Order in Council that started Queensland on its way as a separate self-governing community. As it recites, it was made under the powers of the Act 18 & 19 Vict. c. 54. Sec. 7 of the Act, after authorizing the Order in Council added, "and full power shall

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

be given in and by such Letters Patent or Order in Council to the Legislature of the said Colony to make further provision in that behalf." Sec. 7 and, particularly, its concluding words are the foundation of the Order in Council; and if we are to go back further than the present legislation at all, we must start with sec. 7. That section does not use the word "Constitution" at all. It gives power to the Sovereign by Letters Patent to erect a separate colony, and thereby or by Order in Council to "make provision for the government of any such colony and for the establishment of a legislature therein." Under that power rules of government, including the tenure of the Judges, were set out in the Order in Council. They all came under the word "provision." Then come the words above quoted as to "full power" being given to the Legislature "to make further provision in that behalf," that is, to make whatever provision might be necessary in the future. Observe the words "full power," and that they are in relation to the same subject matter as that within the original competency of the Sovereign.

Accordingly, the Order in Council, besides providing (sec. 2) that the Legislature should have power "to make laws for the peace welfare and good government of the Colony in all cases whatsoever," proceeded, in obedience to the Act, to provide by clause 22 that "The Legislature of the Colony of Queensland shall have full power and authority from time to time to make laws altering or repealing all or any of the provisions of this Order in Council *in the same manner as any other laws for the good government of the Colony*"—with certain exceptions mentioned, as to manner and form. Owing to doubts on the point, namely, whether sec. 7 of the Act was followed sufficiently in regard to the resemblance of the Queensland Legislature to that of New South Wales, the doubts were set at rest by Act 24 & 25 Vict. c. 44. But for purposes of construction we still have to turn to the original authority, sec. 7 of Act 18 & 19 Vict. c. 54.

It becomes evident now, on full comparison of the Act and the Order in Council, that clause 22 was inserted for the very purpose of making it incontestably clear that, as we have said, the Order in Council was only to start the young colony on its way, and equip it with the essentials of corporate and independent existence as a

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member of the Imperial family; and that its future regulations, with the express exceptions set out in clause 22, were left to its own discretion and were not to be considered as Imperial regulations. Further, in order to prevent possible misconception, any alteration or repeal of the provisions of the Order in Council could —apart from express exceptions—be made "in the same manner as any other laws for the good government of the Colony," that is, any other laws within clause 2.

It is difficult now for us to see how any doubt could ever have existed that the Order in Council, so far from requiring a label marked "Constitutional amendment," studiously expressed the very opposite, apart from express exceptions, the mention of which strengthens the affirmative words—because, since a specific manner of passing the excepted classes of laws is stated, it is clear no other condition is to be implied. To borrow Lord *Dunedin's* words in *Whiteman* v. *Sadler* (1), "it seems to" us "that express enactment shuts the door to further implication. *Expressio unius est exclusio alterius.*" The power of repealing the provisions of the Order in Council has in fact been exercised by Act 31 Vict. No. 39. By that Act, passed on 28th December 1867, and entitled "An Act to repeal certain enactments which have been consolidated in twenty-nine several Acts of the present session," the Acts consolidated by the twenty-nine Acts were repealed as from and after 30th December 1867 (sec. 2). By sec. 3 it was enacted that the Order in Council should continue in force till 30th December 1867, and thereafter should be repealed except so far as the Order in Council is excepted. Further repeal was provided for, and several cautionary provisions were made. The Act itself commenced at the same time as the twenty-nine Acts.

Now, the first observation which we have to make is that everybody agrees that that repeal of the provisions of the Order in Council, or such as remained, was valid and effectual. But the singular fact is that the Act which worked that repeal was an ordinary Act of legislation, not professing to be an amendment of the "Constitution," but professing in sec. 3, which deals with the Order in Council, to be made "in the same manner as any other laws

(1) (1910) A.C., 514, at p. 527.

for the good government of the Colony"; and by virtue of this power of legislation it enacted an express repeal of the Order in Council. Does English law make any distinction between an express repeal and an implied repeal? We think not. Given the competent authority, given the absence of any stated requirements as to special method of repeal, we know of no doctrine that upholds a repeal if express, and condemns it if necessarily implied. The effect is the same. The effect of the repealing Act must therefore depend on what it *does*, and not on the label it affixes to itself. The Order in Council put certain limitations on the power of legislation, to which extent the general power contained in par. 2 must be considered as so much diminished. But secs. 15 and 16 were not expressed to be limitations on that legislative power. They were legislative declarations of law, limiting the power of the Crown, and subject to alteration by legislation under sec. 2, which carried out in part the mandate of sec. 7 of the Act 18 & 19 Vict. c. 54. Such an alteration is not a contravention of the Constitution: it is adherence to it, because effected under its authority. Denial of that authority is contravention.

When in 1867 the new *Constitution Act* was passed to take effect on 31st December 1867, the same *primâ facie* unlimited power of legislation was preserved by sec. 2. Specific limitations were expressed, as, for instance, in the proviso to that section, and in secs. 9, 10 and 13. Secs. 15, 16 and 17 relating to the Judges of the Supreme Court are inserted. But, again, there is no limitation on the power of the Legislature to alter the law so declared. On the other hand, in the Act of 1867 there is no counterpart of clause 22 of the Order in Council. The reason is not far to seek. As pointed out in the despatch of Lord John Russell to Governor MacDonnell of South Australia, dated 4th May 1855, such a provision was unnecessary. In sec. 34 of the South Australia *Constitution Act* (No. 2 of 1855-1856), passed by the local Parliament, is contained a provision that the Parliament should have power of repeal, alteration and variation, &c. The Secretary of State pointed out that the provision was unnecessary, for, if a Bill were passed by the Legislature in the exercise of its legitimate functions requiring only the assent of the Crown to give it force, this power would have been

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implied. The acknowledged difference between an Imperial Act and a colonial Act in the making of a "Constitution" is worthy of notice in view of certain arguments addressed to us. Besides, sec. 5 of the *Colonial Laws Validity Act* was, as the Legislature well knew, in existence and only two years old, and this with the wide words of sec. 2 formed a sufficiently elastic constitutional means of amendment. Nowhere do we find in any unitary form of government a provision that the "constitutional law" must always first be amended. It may have to be amended before a power is exerted which in the existing state of the law is incapable of being exerted. But it is contrary to the settled rules of construing Constitutional Acts to introduce implied prohibitions on the legislature to cut down a clear affirmative grant.

