[PRIVY COUNCIL.]

McCAWLEY . . . . . APPELLANT;

AND

THE KING AND OTHERS . . . . RESPONDENTS;

AND

HIS MAJESTY'S ATTORNEY-GENERAL FOR ENGLAND . . . . . } INTERVENER.

ON APPEAL FROM THE HIGH COURT.

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Constitutional Law—Queensland— Amendment of Constitution—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 6th 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.* 106.

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 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

* Present—Lord Birkenhead L.C., Viscount Haldane, Lord Buckmaster, Lord Dunedin and Lord Atkinson.

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."

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, that the *Constitution Act of* 1867 possesses in law no such special constitutional quality as to preclude its amendment by the methods which are appropriate in the case of any other statute; that therefore sec. 6 of the *Industrial Arbitration Act of* 1916 is not *ultra vires*; that sub-sec. 6 of that section authorizes the appointment of a Judge of the Supreme Court for a period of seven years, capable of extension under the Act, if during that period he is of good behaviour and retains his office as President or Judge of the Court of Industrial Arbitration; that the Commission should be construed as appointing the appellant a Judge of the Supreme Court for seven years, or an extended period, and during good behaviour: and, therefore, that the appointment of the appellant was valid.

Decision of the High Court: *McCawley* v. *The King*, 26 C.L.R., 9, reversed.

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APPEAL to the Privy Council from the High Court.

This was an appeal by Thomas William McCawley from the decision of the High Court: *McCawley* v. *The King* (1).

The judgment of their Lordships, which was delivered by Lord BIRKENHEAD L.C., was as follows:—

This is an appeal by special leave from a judgment of the High Court of Australia dated 27th September 1918, which affirmed by a majority of four Judges to three a judgment, dated 22nd August 1918, of the Full Court of Queensland, giving judgment of ouster against the appellant upon an information of quo warranto exhibited against him by certain relators, to show by what authority he claimed to be a Judge of the Supreme Court of Queensland.

The facts which gave rise to this appeal are not in controversy, and may be shortly stated. The *Industrial Arbitration Act of* 1916 (Qd.) provided by sec. 6 for the establishment of a Court to be called the Court of Industrial Arbitration. Sub-secs. 1 to 5 of sec. 6 are as follows:—"(1) There is hereby established a Court to be called the Court of Industrial Arbitration, which shall be a superior Court of record and shall have a seal which shall be judicially noticed. (2) The Governor in Council shall, by commission in His Majesty's name, appoint a Judge or Judges of the Court not exceeding three in number. One of such Judges shall be designated the President of the Court. (3) The Governor in Council may, if and as he deems it necessary, in like manner, appoint an additional Judge or additional Judges of the Court. (4) In case of the illness or absence of a Judge of the Court, or in the event of congestion of work in the Court, the Governor in Council may appoint a permanent Judge of the Supreme Court or District Court to act as a Judge of the Industrial Court, and notwithstanding any Act to the contrary such Judge shall so act, and whilst acting in that capacity such Judge shall 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. (5) For all purposes of status the Court of Industrial Arbitration shall be deemed to be a branch of the Supreme Court, and every Judge of the Court of Industrial Arbitration shall have a status of a Judge of the Supreme Court."

(1) 26 C.L.R., 9.

The language of sub-sec. 6 requires very careful consideration, for the matters raised in this important appeal depend very largely upon its true construction. The sub-section is as follows:— "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. 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. 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 reappointed by the Governor in Council as such President or Judge for a further period of seven years."

On 12th January 1917 a commission was issued by the Governor of Queensland to the appellant, upon the recommendation of the Executive Council, appointing him to be a Judge of the Court of Industrial Arbitration, and designating him the President of the Court. The appointment was for the term of seven years from the date of the commission. The appellant in due course entered upon and began to discharge the duties of Judge and President of this Court. On 12th October of the same year, in pursuance of a recommendation of the Executive Council to that effect, the Governor of Queensland issued to the appellant a commission purporting to appoint him to be a Judge of the Supreme Court of Queensland, to have, hold, exercise, and enjoy the said office during good behaviour. It is important to set out this commission in full. The following were its terms:—"George the Fifth, by the grace of God, of the

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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 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."

