

## HIGH COURT OF AUSTRALIA

Clayton

Vs.

Heffron

(Dixon C.J.(1), McTiernan(1), Fullagar(2), Kitto(3), Taylor(1), Menzies(4) and Windeyer(1) JJ. )

15 December 1960

DIXON C.J., McTIERNAN, TAYLOR AND WINDEYER JJ.

1. This is an application for October 1960. The decree allowed a demurrer ore tenus to the statement of claim and dismissed the suit. The purpose of the suit was to prevent by the remedy of an injunction the holding of a referendum under ss. 5B and 7A of the [Constitution](#) Act, 1902-1956 (N.S.W.) on the question whether a bill for the abolition of the Legislative Council should be adopted. The suit had been before McLelland C.J. in Eq. on a motion for an injunction on 12th and 13th May 1960 when his Honour, relying on s. 6 of the Equity Act, 1901-1957 (N.S.W.), decided to sit with other judges. In the result arrangements were made for a hearing before himself and four other judges, that is to say, two more than the number mentioned by the section. Before the court so constituted the defendants demurred ore tenus to the statement of claim and by a majority consisting of Evatt C.J., Herron J., Sugerman J. and McLelland C.J. in Eq., Owen J. dissenting, the Court decided that the demurrer should be upheld and the motion dismissed. According to s. 5B and s. 7A of the [Constitution](#) Act, 1902-1956 of New South Wales, provisions which it will become necessary to examine in more detail, the Legislative Council cannot be abolished unless at a referendum a majority of voters approve. Under s. 7A considered alone the referendum must be preceded by the passage of the Bill through both Houses; but under s. 5B, assuming the effectiveness of that provision, it is enough if the Bill has been sent up twice to the Council by the Assembly and has been rejected or failed to pass and if there has been a continuance of the disagreement between the two Houses notwithstanding certain measures to secure agreement. A Bill for the abolition of the Legislative Council had been twice passed by the Legislative Assembly and twice transmitted to the Legislative Council where it had not been passed. (at p232)

2. On the part of the plaintiffs it is contended that s. 5B is invalid and that in any event there has been a failure to perform conditions precedent to the submission of the Bill to the electors; the plaintiffs say that on those grounds and on grounds arising thereout the Bill ought not in point of law be put to a referendum. The plaintiffs are five members of the Legislative Council, one member of the Legislative Assembly and one member of the House of Representatives of the Commonwealth Parliament. They have joined as defendants the Premier and other Ministers of the Crown for the State of New South Wales; they have also joined as a defendant the Electoral Commissioner, an officer appointed under s. 21A of the Parliamentary Electorates and Elections Act 1912-1952 (N.S.W.). Some of the Ministers are members of the Legislative Council, others of the Legislative Assembly. The relief claimed against the defendants consists in part of declarations of right and in part of injunctions. It is not unimportant to bear in mind that in New South Wales a declaration of right may not be made unless according to the principles of equity the plaintiff is

entitled to consequential relief whether by way of injunction or by some other remedy. The injunctions which the plaintiffs claim in the prayer to the statement of claim are to restrain the Ministers from taking any step in relation to the holding of the referendum which by resolution the Legislative Assembly has directed or as members of the Executive Council from signing any writ directed towards the holding of such referendum, and to restrain them from applying any public moneys, or incurring any liability payable thereout, towards the holding of the referendum. There is a claim too for an injunction against the defendant the Electoral Commissioner restraining him and any officer of his from taking steps to submit the bill to a referendum. (at p233)

3. How it is possible to support a claim for equitable relief of this nature it is difficult to understand. Indeed the constitution of the suit as a whole strikes one as an experiment against the success of which law equity and wisdom combine. As against the Ministers it is a claim that on the question in hand they be restrained from advising the Crown, executing the administrative functions which belong to them and permitting the expenditure of money which is available under supply or appropriation that has been or will be voted. As to the Electoral Commissioner, he is to be restrained from the performance of the functions which belong to him if and when the Governor issues his writ. This is to be done, moreover, at the suit of plaintiffs whose only interest is either as holders of offices of which the Bill if validly enacted might deprive them or as taxpayers, that is, members of the public, or in two cases members of other legislative bodies. All this is based upon the ground that properly interpreted and applied the law does not authorize the legislative measure proposed; and that is put on two grounds, namely, first, that the provision of the [Constitution](#) of New South Wales which purports to authorize such a proceeding is invalid, and second, that the provision contains requirements from which there have been fatal departures or at all events departures. The case in truth is one in which during the course of a legislative process which may or may not end in the adoption of the measure proposed, it is sought to obtain the interposition of a court of equity to enjoin those taken to be responsible for carrying forward the measure from further proceeding with it. It is evident enough that such a case has no analogy to *Attorney-General (N.S.W.) v. Trethowan* [1932] UKPC 1; (1932) AC 526; (1932) 47 CLR 97 (1931) 44 CLR 394; (1930) 31 SR (NSW) 183. The injunction was there granted by the majority of the Supreme Court because a definite statutory prohibition made, so it was held, the step of presenting that Bill to the Governor for his assent unlawful: in the opinion of the Supreme Court, to enforce this distinct and imperative negative duty the remedy of injunction was available. Be that as it may (cf. *Hughes and Vale Pty. Ltd. v. Gair* [1954] HCA 73; (1954) 90 CLR 203 ) it can have nothing to do with an attempt to secure the intervention of a court of equity in a legislative process on the ground that the procedure is misconceived or alternatively has not been correctly pursued. It may be assumed that the suit would not have been entertained by the Supreme Court sitting in Equity, had it not been for a concession made by the defendants. After the Attorney-General had informed the Supreme Court that there would be a demurrer *ore tenus* to the statement of claim he went on to say that the plaintiffs had agreed to plead in that pleading all the facts that might be relevant so that the defendants by demurring might obtain a final decision and that it had been further agreed between the parties that "for the purposes of these proceedings and in order to avoid the possibility that the Court might decide this application on grounds which left the main constitutional questions undecided, the defendants would concede that an injunction may be granted at the suit of those plaintiffs who are Members of the Legislative Council against the defendants who are Ministers of the Crown and Members of the Executive Council restraining them from proceeding to take any steps towards the issue of a writ for or the holding of a referendum if, in the events which have happened, it would be unconstitutional for the Bill to proceed to a referendum". Upon the basis of this concession the Supreme Court entertained the suit and considered all the points submitted on behalf of the plaintiffs

against the holding of the referendum. There is an ambiguity about the expression "unconstitutional for the Bill to proceed to a referendum", but it seems almost certain that it was meant to cover only such a want of constitutional authority or such a defect of constitutional procedure as would result in its being impossible that the Bill should become a valid law even if approved by a majority of the electors voting at the proposed referendum. Even so, (if the concession is given full effect) the Court in acting upon the concession must go beyond its function of deciding whether an Act of Parliament assented to by the Crown does not go beyond the legislative power of the Parliament so that it cannot form part of the law of the land and must enter upon an inquiry into the lawfulness and regularity of the course pursued within the Parliament itself in the process of legislation and before its completion. It is an inquiry which according to the traditional view courts do not undertake. The process of law-making is one thing : the power to make the law as it has emerged from the process is another. It is the latter which the court must always have jurisdiction to examine and pronounce upon. Of course the framers of a constitution may make the validity of a law depend upon any fact, event or consideration they may choose, and if one is chosen which consists in a proceeding within Parliament the courts must take it under their cognizance in order to determine whether the supposed law is a valid law ; but even then one might suppose only after the law in question has been enacted and when its validity as law is impugned by someone affected by its operation. (at p235)