In 1867, when the new *Constitution Act* was passed, the position was this :—Sec. 2 of the Order in Council gave power to the named Legislature *to make laws in all cases whatsoever—limited only by express restrictions. Sec. 5 of the Colonial Laws Validity Act was also in force, and its effect we have stated.* Now, if secs. 15, 16 and 17 of the *Constitution Act of* 1867 are to be construed as cutting down the power of the Legislature to legislate on the subject of the Judicature, they are *in conflict with the Imperial Act*, which expressly gives the power, and by sec. 2 of that Act those inconsistent local provisions are to that extent void and inoperative as being repugnant. "Full power" in sec. 5 means what it says. If secs. 15 and 16 and 17 are not to be construed as repugnant to sec. 5, they of course offer no obstacle to the legislation impeached in this case. In the case of *R.* v. *Burah* (1) Lord *Selborne*, for the Privy Council, said that in determining whether the prescribed limits of a colonial legislature have been exceeded, that duty must be performed "by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any

(1) 3 App. Cas., 889, at pp. 904-905.

Court of justice to inquire further, or to enlarge constructively those conditions and restrictions." The maxim *Expressum facit cessare tacitum* was similarly applied in *Webb* v. *Outtrim* (1).

How can the Act here be condemned without enlarging constructively those conditions and restrictions? Lord Selborne, when Sir Roundell Palmer, and Sir Robert Collier expressed their view very clearly on the precise question raised here of whether an Act in fact altering the Constitution must be passed, " with that object " : their opinion was expressed very emphatically in the negative. The opinion so given is that of most eminent jurists, speaking with the responsibility of an English Attorney-General and Solicitor-General advising the Crown in relation to the colonies. We have referred to the Act No. 10 of 1855-1856, passed by the South Australian Parliament. Sir Roundell Palmer and Sir Robert Collier were asked whether the Act was valid, as it was not passed " with the object " of altering the Constitution of the Legislature, but was said to have altered that Constitution inadvertently. The reply of the Law Officers laid down the principle as follows :—" If the colonial Registration Act was *ultra vires* of the Legislature of South Australia, it can only be so on the ground that it altered the electoral law contained in the Constitutional Act, No. 2 of 1855. Assuming this to have been its effect, we cannot accede to the argument, which seems to have found acceptance with two South Australian Judges, that it was not passed ' with the object ' of altering the Constitution of the Legislature. It must be presumed that a legislative body intends that which is the necessary effect of its enactments ; the *object*, the *purpose* and the *intention* of the enactment, is the same ; it need not be expressed in any recital or preamble ; and it is not (as we conceive) competent for any Court judicially to ascribe any part of the legal operation of a Statute to inadvertence." *Campbell's Case* (2) is a decision where the same great lawyer, when Lord Chancellor, in a judgment which was concurred in by *James* and *Mellish* L.JJ., stated and applied rules of interpretation that find their analogy in the circumstances of the present case. In our opinion therefore—quite apart from the paramount effect of

(1) (1907) A.C., at p. 89 ; 4 C.L.R., at p. 359.
(2) L.R. 9 Ch., at p. 21.

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the *Colonial Laws Validity Act*—there was ample power also under sec. 2 of the *Constitution Act* of 1867 to do what has been done.

As we have said, *Cooper's Case* (1) has been considered an obstacle to the appellant. Now, as to that case all the observations made as to the proper mode of effecting a change in the law were *obiter*. The Act in hand was unanimously held to be no alteration of the constitutional provisions, and whatever might be the proper method of proceeding in case there were such alterations, that did not affect the decision. Again, there is a clear differentiation between that case and the present, because, even assuming all those *obiter* observations to be sound law, they were in relation to a subject matter—*taxation*—which is not dealt with *eo nomine* by sec. 5 of the *Colonial Laws Validity Act*. That is a subject dependent, so far as that section is concerned, on the second branch, namely, the powers of the Legislature, and if the authority of that section were invoked to support a taxing Act, it would have to be shown that the necessary power of the Legislature had been first acquired. But, further, having considered the subject with all the care and responsibility that a direct decision requires, and sitting with the whole strength of this Court, and recognizing that our duty to ascertain the law with accuracy is higher than the convenience of following *dicta*, however important, we have no hesitation in saying that if the words there used are to be understood in the unlimited sense in which they are now urged, they go beyond the law. And lastly, the judgment of the learned Chief Justice in *Cooper's Case*, assented to by *Isaacs* J., contains a passage which, if it can be sustained and is properly applied, is fatal to the respondents' case. On p. 1314 it is said with reference to the present *Constitution Act of* 1867 having re-enacted the powers in the Order in Council: "If, for instance, they" (that is, the Legislature) "had purported to limit these powers, the original powers would still have continued, and might have been exercised." If that doctrine be applied to sec. 5 of the *Colonial Laws Validity Act* 1865, how much stronger is the position that, whatever the colonial Legislature said as to limiting its powers in 1867, the statutory powers conferred by the paramount

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

authority in 1865 still remain. We think that the stated doctrine as applied to the Order in Council is not sound, but must be true as applied to the Act.

Our opinion is that the enactment is valid.

4. *The Commission.*—The information in par. 6 states that on 12th October 1917 an Executive minute was approved by the Governor that "*pursuant to the provisions of the Industrial Arbitration Act*" the appellant, styled "the President of the Court of Industrial Arbitration," should be appointed by commission a Judge of the Supreme Court at £2,000 a year. It goes on to say that "*in pursuance of the said Executive minute a commission was issued . . . on the said 12th October* 1917" &c. The commission is set out. It shows on the face of it that it issued under the power of the Act and in pursuance of the Governor's direction, and then follow the words of appointment, namely, "appoint you the said Thomas William McCawley, the President of Our Court of Industrial Arbitration, forthwith to be a Judge of Our Supreme Court of Queensland: To have, hold, exercise and enjoy the said office of Judge of Our Supreme Court of Queensland during good behaviour together" &c. We refer specially to the words "appoint . . . to be a Judge of Our Supreme Court of Queensland" and "during good behaviour," because they are the very expressions used in the Act itself. It is said that the appointment is void because it purports to confer a life estate. In our opinion it purports to confer whatever its words mean when read by the light of the Act it recites. If in that Act the tenure is a life tenure, the commission so operates; if by that Act the tenure is co-terminous with the presidency, the commission should be so read. There are two legal reasons for so reading it. The first is a common law principle. *James* L.J. said in *In re Florence Land and Public Works Co.* (1): "It is a cardinal rule of construction that all documents are to be construed *ut res valeat magis quam pereat.*" So also said Lord *Brougham* L.C. in *Langston* v. *Langston* (2); so also *Martin* B. in *R.* v. *Saddlers' Co.* (3). In *Richards* v. *Attorney-General of Jamaica* (4) the Privy Council, dealing with a statutory rule, said: "These words, no doubt, are