Armed with this commission, the appellant presented himself on 6th December 1917 before the Supreme Court of Queensland, and requested the Chief Justice to administer to him the oaths of office proper to be taken by a Judge of that Court. The relators—Feez and Stumm—took objection to the validity of the commission. On 12th February 1918 the Full Court gave a considered judgment to the effect that the appellant was not entitled to have the oaths of

office administered to him or to take his seat as a member of the Supreme Court. On 6th March of the same year the appellant took the oath of office and the oath of allegiance proper to be taken by Judges of the Supreme Court, in the presence of Judge Macnaughton, Judge of District Courts. The Full Court, on 26th April of the same year, gave leave to the relators to exhibit against the appellant an information of quo warranto to show by what authority he claimed to be a Judge of the Supreme Court. The information so authorized was filed on 16th August. It was based upon the grounds which still constitute the main points at issue between the parties. It submitted that the commission of 12th October 1917 was ineffectual for the purpose of appointing the appellant to be a Judge of the Supreme Court, for the following among other reasons: (1) that sub-sec. 6 of sec. 6 of the *Industrial Arbitration Act of* 1916 was contrary to the provisions of the *Constitution Act of Queensland of* 1867, and was therefore *ultra vires*; (2) that if and so far as the commission of 12th October purported to appoint the appellant as Judge of the Supreme Court for life, the Governor in Council had no authority to issue such commission either under sub-sec. 6 of sec. 6 of the Act of 1916 or otherwise. The Full Court of the Supreme Court of Queensland (*Cooper* C.J., *Chubb*, *Shand* and *Lukin* JJ., *Real* J. dissenting) gave judgment in ouster against the appellant on 22nd August 1918. All the members of the Court agreed that the provisions contained in the first two paragraphs of sub-sec. 6 of sec. 6 of the Act of 1916 were inconsistent with the provisions of the *Constitution Act* at the moment when the later Act was passed. The majority of the Court held that those provisions were for this reason alone void and inoperative. *Real* J. held that the provisions under consideration, even though inconsistent with the provisions of the *Constitution Act*, constituted a legal and effective modification of them.

The appellant appealed to the High Court of Australia against the decision above referred to, and judgment was delivered by that Court on 27th September 1918. Here again there was a conflict of judicial opinion. *Griffith* C.J., *Barton*, *Gavan Duffy* and *Powers* JJ. gave judgment against the appellant; *Isaacs*, *Higgins* and *Rich* JJ. took the opposite view, and were of opinion that the appeal

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should be allowed. All the judgments dealt exhaustively with the subject, and their research and learning have afforded the greatest assistance to the Board in reaching a conclusion upon the matters submitted to them. The views of the majority were not entirely harmonious upon the relevant questions. *Griffith* C.J. was of opinion that the Parliament of Queensland could not, by merely enacting a law inconsistent with the *Constitution Act of* 1867, overrule its provisions, although it might with proper formality pass an Act which expressly altered or repealed it. He pointed out that the *Constitution Act of* 1867 had the force of an Imperial statute by virtue of sec. 106 of 63 & 64 Vict. c. 12, to this extent, that the Constitution of each State was to continue as at the establishment of the Commonwealth until altered in accordance with the Constitution of such State. He passed to the conclusion that an attempt to appoint a Judge with any tenure of office other than that prescribed by the Act of 1867 was void and inoperative. In his view the appointment authorized by sec. 6 of the *Industrial Arbitration Act* was limited to seven years. He construed the commission as purporting to appoint the appellant for life, and, so construing it, reached the further conclusion that the commission itself was bad. Of the other learned Judges composing the majority of the Court, some founded their conclusion upon the first of the grounds relied upon by the Chief Justice, namely, that the Constitution of Queensland is a fundamental or organic law, which can only be repealed or modified with special formality ; others preferred to base themselves upon the supposed invalidity of the commission in appointing the appellant for life, and thus exceeding its statutory authorization. *Isaacs* and *Rich* JJ. delivered one of two judgments dissenting from the majority of the Court, and with it their Lordships find themselves in almost complete agreement ; indeed, if it were not for the general constitutional importance throughout the Empire of the matters under discussion, they would have been content to leave the matter where these learned Judges left it. The circumstances, however, make it proper that they should attempt some examination of the matters which have been argued before them. They will address themselves to this task after noting that *Higgins* J., who also dissented, formed the view that upon the true construction of sec. 6,