4. It is not easy to escape the impression that if we had been considering the validity of a statute actually adopted in purported pursuance of s. 5B of the [Constitution](#) Act and assented to by the Crown, some of the points taken in the present suit in support of the plaintiffs' case would have been seen in a truer perspective and put on one side as matters belonging to the legislative process which could not be entertained as grounds for invalidating a statute duly authenticated as enacted by the Legislative Assembly and approved by the electors under s. 5B and assented to by the Governor. However this may be, in support of the application for special leave we listened to a full argument of the matters laid before the Supreme Court, matters which in the judgments delivered in that court were dealt with very fully. (at p235)

5. Naturally enough, the first point urged for the applicants was that s. 5B is invalid. To give an understanding of this point and of its consequences, no less than of the other points relied upon, it is necessary to state not only the effect of the provision but also some of the circumstances which led to its enactment ; but it seems better in this judgment to defer the question of validity until the other points have been disposed of. (at p235)

6. Section 7A, which was adopted by Act No. 28 of 1929, was designed to protect the Legislative Council from abolition except with the approval of the majority of voters voting at a referendum; the protection extended to the alteration of the [Constitution](#) of the Legislative Council or its powers. This was done by forbidding the abolition or an alteration of the constitution or powers of the Legislative Council except in the manner provided in the section. The members of the Council were at that time appointed by the Governor and of course the assent of both Houses to any legislative measure was necessary. The provisions of the section did not touch either of these constitutional features; but by sub-s. (2) it was enacted that a Bill for a purpose within the first sub-section should not be presented to the Governor for the Royal Assent until it had been approved by the electors in accordance with the section, that is at a referendum. It was enacted by another sub-section that the provision should extend to any Bill for the repeal or amendment of the section. In the year 1932 it was decided that the Legislative Council should no longer be formed of members nominated by the Governor but of persons elected by the combined strength of both Houses and that they should hold office for twelve years, one fourth vacating their seats in rotation every three years. This alteration

in the constitution of the chamber could not of course be made except in pursuance of s. 7A, that is by a law passed by both Houses and approved at a referendum. It was decided that the proposal for this reconstitution of the Legislative Council should be accompanied by an attempt to provide for the resolution of irreconcilable conflicts between the two bodies and it was apparently thought desirable that the provision for the purpose should cover alike conflicts over ordinary legislation and conflicts over legislation for the abolition of the Legislative Council, for the alteration of its constitution or of any of its powers or for any other purpose covered by s. 7A. In s. 57 of the Commonwealth [Constitution](#) a provision is to be found for a double dissolution of the Houses in case of conflict over legislation and in [s. 128](#) for a referendum for the amendment of the [Constitution](#) notwithstanding a disagreement between the Houses upon the proposal. By the [Constitution](#) Act 1903 (No. 1864) of Victoria, s. 31, a provision for a double dissolution was made in the case of a second rejection or failure to pass a bill on the part of the Legislative Council when the Bill was sent up by the Legislative Assembly. With these and other like expedients before them the authors of s. 5B used many of the phrases they found but framed a somewhat different provision. The first four sub-sections of the section apply alike to conflicts between the Houses over ordinary laws and to conflicts over laws falling within s. 7A. Sub-section (5), however, relates to laws within s. 7A and prescribes specially for the latter. Bills for the appropriation of money are dealt with by another provision and may be left out of consideration. By sub-s. (1) of s. 5B it is provided that if the Legislative Assembly passes any Bill and the Legislative Council rejects or fails to pass it or passes it with any amendment to which the Legislative Assembly does not agree and if after an interval of three months the Legislative Assembly in the same Session or in the next Session again passes the Bill with or without any amendment which has been made or agreed to by the Legislative Council and the Legislative Council rejects or fails to pass it or passes it with any amendment to which the Legislative Assembly does not agree, and if after a free conference between managers there is not agreement between the Legislative Council and the Legislative Assembly, the Governor may convene a joint sitting of the members of the Legislative Council and the members of the Legislative Assembly. The sub-section goes on to provide that at the joint sitting members may deliberate upon the Bill as last proposed by the Legislative Assembly and upon any amendments made by the Legislative Council with which the Legislative Assembly does not agree. No vote is to be taken at the joint sitting. Sub-section (2) then goes on to prescribe the steps that are to follow. After the joint sitting and either after any further communication with the Legislative Council in order to bring about agreement, if possible, between the Legislative Council and the Legislative Assembly, or without any such communication, the Legislative Assembly may by resolution direct that the bill as last proposed by the Legislative Assembly and either with or without any amendment subsequently agreed to by the Legislative Council and the Legislative Assembly, shall at any time during the life of the Parliament, or at the next general election of members of the Legislative Assembly be submitted by way of referendum to the electors qualified to vote for the election of members of the Legislative Assembly. The sub-section goes on to provide referentially for the manner of holding the referendum. Sub-section (3) next provides that if at a referendum a majority of the electors voting approve the Bill it shall be presented to the Governor for the signification of Her Majesty's pleasure thereon and become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill. Section 5C (2) of the Act provides the formula to be used in that event in the words of enactment. The formula is as follows: "Be it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Assembly of New South Wales in Parliament assembled, with the approval of the electors, in accordance with the provisions of section 5B of the [Constitution](#) Act, 1902, as amended by subsequent Acts, and by the authority of the same as follows:". Sub-section (4) of s. 5B is concerned with the expression which sub-s. (1) uses when after

speaking of the Council's rejecting a Bill it adds the words "or fails to pass it". Sub-section (4) which is copied substantially from s. 31 (2) of the Victorian [Constitution](#) Act 1903 says: "For the purposes of this section the Legislative Council shall be taken to have failed to pass a Bill if the Bill is not returned to the Legislative Assembly within two months after its transmission to the Legislative Council and the Session continues during such period." Sub-section (6) provides how a joint sittings of members of the two Houses is to be convened and held. It is to be convened by the Governor by message to both Houses of the Parliament and it is to be presided over by the President or in his absence the Speaker and, until special standing orders are made, the proceedings are to be governed by those of the Legislative Council. As has already been said, sub-s. (5) provides that s. 5B shall extend to any Bill whether it is a Bill to which s. 7A applies or not. The sub-section goes on to say that in the application of s. 5B to a Bill to which s. 7A does apply the submission of the Bill in accordance with s. 5B shall be a sufficient compliance with the provisions of s. 7A which require that it shall be submitted to the electors. The sub-section then says that the day is to be appointed by the Governor in such manner as may be provided by law and that the day shall be during the life of the Parliament and not sooner than two months after the resolution of the Legislative Assembly for the submission of the Bill to the electors. All that need be said about the special directions contained in sub-s. (5) is that whatever complies with them also complies with the slightly wider procedure prescribed in the case of other Bills by the second paragraph of sub-s. (2). (at p238)