(1) 10 Ch. D., 530, at p. 544.
(2) 2 Cl. & F., 194, at p. 243.
(3) 3 E. & E., 72, at p. 81.
(4) 6 Moo. P.C.C., 381, at p. 398.

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very large, but as they are made under the power of the Act, and to provide for cases mentioned in the Act, we must look to the Act itself, in order to construe them." The other legal reason is that the two material expressions operating in the commission to grant the office are those we have quoted. They are the very expressions in the Act itself. Now, by sec. 12A of the Queensland *Acts Shortening Act of* 1867 (a section inserted by amendment in 1903) it is provided that "where any Act whenever passed confers power to make, grant, or issue any instrument—that is to say, any . . . commission," &c.—"expressions used in the instrument shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power." No one doubts that the statutory power to appoint includes a power to appoint in the recognized way by commission, and so reading the commission by the light of the Act, either with the aid of the common law principle or the statutory direction, the result is that the commission gives a tenure as the Statute requires. It would be different if its language were quite incompatible with that view, or were so strongly worded that that reading would not be reasonable. It is quite easy to see how dangerous it would have been to try to word a commission so as to meet all the possibilities of the Act as they presented themselves to the mind of the person framing the commission. Fatal error might easily arise.

On the whole, we think that the appeal should be allowed.

HIGGINS J. The appellant holds a commission from the King, dated 12th October 1917, purporting to appoint him "to be a Judge of Our Supreme Court of Queensland" and to hold the office "during good behaviour"; and it has been held by the Full Court of Queensland that the appointment is invalid. The ground given for the decision is that sec. 6, sub-sec. 6, of the *Industrial Arbitration Act of* 1916 (I shall call it "the Industrial Act"), under which the commission was issued, is *ultra vires* of the Queensland Parliament; because (it is said) that sub-section confines the term of office to the period during which the appellant holds the office of President of the Industrial Court, and under the *Constitution Act of* 1867, sec. 15, the commissions of all Supreme Court Judges must "continue

and remain in full force during their good behaviour." In other words, the Constitution prescribes that every Supreme Court Judge shall have a life estate in his office conditional on good behaviour; and it is contended that sec. 6 of the Industrial Act provides that the tenure shall not exceed the seven years of office as President of the Industrial Court.

I concur with the learned Judges of the Full Court in their finding that the appellant was duly appointed, as a barrister of not less than five years' "standing," to the office of President of the Industrial Court.

Looking, now, at the words of the commission, they purport to confer a tenure "during good behaviour"—that is to say, a tenure for life conditional on good behaviour (*Co. Lit.* 42a). There are certainly no words in the commission itself limiting the tenure to the period of presidency of the Industrial Court. If the appellant were appointed *simpliciter* to be a Supreme Court Judge, secs. 15-17 of the Constitution would ordinarily apply to him, would fit into his appointment so as to give him a tenure during good behaviour, but with power for the King to remove him upon the address of both Houses; and the salary of £2,000 per annum settled on him would be payable to him during all the period of the commission. But it is said that sec. 6 of the Industrial Act does not authorize the issue of a commission for life; and, unless the contrary intention appears, expressions used in the commission are to have the same meaning as in sec. 6 (Queensland *Acts Shortening Act of* 1867, sec. 12A). In my opinion, if sec. 6 does not authorize a commission for life (during good behaviour), the contrary intention is expressed in the commission; for it is in favour of McCawley by name "during good behaviour," without any qualification. But even assuming that the commission does not show a contrary intention, and assuming that secs. 15-17 of the *Constitution Act* are parts of a fundamental law which overrides ordinary legislation it is hard to see why any provision for an inferior tenure in the Industrial Act would not be overridden by the provisions of the *Constitution Act*. But, in any case, what is the true meaning of sec. 6? It provides (sub-sec. 6): "Notwithstanding the provisions of any Act limiting the number of Judges of the Supreme Court, the

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Governor in Council may appoint the President or any Judge of the" Industrial "Court to be a Judge of the Supreme Court." If the sub-section had ended there, the life tenure would attach to the President when appointed to the Supreme Court. Sec. 15 of the *Constitution Act* would clearly apply to him. Sec. 6 does not purport to alter sec. 15 of the *Constitution Act*, and *primâ facie* is to be so read as to be consistent with it. Is there anything in the subsequent words to show that this was not the intention? Now, the subsequent words provide that the President, if so appointed, may exercise any jurisdiction of the Supreme Court, shall have all the rights, &c., of a Judge of the Supreme Court "in addition to the rights," &c., "conferred by this Act," shall hold office during good behaviour, shall be paid such salary as the Governor in Council may direct, which shall not be diminished or increased "during his term of office as a Judge of the Supreme Court" (not "during his term of office as President"). It is said that these words show an intention to confine the tenure to the term that the appellant holds both offices in association. I cannot find any such intention. It is true that it is "the President" that is to be appointed; but there is nothing to compel us to treat these words as meaning the President during his term of presidency. To say the least, they may mean equally well the person who at the time of appointment holds the office of President—as a *persona designata* by his office. The very nature of the case, indeed, favours this meaning; for the performance of the duties of a Judge of the Supreme Court is not helped, but hindered, by the office of President. The idea may well have been to induce competent practitioners to accept the office of President, and to make it easier for the Government not to renew the office in the case of a man, competent as a lawyer, but found to be unsuited for the peculiar work of the Industrial Court. Moreover, the appointee is expressly to hold office "during good behaviour"—not during his office as President; and these words, if not further qualified, confer a life tenure. The words are not "during his presidency." It is true that in the *Acting Judges Act* (37 Vict. No. 5) the words "during good behaviour" are used in connection with the appointment of a temporary Judge. But the temporary Judges (sec. 2) are to hold office "for the time specified

in the commission"; and the time specified sufficiently negatives the implication of a life tenure. "If a man grants a rent (and goes no farther), these general words shall create an estate for life, but if the habendum be for years, it shall qualify the general words" (*Altham's Case* (1)).