sub-sec. 6, of the *Industrial Arbitration Act* the Executive was authorized to issue a commission to the appellant, appointing him a Judge of the Supreme Court for life during good behaviour. This conclusion rendered it unnecessary for the learned Judge to examine the constitutional question, which was so much discussed by his colleagues, with the same degree of elaboration. He agreed that the commission in fact issued constituted such an appointment, and held that the commission was, therefore, valid. He held, moreover—sharing upon this point the views of *Isaacs* and *Rich* JJ.—that if, contrary to his view, sec. 6 of the *Industrial Arbitration Act* authorized an appointment for seven years only, that section was nevertheless valid by reason of sec. 5 of the *Colonial Laws Validity Act*.

This short statement of the facts is sufficient to illustrate the issues which have risen between the parties, and which require decision by the Board.

The respondents in effect contend that the *Industrial Arbitration Act* was in conflict with the *Constitution Act of* 1867 inasmuch as it purported to authorize the appointment of a Judge for seven years only; that, having regard to the special character of the earlier Act, it had not been varied with the formality and in the manner requisite under the Constitution; and that there was a variance between sec. 6 of the Act of 1916 and the commission issued under that section, inasmuch as the commission, unlike the Act, purported to create the appellant a Judge for life, and so it was argued that the appointment was void upon this ground also.

At one stage of the case it was contended that the appellant was not qualified under the provisions of sec. 6, sub-sec. 7, of the Act of 1916; but this contention was not persisted in before their Lordships, was plainly insupportable, and may be treated as abandoned.

The appellant replies to the objections which still survive, by saying that the Act of 1867, though it deals with very important topics, possesses in law no such special constitutional quality as to preclude its amendment by the methods which are appropriate in the case of any other statute, and that the Act of Parliament under consideration has, in fact, been altered or modified on many occasions under exactly the same circumstances and by the same methods as in the case of the Act of 1916. If this view be rejected, the appellant

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further insists that sec. 6, sub-sec. 6, of the *Industrial Arbitration Act* was a valid exercise of the legislative power of the State of Queensland by reason of sec. 5 of the *Colonial Laws Validity Act* 1865.

Upon the other points he contends :—(1) That the Act of 1916 contemplated and authorized the appointment for life as a Judge of the Supreme Court of a person in the position of the appellant, and, therefore, that there was no discrepancy between the terms of the Act and the terms of the commission founded upon the Act. This contention, though never abandoned, was not very resolutely pressed ; the reason given being that it was premature to decide now whether or not the appellant held his office for life, inasmuch as the question which actually required decision was whether or no the judgment of ouster could be justified at the moment when it was given. (2) That if the Act of 1916 contemplated that the appellant should hold the office of Judge of the Supreme Court only as long as he continued to be Judge of the Industrial Court, the language of the commission was not, rightly understood, inconsistent with the language of the Act so construed. (3) That even if such inconsistency were established, the commission must be read in the light of sec. 12A of the *Acts Shortening Act* of Queensland, with the result that its language must be construed as not giving more than the maximum tenure authorized by the statute.

Such are the various contentions which in the course of the argument have been advanced, and their Lordships, so far as is necessary, deal with them in order.

The first point which requires consideration depends upon the distinction between Constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and Constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly. The difference of view, which has been the subject of careful analysis by writers upon the subject of Constitutional Law, may be traced mainly to the spirit and genius of the nation in which a particular Constitution has its birth. Some communities, and notably Great Britain, have not in the framing of Constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been