7. The Bill which forms the subject of the suit was first passed by the Legislative Assembly on 2nd December 1959. It provided for the abolition of the Legislative Council by the simple statement that that Chamber was thereby abolished: it next went on to abolish in a similar way the office of member of the Legislative Council and all offices in connexion with that body. The Bill, however, then turned to two other topics. The first was the introduction into the [Constitution](#) Act of a provision numbered s. 7B. So numbered immediately following s. 7A of which there seems to be no express repeal, this provision is to prevent the creation or establishment again of any second chamber except after the approval of the electors at a referendum. The form or design of s. 7B is that of s. 7A. The second of the two topics mentioned is the construction to be given to references in existing legislation to the Parliament or the Houses or either of them and so on, a subject that might be considered as incidental to and necessarily arising out of the abolition of the Legislative Council. This perhaps cannot be said of the first topic, namely, the re-establishment of a second chamber. Accordingly it is treated by the plaintiffs as a subject which is distinct and lies wholly outside the scope of s. 7A. On that footing it is argued that the Bill is framed in a way which will not satisfy the requirements of s. 7A. It is said for the plaintiffs that the manner and form prescribed by s. 7A for abolishing the Legislative Council is not complied with unless the Bill passed for submission to a referendum is confined to matters covered by sub-s. (1) or matters to which sub-s. (2) of s. 7A and upon In effect the contention is based upon sub-s. (2) of s. 7A and upon the inconveniences which might arise from permitting other matters being mixed up with the question of abolishing the Legislative Council or with any other question covered by s. 7A when a Bill is submitted to the electors. The difficulty, however, is that sub-s. (2) in speaking of "a Bill for any purpose within sub-s. (1)" uses language which does not confine the Bill to a single purpose. The inconveniences that are vouched in aid of the construction are of a political not a legal character. Moreover, the question is not whether the Bill fulfils the requirements of s. 7A considered alone but of s. 7A as controlled or varied by s. 5B (5); and the latter sub-section expressly says that s. 5B shall extend to any Bill whether it is a Bill to which s. 7A applies or not, a provision which does not speak as if a mutually exclusive distinction must be maintained. The contention cannot be sustained. (at p239)

8. The argument which seems to take its place next in logical sequence is that the Bill should have

been introduced in the Legislative Council and not in the Legislative Assembly because it dealt with the powers, privileges and status of the Legislative Council. It is objected that because it was sent up from the Assembly there was a fatal departure from the manner and form of law making. Blackstone in his Commentaries says that all Bills that may in their consequences any way affect the right of the peerage are by the custom of parliament to have their first rise and beginning in the House of Peers, and to suffer no changes or amendments in the House of Commons: 1 Bl. Com. 168. Erskine May states the rule somewhat differently and as one applying to either House: "A Bill which concerns the privileges of either House should in courtesy commence in the House to which it relates.": May, Parliamentary Practice, 14th ed. (1946) p. 462. However it may be stated it is in this rule of the Parliament at Westminster that the source is found of the privilege claimed for the Legislative Council. There is no express reference to the rule in the Standing Orders of the Legislative Council but r. 2 provides that in all cases not specially provided for resort may be had to the Rules, Forms and Usages of the Imperial Parliament as laid down in the latest edition of May's Parliamentary Practice which shall be followed so far as the same can be applied to the proceedings of that House. On approval by the Governor the Rules and Orders of the Legislative Council and of the Legislative Assembly became "binding and of force": s. 15 (2) of the [Constitution Act, 1902-1956](#). The Act does not make them part of the general law. The use which the plaintiffs seek to make of the rule of privilege or practice which they invoke is twofold. Perhaps the most important application which they make of it is as the ground and explanation of the refusal to give consideration to the Bill: it amounted, they say, to no more than calling attention in the proper and received form to a privilege and to its non-observance and did not constitute a rejection of the Bill or a failure to pass it. But it meant also that there had been a failure to pursue the lawful procedure and moreover it meant that the Bill had lapsed on the privilege being enforced or acted upon and could not be thereafter treated as rejected and sent up a second time. There was, it is said, a failure to comply with the manner and form prescribed for legislation of the description to which the Bill belongs. It is necessary to separate these various arguments: they may depend on the same set of considerations but they place different complexions upon them. In the first place it seems clear enough that if it be right that the bill ought to have originated in the Council, it is not because of a requirement which falls within the proviso to s. 5 of the Colonial Laws Validity Act 1865, which formed the basis of the decision in *Trethowan's Case* (1932) AC 526; (1932) [47 CLR 97](#); (1931) 44 CLR 394; (1930) 31 S.R. (N.S.W.) 183. . The terms of that proviso are these: "provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law for the time being in force in the said Colony". The requirement supposed, that the Bill should originate in the Council, is of a parliamentary kind which is not enforceable by law and it is not prescribed by an Act of Parliament, by letters patent, by order in council or by a "colonial law". It therefore cannot be within the provision. No doubt there are other reasons but that is enough. In the second place, the argument that, inasmuch as in form the Bill was one for the assent of both Houses and was for a purpose governed by s. 7A, it was necessary under the rule or privilege that it should be introduced in the Legislative Council, seems to give too little weight to the consideration that after all what is in question is compliance with s. 5B. Suppose it to be true that a Bill within s. 7A should, as a matter of parliamentary privilege, rule or practice, originate in the Council, yet the very terms of sub-s. (1) and sub-s. (4) of s. 5B considered together show that it is contemplated that on two occasions after the Bill has been passed by the Assembly the Council must reject or fail to pass it. (at p241)

9. But nevertheless the argument has an importance which is considerable. It is not that the existence and operation of the privilege claimed could go to the ultimate validity of a law originating in the Assembly if passed and approved under s. 5B or that it could affect the lawfulness of the

proceedings. The importance is that privilege formed the ground upon which the Council acted and it aids the contention that that action, explained by the claim of privilege, did not amount to a rejection or failure to pass the Bill. (at p241)

10. The Legislative Assembly passed the Bill in the evening of 2nd December 1959 and an hour later adjourned until 1st March 1960. In the meantime the President of the Council received from the Speaker of the Assembly a message reciting the passing of the Bill and presenting it to the Council for its concurrence. The President at once reported to the Council the receipt of the message. Thereupon a motion was moved as a matter of precedence and privilege that the Bill be returned to the Assembly with a message which was set out. The message informed the Speaker that the Legislative Council in accordance with long established precedent practice and procedure, and for that reason, declined to take into consideration a Bill affecting those sections of the [Constitution](#) Act providing for the constitution of the Council unless such Bill originated in the Council and that it returned the Bill (identifying it by its long title) without deliberation thereon and requested that the Legislative Assembly deem this a sufficient reason. The concluding words are traditional in a claim of privilege and indeed the whole message is framed in accordance with the forms long customary in such a claim under parliamentary procedure. (at p241)

11. It appears that in the history of the Parliament of New South Wales since 18 & 19 Vict. c. 54 forty-six Bills directly affecting the constitution, powers or privileges of the Legislative Council have been dealt with and of these thirty-one have been introduced in the Council and fifteen in the Assembly. Of the latter, four on being sent up to the Council were the subject of a ruling by the President that they should have originated in the Council. There were ten in which no point of privilege was raised, and one in which it was mentioned, though the Council proceeded with the Bill. It is obvious from this and other facts which are set out in the pleading that the privilege rule or practice upon which the Council relied is not a new claim but is drawn in some degree from the past relations of the Houses. (at p242)

12. The contention is that the resolution raising and insisting upon the rule in the present case does not amount to a rejection of the Bill and does not involve a failure to pass it within the meaning of s. 5B (1) and (4). (at p242)