Then, taking the provision that the President is to have the rights, &c., of a Supreme Court Judge "in addition to the rights," &c., "conferred by this Act" (the Industrial Act),—if the rights conferred by the Industrial Act are only rights for seven years, only seven years' Industrial Court rights are to be added to the Supreme Court rights. There is nothing inconsistent in a grant of a life estate in Blackacre "in addition to" a grant of a term of seven years in Whiteacre. The phrase "in addition to the rights," &c., "conferred by this Act" was probably inserted in order to meet the requirements of sec. 12 of the Act 31 Vict. No. 23, under which the office of Judge might, but for the phrase, be treated as avoided forthwith on his performance of any of the duties of the Industrial Court, unless the additional duties were clearly cast on him "by law." Where, then, is there anything to negative the life tenure which, according to the *Constitution Act*, must attach to the office of every Judge of the Supreme Court? The draughtsman of the Act has taken the trouble to set out all the incidents of a judgeship of the Supreme Court—through over-anxiety, probably, lest the man who is appointed during his presidency should be treated as being in any way inferior to the other Judges. He is to have all the rights, privileges, &c., of such a Judge; he is to hold office during good behaviour; he is to get a salary "not less" than the other Judges; and he is to have that salary secured to him. But the emphatic restatement of the incidents of the office of Judge cannot be treated as in any way cutting down the tenure.

Even if these considerations were not sufficient to show that the life tenure *primâ facie* intended by the opening words of sub-sec. 6 has not been negatived, we may surely act on the presumption that the Legislature would not cut down the usual life tenure of Supreme Court Judges without express words. The opening words of sub-sec. 6 expressly exclude the operation of the provisions of the Act

(1) 8 Rep. 148a, at p. 154b.

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3 Edw. VII. No. 9, which prescribe five Judges as the maximum (sec. 3); and as they do not exclude the operation of the provisions of sec. 15 of the *Constitution Act* (or even the similar provisions of the Act 31 Vict. No. 23), the principle *Expressio unius exclusio alterius* applies, and a very strong presumption arises that these provisions were not to be excluded. It is hardly conceivable that the Parliament would not have expressly excluded the operation of sec. 15 if it had meant to exclude it.

Moreover, if (as the relators contend) sec. 15 is a fundamental law which cannot be affected by ordinary Acts not specifically repealing or altering it, it would seem to be our duty to construe sub-sec. 6, if possible, so as to keep it within the powers of the fundamental law—*ut res magis valeat quam pereat* (*Macleod* v. *Attorney-General for New South Wales* (1); *D'Emden* v. *Pedder* (2)).

If this construction of sec. 6 of the Industrial Act be accepted, the other questions which were argued at great length need not be decided. But I shall now assume that this construction is not accepted—assume that sec. 6 intends a tenure limited to the term of the appellant's office as President of the Industrial Court. The question then arises, can the Queensland Parliament grant such a tenure in the face of the provisions of sec. 15 of the *Constitution Act*.

Now, sec. 15 does not purport on its face to be a limitation of the powers of the Parliament, or a restraint on the action of the Parliament. It prescribes that the commissions of the present Judges and of all future Judges "shall . . . continue and remain in full force during their good behaviour." If the Governor in Council filled a vacancy on the Supreme Court Bench by issuing a commission for three years, this section would seem to override the commission and make the tenure a tenure "during good behaviour": for the commission is extended of "present Judges" (if any) commissioned for years or at will. But, under sec. 2 of the *Constitution Act*, the Parliament has power, within the Colony of Queensland, to make laws for the peace, order and good government of the Colony "in all cases whatsoever"; there is no exception from this power as to sec. 15, or as to any section of the *Constitution Act* except as to the constitution of the Legislative Council (sec. 9); and it would seem, therefore,

(1) (1891) A.C., 455. (2) 1 C.L.R., 91, at p. 119.

that sec. 15 can be altered or excluded from operation by an ordinary Act of the Parliament. There is no such provision in this *Constitution Act*, as there is in most Constitutions, excepting from the ordinary powers of legislation any of the provisions of the Constitution (unless sec. 9 makes an exception). It follows that if sec. 6 of the Industrial Act is to be read as meaning that the President of the Industrial Court, if appointed to the Supreme Court, is to have a tenure limited to the term of his presidency, that section is valid.

For this purpose, we may ignore the provisions of the Order in Council of 6th June 1859, made under the British Act, 18 & 19 Vict. c. 54, conferring the first Constitution on Queensland. The clauses of that Order which related to the commissions, removal and salaries of the Judges (clauses 15 and 16) have been repealed as from the moment that the *Constitution Act* came into operation (31st December 1867), by the Queensland Act, 31 Vict. No. 39 (sec. 3); and the *Constitution Act* replaces these clauses, and others, in its own body. The *Constitution Act* purports in its recitals to be a consolidation of the laws relating to the Constitution of the Colony, and to be made under the authority of clause 22 of the Order in Council, which enabled the Parliament "to make laws altering or repealing all or any of the provisions of this Order in Council in the same manner as any other laws for the good government of the Colony." The validity of the *Constitution Act* is not contested; but it is an ordinary Act in the sense that there is nothing to prevent the Parliament from repealing (under sec. 2) secs. 15 and 16, or from excluding their operation for a particular case. There is no magic in the words "Constitution Act"; what the Parliament can do is a matter of construction of the relevant Acts in each case. Indeed, the *Constitution Act* appears to be not an organic law in the strict sense, but the creature of the only organic law—the Order in Council made under 18 & 19 Vict. c. 54. The Order in Council is, as it were, the electric wire which carried the British power to make laws; and the *Constitution Act* is merely one of the laws made under that power. No one denies Mr. *Starke's* proposition that the power which you propose to exercise must be in existence before you can exercise it. But it applies to provisions conferring power—

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facultative provisions; it does not apply to provisions of substantive law such as sec. 15 of the *Constitution Act*, whereby commissions, present and future, are made to "continue and remain in full force during good behaviour." Such provisions of substantive law come under sec. 2 of the *Constitution Act*, which enables the Queensland Parliament to "make laws for the peace welfare and good government of the Colony *in all cases whatsoever*." I cannot see my way to accept the view that any law made under the Order in Council becomes the Order in Council—even if the law be called a Constitution. If Parliament, in passing the *Constitution Act*, had desired to except sec. 15 from the general power to make laws contained in sec. 2, it could easily have said so.