conceded to their generation which will be, or may be, wanting to their successors, in spite of the fact that those successors will possess more experience of the circumstances and necessities amid which their lives are lived. Those constitution framers who have adopted the other view must be supposed to have believed that certainty and stability were in such a matter the supreme desiderata. Giving effect to this belief, they have created obstacles of varying difficulty in the path of those who would lay rash hands upon the ark of the Constitution. It is not necessary, and indeed the inquiry would be a long one, to analyse the different methods which have been adopted in different countries by those who have framed Constitutions under these safeguards. But it is important to realize with clearness the nature of the distinction. It is not a distinction which depends in the least upon the differences between a unitary and a federal form of Government. The dictum, for instance, of *Isaacs* and *Rich* JJ. (1) that "nowhere do we find in any unitary form of government a provision that the 'constitutional law' must always first be amended" is, if their Lordships understand it aright, too widely stated. Unitary forms of government have, on the contrary, exhibited both ingenuity and resource in providing complicated machinery which required adjustment before the nature of the Constitution could be effectively modified. Many different terms have been employed in the text-books to distinguish these two contrasted forms of Constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled Constitution as by any other nomenclature. Nor is a Constitution debarred from being reckoned as an uncontrolled Constitution because it is not like the British Constitution, constituted by historic development, but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth. It is of the greatest importance to notice that where the Constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned Judges in the Court below said that, according to the appellant, the

(1) 26 C.L.R., at p. 64.

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Constitution could be ignored as if it were a *Dog Act*, he was in effect merely expressing his opinion that the Constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a *Dog Act* or any other Act, however humble its subject matter.

The fundamental contention of the respondents in this appeal requires the conclusion that the Constitution of Queensland is in the sense explained above a controlled Constitution. The inquiry ought not to be, and in fact is not, a very difficult one; and it is proposed shortly to examine the principal points which arise; but it is important at the outset to notice that the respondents do not find themselves in the position which they would occupy under any genuinely controlled Constitution with which their Lordships are familiar. In such a case, confronted with the objections by which they are met in this appeal, they would have no difficulty in pointing to specific articles in the legislative instrument or instruments which created the Constitution, prescribing with meticulous precision the methods by which, and by which alone, it could be altered. The respondents to this appeal are wholly unable to reinforce their argument by any such demonstration. And their inability has involved them in dialectical difficulties which are embarrassing and even ridiculous. They are, for instance, driven to contend—or at least they did in fact contend—that if it were desired to alter an article of the Constitution it was in the first place necessary to pass a repealing Act; and in the second place by a separate and independent Act to make the desired change effective. Counsel for the respondents, in fact, though perhaps unnecessarily, went so far as to maintain that the attempted modification would not be effectively carried out by a single Act, even if such an Act incorporated the provisions of the two Acts which, in his view, required a separate existence. Their Lordships prefer, however, to consider the matter in a manner more favourable to the respondents; and it would appear that their proposition may be more moderately stated in the following way. The Constitution of Queensland is a controlled Constitution. It cannot, therefore, be altered merely by enacting legislation inconsistent with its articles. It can only be altered by

an Act which in plain and unmistakable language refers to it; asserts the intention of the Legislature to alter it, and consequentially gives effect to that intention by its operative provisions. It must at once be observed that such a Constitution as the respondents conceive of would be, so far as the Board is aware, unique in constitutional history. It is neither controlled nor is it uncontrolled. It is not controlled, because posterity can by a merely formal Act correct it at pleasure. It is not uncontrolled, because the framers have prescribed to their successors a particular mode by which, and by which alone, they are allowed to effect constitutional changes.

Their Lordships are clearly of opinion that no warrant whatever exists for the views insisted upon by the respondents, and affirmed by a majority of the Judges in the Courts below. It was not the policy of the Imperial Legislature, at any relevant period, to shackle or control in the manner suggested the legislative powers of the nascent Australian Legislatures. Consistently with the genius of the British people, what was given was given completely, and unequivocally, in the belief, fully justified by the event, that these young communities would successfully work out their own constitutional salvation. An examination of the various Statutes which are relevant to the matter renders this conclusion, in the opinion of the Board, certain.