13. Sub-section (4) of s. 5B makes failure to return the Bill to the Legislative Assembly within two months after its transmission to the Legislative Council conclusive of failure to pass the Bill. The return of the Bill with the message is of course incompatible with the application to the case of this provision. Owen J. was of opinion that sub-s. (4) provided exhaustively what should be the test of failure to pass a Bill for the purposes of s. 5B. That might form a very important question in the case, if, as his Honour considered, what the Legislative Council had done did not amount to a rejection of the Bill. The reason why Owen J. regarded what the Council did as not amounting to a rejection appears from the following passage in his judgment: "The word 'reject' when used in the Parliamentary sense in which those who drafted s. 5B used it, conveys to my mind the idea that a Bill has either been taken into consideration by a legislative body and after deliberation upon its merits has been rejected by an adverse vote or that there has been an unqualified refusal to consider it. Here there was no rejection in either of these senses." (1960) 77 WN (NSW), at p 795 . It will be seen that the point depends to no small extent upon the word "reject". The word has no technical parliamentary sense: like the words "lost" and "defeated" in the expressions "the Bill is lost" or "the Bill is defeated" it is descriptive rather than a word of art, but of course in a provision of the nature of s. 5B it is true that it is descriptive of a parliamentary result or conclusion. The question is what does s. 5B mean to cover by its use. The provision is concerned with a refusal or neglect of the

Council to give effect to the Assembly's will in law making. It is because the assent of the Council to a bill may be withheld otherwise than by rejection that the alternative "fails to pass" is added and that the provision deals specially with amendment. Pursuing the same purpose, sub-s. (4) provides a period of inaction as conclusive of failure to pass a bill. These are considerations which point to an intention to cover entirely the withholding by the Legislative Council of its consent to a measure sent up to it by the Legislative Assembly. It may well be that the message sent by the Council to the Speaker should be interpreted as an expression of a refusal to entertain the Bill unless and until it was introduced as a new Bill into the Legislative Council and not sent up or transmitted by the Assembly. But it did amount to a refusal to entertain the Bill passed by the Assembly and transmitted: whether that was qualified as to that Bill or definitive, it was a refusal to entertain it or proceed with it and constituted an express denial of the Council's assent to the measure as it then stood before the Council. If on the true interpretation of s. 5B the Bill was then lawfully with the Council for the purpose of that provision there seems to be no good reason why, again for the purpose of that provision, refusal to entertain the Bill should not amount to rejection. On the text of s. 5B (1) and (4), as has already been said, it is clear enough that s. 5B contemplates that a bill, notwithstanding that it falls within s. 7A, shall come up from the Assembly where it originated. It follows that on the true reading of s. 5B the action of the Legislative Council should be held to amount to a rejection of the Bill. That applies equally to the first as to the second refusal to consider the Bill. (at p243)

14. The second rejection took place on 6th April 1960, the Bill having been sent up for a second time by the Assembly on that day. The interval was of course more than three months from 2nd December 1959, but it will be remembered that the Legislative Assembly had adjourned on that date until 1st March 1960. It was not until that date that the message of the Legislative Council was or could have been reported by the Speaker to the Assembly. But this makes no difference. The Bill was in fact rejected by the Council on 2nd December 1959 and it was in the same Session. The step which s. 5B (1) next calls for is expressed by the words "and if after a free conference between managers there is not agreement between the Legislative Council and the Legislative Assembly the Governor may convene a joint sitting of the members of the Legislative Council and the members of the Legislative Assembly". Rules 145-152A of the Standing Orders of the Legislative Council provide for ordinary and free conferences between the Houses. It is unnecessary to state the contents of any of them except r. 152A which says that if a free conference is requested by the Assembly in pursuance of s. 5B the Council shall agree to the conference being held without delay: and the time and place for holding the same shall be appointed by the Council. It should perhaps be explained that a conference and a free conference are methods of bringing about an inter-change of communications or views between the Houses at Westminster once employed there but long since disused. Each House nominates members as representatives called managers. At an ordinary conference the managers exchange written statements: at a free conference there may be unrestricted discussion between the managers. But the last free conference held at Westminster took place in 1836 and there had been none before that since 1740. (at p244)

15. On 7th April 1960 the Legislative Assembly resolved on a message to the Council requesting, pursuant to the provisions of s. 5B, a free conference with the Legislative Council with respect to the Bill. The message named ten managers whom the Assembly had appointed. The message was signed by the Speaker. On the message being reported to the Council, that Chamber adopted a resolution that this House does not consider that any situation has arisen whereby a free conference between managers of the Legislative Council and the Legislative Assembly is either necessary or proper and accordingly it refuses the request of the Legislative Assembly in its message dated 7th April 1960 on the subject of the [Constitution](#) Amendment (Legislative Council Abolition) Bill. A

message accordingly was sent to the Speaker. The Governor thereupon sent messages to the Houses convening a joint sitting of the members of the Houses to deliberate upon the Bill. The purpose was named scil. "to deliberate upon the Bill . . . and for purposes connected therewith". The place named was the Legislative Council chamber and the date 20th April 1960: the members of the Council and of the Assembly were thereby required to give their attendance at the said time and place accordingly. Thereupon a resolution was passed in the Legislative Council to the effect that the House did not consider that a situation had arisen conferring constitutional power upon His Excellency the Governor to convene the joint sitting of members and the House resolved that for this constitutional reason the members of the House do not attend at or participate in such joint sitting. A respectful answer to His Excellency to this effect was resolved upon. The resolution was passed by a majority and in fact twenty-three members of the Legislative Council met eighty-five members of the Legislative Assembly at the time and place appointed. The President not attending, the Speaker presided and there were some deliberations upon the subject of the meeting. (at p244)

16. For the plaintiffs it is contended that upon the foregoing facts there was no fulfilment of the requirements as to a free conference and a joint meeting of members and that this defect of procedure is fatal. It is said that the Governor's authority to convene a joint meeting could arise only if there was a free conference and that in any event there was no joint meeting because the members of the Council who attended did so without the sanction of the House. It must be remembered that for the Crown to summon a conference of the two Houses would be open to constitutional objection as an interference by the Crown with the Houses unless by statute or resolution the Houses had invited or the conventions of the [Constitution](#) allowed it. In a sense therefore the words "after a free conference" do govern the authority of the Governor to convene the joint meeting. It is to be noticed however that the requirement positively expressed is that there shall not be agreement and the words "after a free conference" are concerned with a step first to be taken towards obtaining agreement. It is in such a matter as this that the difference can be seen between the invalidation of a statute by judicial decision on the ground of what of power over the subject and the judicial examination of the regularity of the legislative procedure by which the statute is enacted. In the present proceeding we are engaged in an examination of the course of the legislative process in consequence of the concession made in the Supreme Court. The result is to bring into relief the departure from the direction contained in the words "after a free conference". If these words are understood as expressing an essential condition of the validity of a statute which may emerge from the process, difficulties certainly arise out of the refusal of the Legislative Council to take part in a free conference. But is it in accordance with principle to treat the omission of such a step in the legislative process as invalidating the statute once it is approved by the electors and assented to by the Crown? Under the federal system we have grown so accustomed to attacks upon the validity of Acts of Parliament that it is easy for us to overlook the principles which apply to a unitary system when legislation is attacked because it is not an authentic expression of the legislative will. Although New South Wales no longer enjoys a unitary constitution, it is by those considerations that the problem is governed. If, as seems certainly correct, we should read the concession made at the beginning of the hearing in the Supreme Court as going no further than questions upon which would depend the ultimate validity of the statute if and when approved and assented to, it is necessary to deal with the objection precisely as a court would do if hereafter the validity of the resulting enactment or of any enactment made thereunder were challenged. The assumption to be made is that we have before us a constitutional instrument apparently passed as an Act in pursuance of s. 5B with words of enactment following s. 5C (2) and bearing the assent of the Crown. The assumption must be made whether the supposed legislative enactment falls under s. 7A or relates to some more ordinary subject. Would it be possible for the Court to investigate the legislative process and hold