These considerations lead me to the consideration of *Cooper's Case* (1), and of the *dicta* in that case of my learned colleagues (the *dicta* were admittedly unnecessary for the decision) to the effect that so long as a Constitution remains unaltered any enactment inconsistent with its provisions is invalid. When these *dicta* are studied, it becomes apparent that they apply mainly to the provisions of clause 22 of the Order in Council. Under that clause the Parliament got power to make laws "altering or repealing" any of the provisions of the Order in Council; and the provisions of the Order must remain binding until they have been "altered or repealed." So, in the analogous case of a power of revocation and new appointment, the exercise of the power of revocation is a condition precedent to the exercise of the power of new appointment (*Pomfret* v. *Perring* (2); per *Farwell* L.J. in *In re Thursby's Settlement* (3)). But though this is the rule, it is always open (as the latter case establishes) to show an intention to revoke implied in the appointment—as, for instance, by showing that the appointment in question referred to property which could only pass by the exercise of both powers. It is all a question of construction, of expressed or implied intention. However, in this *Constitution Act* of Queensland, there are no such words used as "alter or repeal" in relation to its provisions. The words are much wider (sec. 2)—"to make laws for the peace welfare and good government of the

(1) 4 C.L.R., 1304.
(2) 5 D. M. & G., 775.
(3) (1910) 2 Ch., 181.

Colony *in all cases whatsoever*"; and these words do not exclude secs. 15 and 16. It is quite true, as the Chief Justice stated at p. 1314, that if the Parliament had purported to limit the powers conferred by sec. 22 of the Order in Council, the original powers so conferred would still have continued; but that follows from the fact that, in the repeal of the provisions of the Order in Council, clause 22 was expressly excepted from the repeal. There is nothing now binding the Queensland Parliament to a life tenure for the Judges except sec. 15 of the *Constitution Act* (and sec. 9 of the Act 31 Vict. No. 23); and any more recent Act of the Parliament creating an exception from the rule of sec. 15 must, in my opinion, prevail. I am therefore of opinion that the Parliament could, if it thought fit, grant a tenure inferior to a life tenure, "notwithstanding the provisions of sec. 15 of the *Constitution Act*"; as well as increase the number of Judges from five, "notwithstanding the provisions of any Act limiting the number of Judges of the Supreme Court."

If it is necessary to express an opinion as to the effect of the *Colonial Laws Validity Act* (28 & 29 Vict. c. 63), my view is that sec. 6 is thereby made valid, whatever its meaning, and even if it would be invalid but for that Act (so far as the powers flowing from the British Parliament are concerned). The British Act of 28 & 29 Vict. provides (sec. 5) that every colonial legislature shall have and "be deemed at all times to have had" power to establish Courts and to abolish and reconstitute the same and to alter the constitution thereof. This Act, passed in 1865, validates the creation of the Supreme Court of Queensland in 1861, if the creation was not otherwise valid: and it provides that the Queensland Parliament may alter the constitution of *that Court*; and I regard the tenure of the Judges as part of the constitution of the Court. Nor is the Industrial Act, sec. 6, "repugnant," under sec. 2 of the British Act, to the provisions of any (existing) Act of Parliament extending to the Colony, or to any (existing) order or regulation made under any such Act of Parliament or having in the Colony the force or effect of such Act. Assuming that sec. 6 would be repugnant to the Order in Council (sec. 15), it has, under sec. 2, merely to be read subject to the Order in Council, and it is only void to the extent of the repugnancy. But sec. 15 of the Order in Council has, as I

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have stated, been repealed by the Queensland Act 31 Vict. No. 39, and it no longer stands in the way of any Act of the Queensland Parliament on the subject of tenure of Judges.

In my opinion, the appeal should be allowed.

GAVAN DUFFY J. Many interesting and important questions have been discussed in this case, but in my opinion the point at issue may be determined by ascertaining the meaning of sec. 6 of the *Industrial Arbitration Act of* 1916 and of the commission which the Queensland Executive has purported to issue to the appellant under its provisions. The first paragraph of the section runs thus: "Notwithstanding the provisions of any Act limiting the number of Judges of the Supreme Court, the Governor in Council may appoint the President or any Judge of the Court to be a Judge of the Supreme Court." It is clear that these words do not merely render the President or a Judge of the Court eligible for an appointment as a Judge of the Supreme Court, but enable him to be so appointed notwithstanding sec. 3 of Edw. VII. No. 9, which limits the number of the Judges of the Supreme Court to five; the question for our consideration is whether the President or Judge, when so appointed, has a life tenure or not. If the words cited stood alone, I think we should be compelled to answer this question in the affirmative, because sec. 9 of 31 Vict. No. 23 and sec. 15 of 31 Vict. No. 38 expressly provide that the commissions of Supreme Court Judges shall remain in full force during their good behaviour. But they do not stand alone, the second paragraph proceeds as follows: "The President or any Judge of the Court, if so appointed as aforesaid, may exercise and sit in any jurisdiction of the Supreme Court, and shall have in all respects and to all intents and purposes the rights, privileges, powers, and jurisdiction of a Judge of the Supreme Court in addition to the rights, privileges, powers, and jurisdiction conferred by this Act, and shall hold office as a Judge of the said Supreme Court during good behaviour, and be paid such salary and allowances as the Governor in Council may direct, which shall not be diminished or increased during his term of office as a Judge of the Supreme Court or be less than the salary and allowances

of a Puisne Judge of the Supreme Court; and upon such direction the said payments shall become a charge upon the Consolidated Revenue."