The first document which requires consideration in this connection is the Order in Council of 1859 empowering the Governor of Queensland to make laws and to provide for the administration of justice in the Colony. This Order in Council was made pursuantly to an Act of 18 & 19 Vict., c. 54, sec. 7. The section is referred to hereafter. Clause 1 of the Order in Council provided that there should be within the Colony of Queensland a Legislative Council and Legislative Assembly. Clause 2 must be set out in full:—"And it is hereby declared and ordered that within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace welfare and good government of the Colony in all cases whatsoever. Provided that all bills for appropriating any part of the public revenue for imposing any new rate tax or impost subject always to the limitations hereinafter provided shall originate in the Legislative

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Assembly of the said Colony." Clause 14 was as follows: "The provisions of the before-mentioned Act of the fourteenth year of Her Majesty chapter fifty-nine and of the Act of the sixth year of Her Majesty chapter seventy-six intituled 'An Act for the Government of New South Wales and Van Diemen's Land' which relate to the giving and withholding of Her Majesty's assent to bills and the reservation of bills for the signification of Her Majesty's pleasure thereon and the instructions to be conveyed to Governors for their guidance in relation to the matters aforesaid and the disallowance of bills by Her Majesty shall apply to bills to be passed by the Legislative Council and Assembly constituted under the said Act of the Legislature of New South Wales and this Order and by any other legislative body or bodies which may at any time hereafter be substituted for the present Legislative Council and Assembly." Clauses 15, 20 and 22 should be particularly set out:—"15. 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." "20. All laws statutes and ordinances which at the time when this Order in Council shall come into operation shall be in force within the said Colony shall remain and continue to be of the same authority as if this Order in Council had not been made except in so far as the same are repealed and varied hereby and all the Courts of civil and criminal jurisdiction within the said Colony and all charters legal commissions powers and authorities and all offices judicial administrative or ministerial within the said Colony respectively except so far as the same may be abolished altered or varied by or may be inconsistent with the provisions of this Order shall continue to subsist as if this Order had not been made unless and until other provision shall be made as to any of the matters aforesaid by Act of the Legislature of Queensland but so that the power of the Governor of New South Wales in relation to the matters aforesaid shall (except as hereinbefore provided) be vested in the Governor of Queensland." "22. The Legislature of the Colony of Queensland shall have full power and authority from time to time to make laws altering or

repealing all or any of the provisions of this Order in Council in the same manner as any other laws for the good government of the Colony except so much of the same as incorporates the enactments of the fourteenth year of Her Majesty chapter fifty-nine and of the sixth year of Her Majesty chapter seventy-six relating to the giving and withholding of Her Majesty's assent to bills and the reservation of bills for the signification of Her Majesty's pleasure and the instructions to be conveyed to Governors for their guidance in relation to the matters aforesaid and the disallowance of bills by Her Majesty Provided that every bill by which any alteration shall be made in the constitution of the Legislative Council so as to render the whole or any portion thereof elective shall be reserved for the signification of Her Majesty's pleasure thereon and a copy of such bill shall be laid before both Houses of the Imperial Parliament for the period of thirty days at least before Her Majesty's pleasure thereon shall be signified."

It has already been pointed out that the Order in Council was made under the authority of 18 & 19 Vict. c. 54, sec. 7. This section authorized in terms the Order in Council, and contained the following provision: "Full power shall be given in or by such letters patent or Order in Council to the Legislature of the said Colony to make further provision in that behalf." In order that the importance of the words "full power" and "further provision" should be appreciated, it is important to recall that the Order in Council provided by clause 22, already set out, 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." It is evident, therefore, that sec. 7 of 18 & 19 Vict. c. 54 was intended to authorize an Order in Council which should give, or which might give, to the Legislature of the Colony powers unrestricted, within the ambit relevant to the present discussion. Wider words could hardly be conceived than those of sec. 7. The Order in Council was authorized "to make provision for the government of any such Colony and for the establishment of a Legislature therein." Those who drafted the Order in Council made,