the enactment void because there had not been a conference of managers? There is no doubt that the words "after a free conference between managers" contain an implied direction that such a conference shall take place. In the same way the words relating to the joint sitting of members of the Houses import an intention that the Governor shall then exercise the authority to convene a joint sitting of members. But it is an entirely different thing to find in the direction an intention that a departure from the procedure shall spell invalidity in the statute when it is passed approved and assented to. In this case there are two matters with which we are dealing: the legislative power and the procedure for its exercise. The principles of the common law distinguished sharply between invalid attempts to exercise a legislative power and departures from the prescribed course for its exercise which may not or do not bring invalidity as a necessary consequence. In the end the distinction must be governed by the intention expressed by the legislature conferring the power and prescribing the steps to be taken in the course of its exercise. But commonly no express declaration is to be found in a statutory power as to the effect on validity of departures from the procedure laid down. The question is then determined by reference to the nature of the power conferred, the consequences which flow from its exercise, the character and purpose of the procedure prescribed. The power here is to enact a public general statute and the power to do this extends to a statute altering the constitution of the Legislature so that if the statute is to be void every future piece of legislation passed by the Legislature of the State so constituted will have no force or effect. The matter of procedure prescribed is a matter affecting the process in Parliament of legislating, a matter at once outside the ordinary scope of inquiry by the courts and also one not necessarily of public notoriety. The point of procedure concerns a step preliminary to the calling by the Governor of a joint sitting of the members of the two Houses. Such a meeting was convened in point of fact and a meeting of certain members of the two Houses took place at the time and place appointed. The point that in itself it could not amount to a joint meeting of members because the Council had resolved that its members should not attend is untenable. The preliminary step of appointing managers freely to confer rested on the co-operation of both Houses in a conflict. It would rest with either House to neglect the duty and so bring the proceedings to nought. True it is that one contention is that a condition should be implied that the Council or the Assembly or for that matter neither of them may defeat the operation of s. 5B by doing so. But once the conclusion is reached that a failure to perform the requirement of holding a free conference by managers spells invalidity of the ultimate statute, to make such an implication seems to amount to extracting from the interpretation which is first placed on the clause an implication to avoid a necessary consequence of that interpretation. On the other hand, before one reaches the conclusion that the failure to fulfil the requirement of holding a free conference will result in the invalidity of the law if adopted, it is natural to treat the fact that the Legislative Council may decline a conference of managers as a reason to be added to the other considerations for holding that it is not a matter going to validity. Lawyers speak of statutory provisions as imperative when any want of strict compliance with them means that the resulting act, be it a statute, a contract or what you will, is null and void. They speak of them as directory when they mean that although they are legal requirements which it is unlawful to disregard, yet failure to fulfil them does not mean that the resulting act is wholly ineffective, is null and void. It is almost unnecessary to say that the decided cases illustrating the distinction relate to much humbler matters than the validity or invalidity of the constitution of the Legislature of a State. But in them all the performance of a public duty or the fulfilment of a public function by a body of persons to whom the task is confided is regarded as something to be contrasted with the acquisition or exercise of private rights or privileges and the fact that to treat a deviation in the former case from the conditions or directions laid down as meaning complete invalidity would work inconvenience or worse on a section of the public is treated as a powerful consideration against doing so. Is it possible to imagine a stronger case of inconvenience than the invalidation perhaps at some future time of a

constitutional provision possessing all the outward appearances of a valid law on the ground that when it was made managers of the Council had not met managers of the Assembly before the members of the two Houses were required by the Governor to meet? The argument for the plaintiffs suggested that the Governor's "power" to summon a joint meeting of members could not arise without a conference of managers. If that were all it would be enough to say that it is not a "power" in the ordinary sense and that in fact he did summon or convene the meeting without objection on the ground that he had interfered with the parliamentary process in a way which was beyond the province of the Crown. But that is not the real point. The real point sought to be made is that a free conference is an essential condition of the ultimate validity of any statute enacted under s. 5B. To that the answer is that according to the principles governing the invalidation of statutes for deviation from the legislative procedure laid down by law no such invalidity should be held to ensue as a consequence of the lack of a meeting of managers in a free conference. Once that conclusion is reached there is an end of any contention that the proviso to s. 5 of the Colonial Laws Validity Act 1865 can apply; there is no imperative requirement. For the foregoing reasons, assuming that s. 5B possesses force and validity, there is no valid ground upon which it should be held that a fatal departure from its requirements has occurred justifying the intervention of the Court. (at p248)

17. But the plaintiffs attack the constitutional validity of s. 5B and say that it cannot provide a means by which the Legislative Council may be abolished without the consent of that Chamber itself to a Bill for the purpose, before its submission to the electors for approval. The grounds for this contention are said by the plaintiffs to be found in the nature of the constituent power of the Legislature of New South Wales and the limitations upon that power. But before proceeding to deal with that contention it is desirable to dispose of an entirely difference and somewhat curious point made against the validity of so much of s. 5B as may cover a Bill to abolish the Legislative Council. It is based on [s. 15](#) of the [Constitution](#) of the Commonwealth. That section provides for filling a casual vacancy in the Senate. Its opening sentence says that if the place of a senator becomes vacant before the expiration of his term of service the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term or until the election of a successor as thereafter provided whichever first happens. It is obvious that the provision supposes that there will be two Houses of Parliament in every State: it is argued that it necessarily implies that there shall continue to be two Houses of Parliament accordingly. The contention means that the Federal [Constitution](#) deprives the State legislature of the power to abolish one house. This argument seems clearly enough to be ill founded. The supposition that there will be two Houses implies no intention legislatively to provide that the constitutional power of the State to change to a unicameral system, if the power existed, should cease. One can understand the section being relied upon as evidence that it was not supposed that the power to make the change existed. But that is all. Even that is not a very cogent argument. (at p249)