It will be observed that it is the President or Judge of the Court who is to be appointed in the first paragraph, and it is the President or Judge who is to exercise the jurisdiction and to enjoy the rights, privileges, and powers of a Judge of the Supreme Court conferred by the second paragraph, and that the rights, privileges, powers, and jurisdiction so conferred are to be "in addition to the rights, privileges, powers, and jurisdiction conferred by this Act." The words of these paragraphs when taken together seem apt to confer on the appointee the rights, privileges, powers, and jurisdiction of a Supreme Court Judge to be exercised during his tenure of office as an Industrial Judge and as complementary to his rights, privileges, powers, and jurisdiction as such Industrial Judge and not otherwise. The second paragraph proceeds to enact that the appointee shall hold office as a Judge of the said Supreme Court during good behaviour, and it is urged that these words plainly indicate a life tenure. If the section provided that the individual appointed a Judge of the Supreme Court should hold his office during good behaviour there would be much force in this argument, but it provides that the President or any Judge of the Court of Industrial Arbitration, if so appointed, shall hold his office as a Judge of the Supreme Court during good behaviour. And these words also are apt to confer on the President or Judge of the Court of Industrial Arbitration a tenure of the office of Judge of the Supreme Court so long, and so long only, as he remains the President or a Judge of the Court of Industrial Arbitration. The words "during good behaviour" are used not to create a tenure or define its extent, but to attach a condition to the prescribed tenure. They may properly be used to impose a condition with respect to any tenure, and they have been so used in various Acts of Parliament when it was desired to impose a condition on a tenure less than a life tenure. For instance, the Queensland Statute 37 Vict. No. 5, by sec. 1, enables the Governor in Council to appoint a person qualified to be a Judge of the Supreme Court to act temporarily in place of a Judge absent on leave, and by sec. 2 provides that every person so appointed

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shall hold his commission during good behaviour; and the Commonwealth Parliament in sec. 12 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904 enacts that the President of the Commonwealth Court of Conciliation and Arbitration shall be entitled to hold office during good behaviour for seven years. But the matter does not rest here: when we examine the language of the second paragraph of sec. 6 we find that part of it is unnecessary if the first paragraph authorizes an appointment of what I may call an ordinary Judge of the Supreme Court, and that the rest is inconsistent with such a construction of that paragraph. If par. 1 of sec. 6 contemplates the appointment of such a Judge, why is it necessary to provide that the appointee "may exercise and sit in any jurisdiction of the Supreme Court, and shall have in all respects and to all intents and purposes the rights, privileges, powers, and jurisdiction of a Judge of the Supreme Court," and why is it necessary to provide that he shall hold office as a Judge of the said Supreme Court during good behaviour, when that is already provided by sec. 9 of 31 Vict. No. 23 and sec. 15 of 31 Vict. No. 38, and why provide that he shall be paid such salary and allowances as the Governor in Council may direct, which shall not be diminished or increased during his term of office as a Judge of the Supreme Court or be less than the salary and allowances of a Puisne Judge of the Supreme Court, when sec. 3 of 38 Vict. No. 3 provides that the salary of a Judge of the Supreme Court shall be at the rate of £2,000 per annum, and sec. 10 of 31 Vict. No. 23 and sec. 17 of 31 Vict. No. 38 provide that his salary shall in all time coming be paid and payable so long as his commission shall continue or remain in force? It is said that we should, if possible, so interpret sec. 6 as to give it validity, and that inasmuch as sec. 15 of 31 Vict. No. 38 provides that Supreme Court Judges shall have a life tenure, we should hold that sec. 6 confers such a tenure. This argument is based on the hypothesis that sec. 6 is invalid if inconsistent with sec. 15 of 31 Vict. No. 38, an hypothesis which I am not at present disposed to accept. It is further said that Parliament would have expressly mentioned sec. 15 of 31 Vict. No. 38 if it had intended to exclude its operation. But this is not what it has done with respect to sec. 3 of 38 Vict. No. 3. That section fixes the salary of a Puisne Judge of the Supreme Court at £2,000

per annum, and sec. 6 without making any reference to sec. 3 of 38 Vict. No. 3 fixes the salary of the new Judge at such sum as the Governor in Council may direct, not less than the salary of a Puisne Judge of the Supreme Court. In my opinion, a Judge of the Supreme Court, appointed under the provisions of sec. 6 of the *Industrial Arbitration Act of* 1916, holds his office only during the term of his office as the President or Judge of the Court of Industrial Arbitration. When the appellant received his commission as a Supreme Court Judge there were already in existence five Judges of the Supreme Court, and there was no authority to appoint another Judge except under the provisions of sec. 6. If the Executive authorities had issued the commission to the appellant, appointing him to be a Judge of the Supreme Court during his occupation of the office of President of the Court of Industrial Arbitration, the question of the validity of sec. 6 must have been determined in these proceedings, but they have not done so. Apparently they were advised that the section authorized an appointment for life, and accordingly a commission was issued to the appellant which, after reciting the provisions of the *Industrial Arbitration Act of* 1916 and a direction of the Governor in Council, proceeds to appoint the appellant forthwith to be a Judge of the Supreme Court of Queensland—"To have, hold, exercise and enjoy the said office of Judge of Our Supreme Court of Queensland during good behaviour together with the rights, powers, privileges, advantages and jurisdiction thereunto belonging or appertaining." These words are precisely appropriate in the appointment of a Judge of the Supreme Court holding a life tenure during good behaviour under the provisions of Acts 31 Vict. No. 23 and 31 Vict. No. 38, and they were intended to confer such a tenure on the appellant. But it is said that a different meaning should be given to them because of sec. 12A of the *Acts Shortening Act of* 1867, which runs thus: "12A. Where any Act whenever passed confers power to make, grant, or issue any instrument—that is to say, any proclamation, Order in Council, order, warrant, letters patent, commission, rules, regulations, or by-laws—expressions used in the instrument shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power."

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The expression in the commission "Judge of Our Supreme Court of Queensland during good behaviour" is said to mean Judge of Our Supreme Court during good behaviour and occupation of the office as President of the Court of Industrial Arbitration, because that is the tenure which sec. 6 contemplates, but this is not enough unless we can find some expression occurring both in the section and in the commission and denoting or connoting that tenure when occurring in the section. I can find no such expression. It is true that the phrases "Judge of the Supreme Court" and "during good behaviour" are to be found in sec. 6, but neither of these expressions there denotes or connotes a tenure during occupancy of the office of President of the Court of Industrial Arbitration. That tenure is attached to the office of a Judge of the Supreme Court appointed under the section because of the existence of other words in the section and not because of any meaning there inherent in the expressions themselves. The expressions "Judge of the Supreme Court" and "during good behaviour" have precisely the same meaning in the section and in the commission, but the commission does not accord with the section because the section prescribes a tenure and attached to it a condition of good behaviour, while the commission omits to expressly prescribe any tenure and as a consequence of the omission the law implies a life tenure to which the condition of good behaviour prescribed in the commission attaches. The result is that, in my opinion, the commission is not authorized by law, and the appeal should be dismissed.