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in clause 22, full, but not excessive, use of the powers conceded to them by sec. 7 of the Imperial Act. Their Lordships are unable to conceive how real doubt can exist as to the meaning of the language used. But although the matter would seem to the Board to be extremely plain, it is none the less evident that in this, and in other comparable cases, doubts did in fact arise. Narrow constructions were placed by colonial Judges upon the instruments creating Constitutions in colonial Legislatures. Causes of friction multiplied, and soon a conflict emerged, analogous to that which is the subject of discussion to-day, between those who insisted that the Constitutions conceded to the Colonies could be modified as easily as any other Act of Parliament, and those who affirmed that the statute defining such Constitutions were "fundamental" or "organic" and that therefore the Constitution was controlled. These controversies became extremely grave, and were reflected in an opinion cited in the course of the argument and given in 1864 by the law officers of the day, Sir *Roundell Palmer* and Sir *Robert Collier*. These distinguished lawyers were of opinion, and the Board concurs in their view, that when legislation within the British Empire which is inconsistent with constitutional instruments of the kind under consideration comes for examination before the Courts, it is unnecessary to consider whether those who were responsible for the later Act intended to repeal or modify the earlier Act. If they passed legislation which was inconsistent with the earlier Act, it must be presumed that they were aware of, and authorized, such inconsistency. The law officers, however, recognizing that in fact these doubts were genuinely felt by many colonial Judges, prudently advised that an attempt should be finally made to solve these difficulties by explanatory legislation. The *Colonial Laws Validity Act* 1865, in Imperial history *clarum et venerabile nomen*, had its origin in this opinion. The present litigation has established only too plainly that it has not achieved its purpose. Their Lordships cannot refrain from expressing the opinion that it ought to have done so.

The preamble of the Act 28 & 29 Vict. c. 63 was as follows:—"Whereas doubts have been entertained respecting the validity of divers laws enacted or purporting to have been enacted by the

Legislatures of certain of Her Majesty's Colonies, and respecting the powers of such Legislatures, and it is expedient that such doubts should be removed: Be it hereby enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows." Secs. 2 and 3 are as follows:—"2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative. 3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid." The important provision, however, of this Act in relation to the present litigation is contained in sec. 5: "Every colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein, and every representative Legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council or colonial law for the time being in force in the said Colony."

It would indeed be difficult to conceive how the Legislature could more plainly have indicated an intention to assert on behalf of colonial Legislatures the right for the future to establish Courts of Judicature, and to abolish and reconstitute them, than in the language under consideration; nor were the framers of this Act content with making provision for the future. Adhering to their

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fundamental purpose, which was to remove doubts as to the validity of colonial laws, they affirmed in terms that every colonial Legislature should be deemed at all times to have had full powers in the matters in question.

Upon this part of the case their Lordships do not think it useful to expend time upon a more detailed examination of the materials which were so much discussed in the Courts below and which have been the subject matter of argument before the Board. In their view it is evident that unless the Act to consolidate the laws relating to the Constitution of the Colony of Queensland which was passed in 1867 contributed some new and special quality to, or imposed some new and special restriction upon, the Constitution of that Colony the argument for the respondents upon the matters heretofore discussed wholly fails. The contention of the respondents is that the *Constitution Act of* 1867 enacted certain fundamental organic provisions of such a nature as thereafter to render the Constitution stereotyped or controlled. It becomes, therefore, necessary to attempt some examination of the Act in question.

It may be premised that if a change so remarkable were contemplated one would naturally have expected that the Legislature would have given some indication, in the very lengthy preamble of the Act, of this intention. It has been seen that it is impossible to point to any document or instrument giving to, or imposing upon, the Constitution of Queensland this quality before the year 1867. Yet their Lordships discern nowhere in the preamble the least indication that it is intended for the first time to make provisions which are sacrosanct, or which at least can only be modified by methods never previously required. The preamble does, indeed, deal with somewhat cognate matters. It recites, for instance, the Order in Council of 1859, and, in particular, that part of the Order—namely, clause 22—which declared that the Legislature of the Colony should have power to make laws altering or repealing any of the provisions of the Order in the same manner as any other laws for the good government of the Colony. It recites further the provisions of 5 & 6 Vict. c. 76, secs. 31, 32 and 33, dealing respectively with the giving or withholding assent to bills; the

disallowance of bills assented to; and the assent to bills reserved. The preamble, therefore, gives no indication of intention such as might have been looked for if the effect of the Act were such as the respondents maintain.

Nor is their case improved by an examination of the sections of the Act. Sec. 2 is as follows:—"Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace welfare and good government of the Colony in all cases whatsoever. Provided that all bills for appropriating any part of the public revenue for imposing any new rate tax or impost subject always to the limitations hereinafter provided shall originate in the Legislative Assembly of the said Colony." It would be almost impossible to use wider or less restrictive language. The Colony may make laws for the peace, welfare and good government of the Colony "in all cases whatsoever."