18. It is now necessary to return to the question of the intrinsic validity of s. 5B. There are two sources of possible constitutional power enabling the Legislature to adopt s. 5B: one is [s. 5](#) of the [Constitution](#) Act, 1902-1956 (N.S.W.), the other is s. 5 of the Colonial Laws Validity Act 1865 (28 & 29 Vict. c. 63). Sub-section (5) of s. 5B extends the operation of the section to Bills to which s. 7A applies and, of course, the proviso to s. 5 of the Colonial Laws Validity Act 1865 forms the basis of the restriction or qualification imposed by s. 7A upon the exercise of the constituent power of the legislature. For, the reason why in Trethowan's Case [\[1932\] UKPC 1](#); [\(1932\) AC 526](#); [\(1937\) 47 CLR 97](#); (1931) 44 CLR 394; (1930) 31 SR (N.S.W.) 183. it was decided that the referendum prescribed by s. 7A was an essential condition of the abolition of the Legislative Council was simply because s. 7A was held to provide a manner and form which according to the proviso to s. 5 of the Colonial Laws Validity Act must be followed. It therefore might be thought that to effect the change

in the actual operation or application of s. 7A which sub-s. (5) of s. 5B assumes to make, reliance must to some extent at all events be placed upon the constituent power conferred on colonial legislatures by s. 5 of the Colonial Laws Validity Act 1865. But reflection will show that this is not necessarily so. The proviso to s. 5 by its own terms requires that "such laws", that is so far as the matter in hand is concerned laws respecting the constitution, powers and procedure of the legislature, shall be passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law for the time being in force in the said colony. This catalogue of legislative instruments covers much else besides a law made under the power expressly given by s. 5 to the representative legislature to make laws respecting its constitution powers and procedure. It is however the fact that in most of the judgments given in Trethowan's Case [\[1932\] UKPC 1](#)[\[1932\] UKPC 1](#); ; (1930) 31 SR (NSW) 183; (1931) 44 CLR 394; [\(1932\) AC 526](#); [\(1932\) 47 CLR 97](#) reliance was placed upon that power for the enactment of s. 7A, as distinguished from its effectiveness under the proviso when enacted. So far as concerns the effectiveness of pars. (a), (b) and (c) of sub-s. (5) it is not a matter of importance; for clearly they can be justified constitutionally in exactly the same way as was s. 7A. But some doubt may perhaps exist as to the substance of s. 5B falling within the words "respecting the constitution powers and procedure of such legislature", although the same doubt does not appear to have been felt by members of the Court in Taylor v. Attorney-General of Queensland [\[1917\] HCA 45](#)[\[1917\] HCA 45](#); ; [\(1917\) 23 CLR 457](#): cf (1917) 23 CLR, at pp 470 473, 474, 477, 480 . The reason for the doubt is that s. 5B leaves the legislature as it is and yet makes special provision on occasion for one House with the approval of the electors at a referendum exercising a full legislative power, including indeed a constituent legislative power, without the consent of the other House. It may be said that to do this goes beyond the literal meaning of the words "constitution powers and procedure of such legislature". But be that as it may, [s. 5](#) of the [Constitution](#) Act, 1902-1956 appears on consideration to contain a sufficient power not only to change the bicameral system into a unicameral system but also to enable the resolution of disagreements between the two Houses by submitting an Act passed by the Assembly for the approval of the electors in substitution for the assent of the Council and moreover to include in the application of that legislative process Bills for the abolition of the Legislative Council and Bills otherwise falling within the description dealt with by s. 7A. The reasoning supporting this conclusion is indeed simple. It rests on the plain if very general words of [s. 5](#) of the [Constitution](#) Act. The first paragraph of the section is as follows: "The Legislature shall, subject to the provisions of the Commonwealth of Australia [Constitution](#) Act, have power to make laws for the peace welfare and good government of New South Wales in all cases whatsoever." The expression "Legislature" is defined in s. 3 to mean the Sovereign with the consent of the Legislative Council and Legislative Assembly. The second paragraph of s. 5 is a proviso to the effect that all Bills for appropriating any part of the public revenue or for imposing any new rate tax or impost shall originate in the Legislative Assembly. The proviso has no relevance to the case, but perhaps it may supply an example of a parliamentary proviso that would not be regarded as affecting the validity of the appropriation rate tax or impost and also an example of a provision of the [Constitution](#) which might be removed in the exercise of the power expressed in the first paragraph of [s. 5](#). The first paragraph confers a complete and unrestricted power to make laws with reference to New South Wales. There is doubtless a territorial limitation implied in the reference to New South Wales but there is no limitation of subject matter. The laws may be constitutional or at the other extreme they may deal with subjects of little significance. Clearly the power extends to laws altering the [Constitution](#) Act itself: cf. McCawley v. The King [\(1920\) AC 691](#), at pp 703-706, 709; [\(1920\) 28 CLR 106](#), at pp 114-117, 120 . It was contended that although it might be true that s. 5 gave a very extensive power which, as in a flexible or uncontrolled constitution, extended to laws relating to, and changing, the "[Constitution](#)" of New South Wales, yet the postulate or hypothesis of

the section is that "the Legislature" as defined shall be and remain the repository of the power so that no law could be good which placed such a power of constitutional amendment or indeed of simple law-making in the hands of one House even with the approval of a majority of the electors and the assent of the Crown. There are many reasons for assuming that the assent of the Crown must always remain necessary but what ground is there for supposing that the Legislature must always remain defined in terms of two Houses? The purpose of the provision is to express the full legislative power of a State the authority of which is continued under [ss. 106](#) and [107](#) of the [Constitution](#) of the Commonwealth. The Legislature was endowed with constituent as well as ordinary legislative power. [Section 5](#) was of course enacted by the Legislature of New South Wales. But it was enacted in the exercise of the State's constituent legislative power and that in turn depended upon an existing source of authority. That existing source of authority consisted in the Imperial Act (18 & 19 Vict. c. 54), commonly called the [Constitution](#) Statute 1855, and the Act of the Colony as amended which forms the schedule of that statute, otherwise 17 Vict. No. 41, commonly called the [Constitution](#) Act. To give the history of these two legislative instruments and to explain them would be rather to stray from the material point. They meant the establishment of a new legislature; at the same time the principles of responsible government were introduced and with that came the principles and conventions and general tradition of British parliamentary procedure. But what matters here is that the two instruments contain the source whence the constituent power of the Legislature is derived. It is therefore enough to say that in intended pursuance of a power conferred by ss. 32 and 33 of 13 & 14 Vict. c. 59 upon the then Legislative Council to establish separate legislative Houses and the like the Legislative Council passed a Bill which was reserved for the Royal Assent. In England it was considered to go beyond the power of the Council in certain respects. Changes were made in it and the [Constitution](#) Statute was passed to enable the Queen to assent to it in its changed form. In that form it was placed in the schedule to the [Constitution](#) Statute. All that matters for present purposes is that by [s. 1](#) of the [Constitution](#) Act (17 Vict. No. 41) the then existing Legislative Council was replaced by a Legislative Council and a Legislative Assembly composed in the manner which the Act prescribed and the Queen was empowered by and with the consent of the Council and Assembly to make laws for the peace, welfare and good government of the Colony of New South Wales in all cases whatsoever. [Section 4](#) of the [Constitution](#) Statute (18 & 19 Vict. c. 54) enacted that it should be lawful for the Legislature of New South Wales to make laws altering and repealing all or any of the provisions of the [Constitution](#) Act, by the section called "the said reserved Bill", in the same manner as any other laws for the good government of the Colony. Section 9 defined the word "Legislature" in the Act to include as well the Legislature to be constituted under the said reserved Bill and the Act as any future Legislature which might be established in the Colony under the powers in the said reserved Bill and the Act contained. In fact the Act of 1902 repealed the [Constitution](#) Act (scil. "the said reserved Bill") and replaced it with the provisions of that Act. It seems obvious that the combined effect of [s. 4](#) of the [Constitution](#) Statute and [s. 1](#) of the [Constitution](#) Act was to confer upon the Legislature of New South Wales a full constituent power. It does not appear to matter whether you say that the power conferred by [s. 4](#) of the [Constitution](#) Statute to repeal the [Constitution](#) Act implies a power to replace it or say that the two provisions (s. 4 of the Statute and s. 1 of the Act) combined to show that the power to make laws for the peace welfare and good government of the colony of New South Wales comprised a power to enact a constitution. The authority thus conferred is that exercised in adopting [s. 5](#) of the [Constitution](#) Act 1902 and it formed an ample foundation for that enactment. It must be remembered that the negative restrictions which s. 7A imposes under the operation of s. 5 of the Colonial Laws Validity Act were complied with when s. 5B was enacted. That being so, once it is seen that s. 5 gives the Legislature a full constituent power the question why should the power of the Legislature not extend to the enactment of s. 5B almost answers itself. What it means is that

the power to legislate, including the power to legislate for the abolition of the Council, may be exercised by the Crown with the consent of the Assembly provided the proposed law is approved by the majority of the electors voting at a referendum. That is a law falling within the authority described by [s. 5](#) of the [Constitution](#) Act, 1902. That being so it is valid. (at p252)