POWERS J. I agree that any appointment of the President of the Court of Industrial Arbitration as a Judge of the Supreme Court under sub-sec. 6 of sec. 6 of the *Industrial Arbitration Act of* 1916 must, on the true construction of sec. 6 of that Act, be held to be an appointment of the President as President of the Court of Industrial Arbitration to be held by him only during the term of his office as President of that Court—not exceeding seven years—and not during good behaviour in the ordinary unqualified meaning of those words. The commission issued to the appellant was one "to have, hold, exercise and enjoy the said office of Judge of Our Supreme Court of Queensland during good behaviour together with all the rights,

powers, privileges, advantages and jurisdiction thereunto belonging or appertaining." The commission, if it must be read as an appointment of a Supreme Court Judge for life "during good behaviour," is, in my opinion, invalid because the *Industrial Arbitration Act of* 1916 does not, on a proper construction of the Act, empower the Governor in Council to issue such a commission. A commission in those words, on the face of it, is wider than the Act (on the interpretation placed upon it by the Court) empowered the Governor in Council to issue. The commission, however, expressly states that it was issued by virtue of the provisions of the *Industrial Arbitration Act of* 1916.

Sec. 12A of the *Acts Shortening Act* (Qd.) enacts that "Where any Act whenever passed confers powers to make, grant, or issue any instrument—that is to say, any proclamation, Order in Council, order, warrant, letters patent, commission, rules, regulations, or by-laws—expressions used in the instrument shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power."

The words used in the Act, so far as they apply to a Judge of the Supreme Court, are "during good behaviour." The words used in the commission appointing the President a Judge of the Supreme Court are "during good behaviour." The majority of the Court in this case construe the words "during good behaviour" in sub-sec. 6 of sec. 6 of the Act to mean good behaviour during the term of the appellant's office as President of the Court of Industrial Arbitration—not exceeding seven years. Under the *Acts Shortening Act* referred to, it appears to me that, as the contrary intention does not appear in the commission, we are bound to give the same meaning to the words "during good behaviour" in the commission, as we give to the same words in the Act conferring the power.

For the above reasons I do not think the commission is invalid on the ground only that it contained the words "during good behaviour." If the Act is valid, the commission is valid.

The respondents further contended that the appointment of the appellant as a Judge of the Industrial Court of Arbitration, and as a Judge of the Supreme Court of Queensland, was invalid because he was not "a barrister of not less than five years' standing" at the date of the appointment. The appellant had never practised as a

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barrister. For the reasons mentioned by the learned Judges of the Supreme Court in their judgment in this case, I hold that the appellant was "a barrister of not less than five years' standing" within the meaning of the *Industrial Arbitration Act of* 1916 (Qd.).

The next question to be considered is whether the commission is invalid as an appointment to the office of a Supreme Court Judge for any term less than "during good behaviour" only, on the ground that it is contrary to sec. 15 of the Constitution of Queensland to appoint a Judge of the Supreme Court except under a commission to continue in force "during good behaviour" only. The majority of the Court has come to the conclusion that the commission in this case is one inconsistent with the provisions of the Constitution as it stood before the *Industrial Arbitration Act of* 1916 was passed. Four of the five Judges of the Supreme Court of Queensland held that the provisions contained in the first two paragraphs of sub-sec. 6 of sec. 6 of the *Industrial Arbitration Act of* 1916 are inconsistent with the provisions of the Queensland Constitution as it stood when the Act in question was passed, and that they are therefore void and inoperative. The only difference of opinion between the members of this Court is whether the *Industrial Arbitration Act of* 1916, which is admittedly inconsistent with the Constitution, could be legally passed by Parliament before sec. 15 of the Constitution of Queensland was repealed or amended by an Act.

In England the question to be considered could not arise, because there is not any written Constitution. The power of Parliament is unlimited. The question could not well arise in connection with the Commonwealth Constitution, for the Constitution provides that no amendment of it can become law until after both Houses of Parliament pass a Bill containing the proposed amendment, and it is approved of by the electors qualified to vote for the election of the House of Representatives in the manner and subject to the conditions set out in sec. 128. Any Act inconsistent with the Constitution, before amendment, is always held by this Court to be *ultra vires*. Queensland has a written Constitution also; but it is contended—after it has been in existence as a Constitution for fifty-one years—that Acts inconsistent with it can be passed before any amendment of the Constitution, just as freely as in England, where

there is no written Constitution or other limitation to the powers of Parliament: in fact, that the Constitution can be ignored, as my brother *Higgins* put it during the argument, as if it were a *Dog Act*.

Sec. 5 of the *Colonial Laws Validity Act* does allow the Queensland Legislature to amend the *Constitution Act of* 1867, but if the contention of the appellant is right the Imperial Act has the effect of doing away with the colonial Constitutions as such, and allowing colonial legislatures to pass legislation without recognizing that there is an existing Constitution. The *Industrial Arbitration Act of* 1916 did not expressly purport to amend the Constitution. Sec. 6 starts with the following words: "Notwithstanding the provisions of any Act limiting the number of Judges of the Supreme Court, the Governor in Council may" &c. The Act limiting the number of Judges at the time was an ordinary *Supreme Court Act*, and was not contrary to any provision of the Constitution. It would be reasonable to suppose that if Parliament had intended the Act to be an amendment of the Constitution, as well as of the *Supreme Court Act*, it would have added "or of the Constitution" after the words "Judges of the Supreme Court."