The next section which requires examination is sec. 9:—"Notwithstanding anything hereinbefore contained the Legislature of the said Colony as constituted by this Act shall have full power and authority from time to time by any Act or Acts to alter the provisions or laws for the time being in force under this Act or otherwise concerning the Legislative Council and to provide for the nomination or election of another Legislative Council to consist respectively of such members to be appointed or elected respectively by such person or persons and in such manner as by such Act or Acts shall be determined. Provided always that it shall not be lawful to present to the Governor of the said Colony for Her Majesty's assent any bill by which any such alteration in the Constitution of the said Colony may be made unless the second and third readings of such bill shall have been passed with the concurrence of two-thirds of the members for the time being of the said Legislative Council and of the said Legislative Assembly respectively Provided also that every bill which shall be so passed for any of such purposes shall be reserved for the signification of Her Majesty's pleasure thereon and a copy of such bill shall be laid before both Houses of the Imperial Parliament for the period of thirty days at the least before Her

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Majesty's pleasure thereon shall be signified." This section required a two-thirds majority of the Legislative Council, and of the Legislative Assembly, as a condition precedent of the validity of legislation altering the constitution of the Legislative Council. We observe, therefore, the Legislature in this isolated section carefully selecting one special and individual case in which limitations are imposed upon the power of the Parliament of Queensland to express and carry out its purpose in the ordinary way, by a bare majority.

Their Lordships proceed now to consider the language and effect of secs. 15 and 16. Those sections are as follows :—" 15. The commissions of the present Judges of the Supreme Court of the said Colony and of all future Judges thereof shall 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. 16. 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 contention of the respondents upon these sections, shortly stated, is that they embody a judicial charter affording security of judicial tenure ; that they cannot be modified except in some manner of which their Lordships take leave to observe that it is neither clearly conceived, nor intelligibly described ; that the Act of 1916 is in conflict with these sections ; that that Act does not comply with the formalities (whatever they may be) required for the effective modification of the sections ; and, therefore, that the Act of 1916 is *ultra vires* and inoperative.

It does not appear necessary to the Board to undertake any historical examination of the matter ; nor is it willing, as it was at one time invited, to form or state a conclusion upon the true construction of the Act of Settlement. It appears sufficient to say that in Great Britain legislation relating to judicial tenure can be altered as easily—so far as form is concerned—as any other legislation. And it is only necessary to add that their Lordships are wholly unable to discern in the language of secs. 15 and 16, or of any other sections in the Act of 1867, the slightest indication of an intention

on the part of the Legislature to deal in any exceptional manner with legislation affecting judicial tenure in Queensland.

Still less is the Board prepared to assent to the argument, at one time pressed upon it, that distinctions may be drawn between different matters dealt with by the Act, so that it becomes legitimate to say of one section: "This section is fundamental or organic; it can only be altered in such and such a manner"; and of another: "This section is not of such a kind; it may consequently be altered with as little ceremony as any other statutory provision." Their Lordships therefore fully concur in the reasonableness of the observations made by *Isaacs* and *Rich* JJ. that, in the absence of any indication to the contrary, no such character can be attributed to one section of the Act which is not conceded to all; and that if secs. 15 and 16 are to be construed as the respondents desire, the same character must be conceded to sec. 56, which provides that in proceedings for printing any extract from a paper it may be shown that such extract was *bonâ fide* made.

No attempt has been made in the judgments below, or in the arguments placed before the Board, to deal with the point made by *Isaacs* and *Rich* JJ., that if secs. 15 and 16 of the *Constitution Act of* 1867 are to be construed as depriving the Legislature of the power to legislate upon the subject of the Judicature they are in conflict with the Imperial Act, already referred to, which gives such power in the plainest possible language.

The conclusion of the Board, therefore, upon the matters, which have up to the present been considered, is that the main case put forward by the respondents fails. The Act of 1867 has no such character as it has been attempted to give it. The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal.

It follows, therefore, that sec. 6 of the *Industrial Arbitration Act of* 1916 was not *ultra vires*. The Legislature was fully entitled to vary the tenure of the judicial office. Having reached this conclusion, it would not be necessary for their Lordships to consider whether

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or not the effect of the Act was actually to alter the tenure, if it were not for the fact that some of the Judges below have held, and it has been argued before the Board, that the Act authorized the creation of a Judge with a tenure for years, during good behaviour, whereas the commission authorized only the creation of a Judge for life. And so it is contended that the commission is bad and that the judgment of ouster appealed against should stand.