19. It follows from the foregoing that the order or decree of McLelland C.J. in Eq. following the decision of the Full Court is right. That being so the proper course for this Court to follow is to dismiss the application for special leave to appeal. (at p252)

FULLAGAR J. This is an application by the plaintiffs in a suit in equity in the Supreme Court of New South Wales for special leave to appeal from a decree made by McLelland C.J. in Eq. dismissing the suit. The dismissal followed necessarily from the decision of a specially constituted Full Court of five judges given on a demurrer ore tenus to the statement of claim. That decision was the decision of a majority: Evatt C.J., Herron J., Sugerman J. and McLelland C.J. in Eq., Owen J. dissenting. (at p253)

2. The Legislature of New South Wales at present comprises, under the [Constitution](#) Act, 1902-1956 (N.S.W.), two Houses of Parliament - the Legislative Council and the Legislative Assembly. The object of the suit was to obtain declarations and injunctions which would have the effect of preventing the submission to a referendum under the [Constitution](#) Act, of a Bill for the Abolition of the Legislative Council. That Bill has been passed by the Assembly, but has not been passed by the Council. The difficulties which such a suit must encounter in limine are obvious, and are illustrated by *Hughes and Vale Pty. Ltd. v. Gair* [\[1954\] HCA 73; \(1954\) 90 CLR 203](#) . In this particular case, however, an agreement has been made between the parties with a view to obviating, in part at least, these difficulties. I think the most convenient course is first to consider on their merits the questions of law raised in the suit, and then, in the light of the view which I take on those questions, to consider the effects of this agreement. (at p253)

3. In order to understand the position which has arisen, it is necessary to go back to the year 1929. By s. 2 of Act No. 28 of that year a new s. 7A was introduced into the [Constitution](#) Act. That section, so far as material, is as follows: "(1) The Legislative Council shall not be abolished nor, subject to the provisions of sub-section six of this section, shall its constitution or powers be altered except in the manner provided in this section. (2) A Bill for any purpose within sub-section one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section. (3) On a day not sooner than two months after the passage of the Bill through both Houses of the Legislature the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly. Such day shall be appointed by the Legislature. (4) When the Bill is submitted to the electors the vote shall be taken in such manner as the Legislature prescribes. (5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent. (6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section." It is to be noted in passing that sub-s. (2) of this section takes the remarkable course of expressly prohibiting the presentation to the Governor of a Bill for any purpose within sub-s. (1) unless it has been approved at a referendum. (at p254)

[4. In 1930](#) both the Legislative Council and the Legislative Assembly passed two Bills, the one of which purported to repeal s. 7A, and the other of which purported to abolish the Legislative Council. Before the Bill had been presented to the Governor, certain members of the Legislative Council commenced a suit in equity in the Supreme Court of New South Wales against the President

of the Legislative Council, the Attorney-General and others, claiming (inter alia) a declaration that it would be unlawful to present the Bill to the Governor without its being submitted to a referendum, and an injunction to restrain such presentation. This was the well-known case of *Trethowan v. Attorney-General (N.S.W.)* (1930) 31 SR (NSW) 183; (1931) [44 CLR 394](#) [[1932](#)] [UKPC 1](#); ; ([1932](#)) [AC 526](#); ([1932](#)) [47 CLR 97](#) . The Supreme Court (Long Innes J. dissenting) made the declaration and granted the injunction. "From this decision the defendants other than the President of the Council appealed, by special leave, to the High Court, which in granting such leave ordered that the appeal to the High Court be limited to the questions whether the Parliament of the State of New South Wales had power to abolish the Legislative Council of the said State or to alter its constitution or powers or to repeal s. 7A of the [Constitution](#) Act 1902 except in the manner provided in the said s. 7A" (1931) 44 CLR, at pp 399, 400 . Questions of remedy being thus excluded from consideration, the appeal to the High Court was dismissed (McTiernan J. dissenting), and an appeal from the High Court to the Privy Council was also dismissed. (at p254)

5. It was argued for the defendants in *Trethowan's Case* [[1932](#)] [UKPC 1](#); (1930) 31 SR (NSW) 183; (1931) 44 CLR 394; ([1932](#)) [AC 526](#); ([1932](#)) [47 CLR 97](#) that s. 7A was devoid of effect, because the Parliament of New South Wales (like the Imperial Parliament) could not "fetter itself" - the Legislature of New South Wales could not legislate itself out of its constitutional power to make and repeal laws. Indeed, it was said, if it purported to deprive itself of a power, no formal repeal was necessary to effect a resumption of the power, and it would remain competent to make laws inconsistent with any restraint or limitation which it had sought to create: *McCawley v. The King* ([1920](#)) [AC 691](#); (1920) [28 CLR 106](#) . But the Queensland statute which was in question in *McCawley v. The King* ([1920](#)) [AC 691](#); ([1920](#)) [28 CLR 106](#) was not one which affected the constitution of the legislature itself. The statute in question in *Trethowan's Case* [[1932](#)] [UKPC 1](#); (1930) 31 SR (NSW) 183; (1931) 44 CLR 394; ([1932](#)) [AC 526](#); ([1932](#)) [47 CLR 97](#) was such a statute, and the position was held to be governed by s. 5 of the Colonial Laws Validity Act. That section, so far as material, provides: "Every representative legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in Council, or colonial law for the time being in force in the said Colony." The Legislature of New South Wales is a representative legislature within the meaning of this provision, which in terms looks both to the past and to the future. It was held that s. 7A prescribes a "manner or form" in which legislation of a particular character must be "passed". (at p255)