My learned brothers who hold that the *Industrial Arbitration Act of* 1916 is inconsistent with the Constitution and therefore invalid, and those who hold the opposite view, have given their reasons at length in support of their respective views. The question now raised came before this Court and was decided in 1907, in opinions expressed by four of the five Judges of this Court who then comprised the Full Court, in what is usually termed *Cooper's Case*. It is clear that the contentions raised in this case on this point were expressly raised in *Cooper's Case*. That will be seen by a reference to what appears in the report of the case (1). In that case it was decided by *Griffith* C.J. and *Barton*, *O'Connor* and *Isaacs* JJ. that "the power vested in a State legislature by its Constitution to enact constitutional alterations must be exercised by direct legislative provisions: So long as the Constitution remains unaltered any enactment inconsistent with its provisions is invalid." The same claim, exactly, was made by the respondent in *Cooper's Case* (2) that has been made by the appellant in this case, namely, that

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

(2) 4 C.L.R., at pp. 1308, 1310.

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"the *Constitution Act* 1867 was only a local Act; it substituted for the Imperial Order in Council, which was a fundamental law, an enactment alterable by the ordinary course of legislation. . . . In enacting an Act which involves a necessary inconsistency with the Constitution . . . the Legislature must be taken to have intended to make an alteration of the Constitution." The learned Chief Justice (1) set out the contention of the respondent. He said: "It was contended for the respondent that since the passing of this Act the provisions relating to the tenure of office of the Judges of the Supreme Court and their salaries depend entirely upon the *Constitution Act of* 1867, and that this Act, being an Act of the Queensland Legislature, was of no more effect than any other Act of that Legislature, and, consequently, that any restrictions imposed or rights conferred by it might be disregarded or abrogated by any subsequent Act inconsistent with it, although not purporting to be an amendment of the Constitution, so that, if the Legislature thought fit by Statute to alter the tenure of office of existing Judges or to reduce their salaries, they could do so without first amending the Constitution." The learned Chief Justice also said (2):—"In my opinion, therefore, the Legislature could not after the Act of 1867, any more than before, disregard the provisions of the Constitution as existing for the time being, so as to be able to pass a law inconsistent with them, without first altering the Constitution itself. That is to say, their power was no more plenary than it was before. The distinction between an authority to alter or extend the limits of their powers and an authority to disregard the existing limits is clear. I am, therefore, of opinion that the *Income Tax Acts* 1902-1904, if and so far as they were inconsistent with the then existing Constitution, were wholly inoperative. . . . I think that, if the Legislature desires to pass a law inconsistent with the existing Constitution, it must first amend the Constitution. This would be done by a Bill for that purpose, to which the attention of the Legislature and the public would be called, and the passing of and assent to which would obviously depend upon considerations very different from those applicable to an ordinary law passed in the exercise of the plenary powers of the Legislature under the existing Constitution.

(1) 4 C.L.R., at p. 1313.

(2) 4 C.L.R., at pp. 1314-1315.

For these reasons I am of opinion that the Constitution of Queensland for the time being has the force of an Act of the Imperial Parliament extending to the Colony, and that it is the duty of the Court to inquire whether any Act passed by the State Legislature is repugnant to its provisions." *Barton* J. said (1):—"The legislation of a body created by and acting under a written charter or constitution is valid only so far as it conforms to the authority conferred by that instrument of government. Therefore attempted legislation, merely at variance with the charter or constitution, cannot be held an effective law on the ground that the authority conferred by that instrument includes a power to alter or to repeal any part of it, if the legislation questioned has not been preceded by a good exercise of such power, that is, if the charter or constitution has not *antecedently* been so altered within the authority given by that document itself." The late Mr. Justice *O'Connor* said (2): "I wish to express my entire concurrence on all grounds in the judgment of my learned brother the Chief Justice which I have had the opportunity of reading." The learned Judge also said:—"The position generally may be thus stated. The Queensland Parliament may repeal or alter any portion of its Constitution, and when the repeal or alteration has taken effect, that portion is as if it had never been. But so long as it exists no Act conflicting with it can be passed. In other words, before an Act can be passed taking away any right given by the Constitution, the Queensland Parliament must first repeal the portion of the Constitution which gives the right." *Isaacs* J. entirely concurred with the learned Chief Justice, for he said (2): "I have had the opportunity of reading the judgment of the learned Chief Justice, and I agree with the reasons there stated, and have nothing further to add."

That judgment was given in 1907, and has not been questioned until this appeal; but in *Baxter* v. *Ah Way* (3) *Isaacs* J. said:—"It was suggested that *Hodge* v. *The Queen* (4) ought to be distinguished because the Legislature of the Province of Ontario might change its Constitution. But the power of the Legislature must depend upon the terms of the Constitution as it exists at the given

(1) 4 C.L.R., at p. 1317.
(2) 4 C.L.R., at p. 1329.
(3) 8 C.L.R., at p. 643.
(4) 9 App. Cas., 117.

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moment. It is not a sound argument that, because a change might be deliberately made by Parliament in a Constitution, therefore any ordinary Act whatever may be passed, though in contravention of constitutional provisions as they stand. The case of *Cooper* v. *Commissioner of Income Tax* (1) is a clear authority against such a contention."

The opinions expressed in *Cooper's Case* were not necessary for the actual decision in that case, and not therefore binding on the Court, but, as my brother *Barton* said in his judgment to-day (2), "they were not *obiter dicta* in the sense of expressions beyond the matters argued, for the Court heard full argument on the point, and decided the matter with as much care and elaboration as if the point had been vital." I do not think that the opinions expressed by *Griffith* C.J. and *Barton*, *O'Connor* and *Isaacs* JJ. in *Cooper's Case* were wrong, or the opinions expressed by *Isaacs* J. in *Baxter's Case* (3); and I adopt them.

The decision in *Taylor's Case* (4) was given after an Act had been passed expressly amending the Constitution, and does not govern the decision in this case. *Isaacs* J. said of the Act in question (5): "It was passed avowedly as an amendment of the Constitution by both Houses unanimously, and was reserved for His Majesty's assent."

I hold that the commission appointing the appellant as a Judge of the Supreme Court is invalid because sub-sec. 6 of sec. 6 of the *Industrial Arbitration Act of* 1916 conferring the power to issue it is inconsistent with the provisions of the Queensland Constitution as it stood when the Act in question was passed, and that sub-sec. 6 of sec. 6 of the Act is therefore void and inoperative.

I think the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant, *W. F. Webb*, Crown Solicitor for Queensland.

Solicitors for the respondents, *G. Storer*; *G. Waugh*.

B. L.

(1) 4 C.L.R., 1304.
(2) *Ante*, p. 35.
(3) 8 C.L.R., 626.
(4) 23 C.L.R., 457.
(5) 23 C.L.R., at p. 471.