The relevant sections of the *Industrial Arbitration Act of* 1916 have already been set out. The effect of sub-sec. 6 of sec. 6 may be shortly restated. The Governor in Council is given power to appoint a President or any Judge of the Court of Industrial Arbitration to be a Judge of the Supreme Court. So appointed, the President or the Judge is to enjoy all the rights and powers of the Judge of the Supreme Court in addition to the rights conferred by the Act. He is to hold office as Judge of the Supreme Court during good behaviour. It seems to their Lordships to be impossible to contend that the effect of the provisions, thus generally summarized, can be to authorize the appointment of a person in the position of the appellant to a judgeship in the Supreme Court for life. In the first place, reason and policy would render such a view difficult of adoption. It is intelligible that the Legislature should have desired to throw an atmosphere of judicial prestige around one whose duty it was to compose, or pronounce upon, matters of industrial dissension, for the duration of this important function. But it is extremely difficult to discover any ground of policy likely to have influenced the Legislature to provide that the Industrial Judge should retain his position on the Supreme Court Bench for ten, fifteen or even twenty years after his arbitral and industrial functions had determined. The language actually used gives additional weight to these considerations. The persons designated as eligible are described in the terms of the office which makes them eligible. It is the President or any Judge of the Court who may become a Judge of the Supreme Court. And, moreover, the words which follow state in terms that the person so appointed shall enjoy the rights, &c., of the Judge of the Supreme Court " in addition to " his industrial rights. How can he add his rights as a Judge of the Supreme Court to his rights as a Judge of

the Industrial Court if he has ceased to hold the latter position altogether? There is, indeed, on the hypothesis something to add, but there is nothing to which it can be added. The structure and language of sub-sec. 6 render, in the opinion of the Board, the conclusion irresistible, that the Legislature contemplated that the Judge of the Industrial Court should hold his position as Judge of the Supreme Court so long, and so long only, as he held the office which provided him with his qualification. The true effect therefore of sec. 6 of the Act is to authorize the appointment of a Judge of the Supreme Court for a period of seven years, capable of extension under the Act, if during that period he is of good behaviour and retains his office as President or Judge of the Court of Industrial Arbitration.

It is finally contended on behalf of the respondents that, such being the true construction of sec. 6, the commission issued to the appellant on 12th October 1917, purporting to appoint him a Judge of the Supreme Court of Queensland, is invalid for contrariety having regard to the terms of the Act upon which it is founded. The terms of the commission have already been set out. It purports to create the appellant a Judge of the Supreme Court "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." These words, it is said, contain no limitation whatsoever. They amount to an appointment for life during good behaviour. The Act of 1916 authorized no such appointment; therefore (such is the argument), the commission was bad. It would no doubt have been more satisfactory if the Act of 1916 had made it plain, in direct and simple language, that the specially created Supreme Court Judge only retained that office as long as he retained the qualifying office. Equally it would have been more satisfactory if the commission had in explicit terms indicated that the appointment therein made was limited in the manner which their Lordships conceive to have been effected by the Act. But at the same time common sense must be applied to the elucidation of these matters. The Act must be construed, as their Lordships have already decided, as authorizing an appointment for seven years (or an extended period)

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during good behaviour. The draftsman of the commission was in terms availing himself of the powers contained in that Act. He neither claimed nor possessed any vestige of right to make such an appointment except pursuantly to the Act. The Act was the only soil in which the commission had any root. When the commission therefore makes an appointment under the terms of the Act, and during good behaviour, it means, and can only mean, what the Act means, namely, for seven years (or an extended period) and during good behaviour.

It only remains to add that if, contrary to the view of the Board, the commission were on the face of it excessive, the invalidity would be fully cured by sec. 12A of 31 Vict. No. 6 (Qd.). Sec. 12A is as follows: "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."

On all these grounds their Lordships are of opinion that the appeal should be allowed, the judgments of the High Court of Australia and the Supreme Court of Queensland set aside, and the demurrer allowed. And they will humbly advise His Majesty accordingly.