6. I regard *Trethowan's Case* [[1932](#)] [UKPC 1](#); (1930) 31 SR (NSW) 183; (1931) 44 CLR 394; ([1932](#)) [AC 526](#); ([1932](#)) [47 CLR 97](#) as establishing four things with regard to s. 5 of the Colonial Laws Validity Act. First, that section has put beyond doubt the power of a representative colonial legislature to make laws respecting its own constitution: it is not necessary to consider whether it could deprive itself of its representative character. Secondly, such a legislature may prescribe a particular "manner or form" in which a law respecting its own constitution must be "passed". It may repeal or alter a "manner or form" which has been prescribed, but, until it has specifically repealed or altered the prescribed "manner or form", a law which has not been "passed" in the prescribed manner or form will not be a valid law. Thirdly, the words "manner or form" have a wide meaning, and, in spite of the fact that the word "passed" is used, cannot be regarded as referring only to matters of Parliamentary procedure. The statement of Rich J. to this effect in *Trethowan's Case* (1931) 44 CLR, at pp 418, 419 was expressly approved by the Privy Council (3), and their Lordships also approved of a passage a little later in his Honour's judgment in which he said: "In my

opinion the proviso to s. 5 relates to the entire process of turning a proposed law into a legislative enactment, and was intended to enjoin fulfilment of every condition and compliance with every requirement which existing legislation imposed upon the process of lawmaking" (1932) AC, at p 541; (1932) 47 CLR, at p 106 . Dixon J. said: "The law governing the reservation of Bills and the laying of copies before the Houses of the Imperial Parliament were matters prominently in view when s. 5 was framed. It is evident that these matters are included within the proviso, and that, if and in so far as the law for the time being in force purported to make them imperative, a law could not be said to have passed unless they were fulfilled. An interpretation which restricts the application of the words of the proviso to conditions occurring, so to speak, within the representative legislature confines to matters of procedure part of a constitutional provision basal in the development of the self-governing Colonies. The more natural, the wider and the more generally accepted meaning includes within the proviso all the conditions which the Imperial Parliament or that of the self-governing State or Colony may see fit to prescribe as essential to the enactment of a valid law. Upon this interpretation a full constituent power is given to the representative legislature, but it may determine what shall be necessary to constitute an exercise of that or any other legislative power" (1931) 44 CLR, at pp 432, 433 . Fourthly, non-compliance with a prescribed "manner and form" involves the consequence of invalidity. (at p256)

7. Having these matters in mind, I come to the events which led to the suit with which we are now concerned. (at p256)

8. Up to 1933 the Legislative Council was a nominee House consisting of an unlimited number of members. By s. 3 of Act No. 2 of that year it was provided that, as from a date to be proclaimed, the Legislative Council should consist of sixty elected members. While the Council was a nominee House, any serious difference between the will of the Assembly and the will of the Council could be resolved by the Government of the day by the appointment of new members who could be relied upon to support the will of the Assembly. But the change in the constitution of the Council meant that this expedient was no longer available, and it was evidently thought desirable that some new method should be provided for the resolution of what are commonly called "deadlocks" between the Houses. To this end new sections 5A and 5B were introduced into the [Constitution](#) Act. Section 5A provides: "If the Legislative Assembly passes any Bill appropriating revenue or moneys for the ordinary annual services of the Government and the Legislative Council rejects or fails to pass it or returns the Bill to the Legislative Assembly with a message suggesting any amendment to which the Legislative Assembly does not agree, the Legislative Assembly may direct that the Bill with or without any amendment suggested by the Legislative Council, be presented to the Governor for the signification of His Majesty's pleasure thereon, and shall become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill." Section 5B, so far as material, provides: "(1) If the Legislative Assembly passes any Bill other than a Bill to which section 5A of this Act applies, and the Legislative Council rejects or fails to pass it or passes it with any amendment to which the Legislative Assembly does not agree, and if after an interval of three months the Legislative Assembly in the same Session or in the next Session again passes the Bill with or without any amendment which has been made or agreed to by the Legislative Council, and the Legislative Council rejects or fails to pass it or passes it with any amendment to which the Legislative Assembly does not agree, and if after a free conference between managers there is not agreement between the Legislative Council and the Legislative Assembly, the Governor may convene a joint sitting of the Members of the Legislative Council and the Members of the Legislative Assembly. The Members present at the joint sitting may deliberate upon the Bill as last proposed by the Legislative Assembly and upon any amendments made by the Legislative Council with which the Legislative Assembly does not agree. No vote shall be taken at

the joint sitting. (2) After the joint sitting and either after any further communication with the Legislative Council in order to bring about agreement, if possible, between the Legislative Council and the Legislative Assembly, or without any such communication the Legislative Assembly may by resolution direct that the Bill as last proposed by the Legislative Assembly and either with or without any amendment subsequently agreed to by the Legislative Council and the Legislative Assembly, shall, at any time during the life of the Parliament or at the next general election of Members of the Legislative Assembly, be submitted by way of referendum to the electors qualified to vote for the election of Members of the Legislative Assembly." The section provides for the conduct of the referendum, and then proceeds: " (3) If at the referendum a majority of the electors voting approve the Bill it shall be presented to the Governor for the signification of His Majesty's pleasure thereon and become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill. (4) For the purposes of this section the Legislative Council shall be taken to have failed to pass a Bill if the Bill is not returned to the Legislative Assembly within two months after its transmission to the Legislative Council and the Session continues during such period. (5) This section shall extend to any Bill whether it is a Bill to which section 7A of this Act applies or not." Sub-section (6) provides: "A joint sitting of the Members of the Legislative Council and the Members of the Legislative Assembly for the purposes of this section may be convened by the Governor by message to both Houses of the Parliament. At such joint sitting the President of the Legislative Council or in his absence the Speaker of the Legislative Assembly shall preside, and until standing rules and orders governing the procedure at joint sittings have been passed by both Houses and approved by the Governor, the Standing Rules and Orders of the Legislative Council shall so far as practicable apply." (at p258)

9. Since the Act of 1933 reconstituted the Legislative Council, it fell within s. 7A of the [Constitution](#). It was in fact passed by both Houses, approved by a majority of the electors at a referendum, and assented to by the Governor. So far as s. 5B is concerned, it is to be noted that it is quite general in its terms. It applies to all Bills other than Appropriation Bills. It is expressly made applicable to Bills of the character described in s. 7A, but it is in no sense specifically directed to Bills affecting the Legislative Council. (at p258)

10. The applicants in the present case advanced, and strongly pressed, an argument that s. 5B was invalid, but as to this argument I need say but little. If the matter had been free from authority, I should have thought that there was a great deal to be said for the view that s. 5B - and, for that matter, s. 5A also - was invalid. But the matter appears to me to be clearly covered by the decision of this Court in *Taylor v. Attorney General for Queensland* [\[1917\] HCA 45](#); [\(1917\) 23 CLR 457](#) . In that case the Parliamentary Bills Referendum Act of 1908 (Q.) provided that when a Bill passed by the Legislative Assembly in two successive sessions has in the same two sessions been rejected by the Legislative Council, it may be submitted by referendum to the electors, and, if affirmed by them, shall be presented to the Governor for His Majesty's assent, and upon receiving such assent the Bill shall become an Act of Parliament in the same manner as if passed by both Houses of Parliament, and notwithstanding any law to the contrary. The Court, constituted by five justices, unanimously held that this was a valid and effective Act. The Queensland enactment was not in identical terms with s. 5B, but it appears to me to be manifestly impossible to distinguish *Taylor's Case* [\[1917\] HCA 45](#); ; [\(1917\) 23 CLR 457](#) on the ground of any difference between the two enactments. (at p258)

11. I am clearly of opinion that this Court should not now reconsider *Taylor's Case* [\[1917\] HCA 45](#); [\(1917\) 23 CLR 457](#) . I would regard such a course as out of the question. It is, however, very

important to observe the ground of the decision in that case. All the Justices were of opinion that the law in question was a law respecting the constitution and powers of the Legislature of Queensland within the meaning of s. 5 of the Colonial Laws Validity Act, and it was for that reason, and by virtue of that Act, that that law was held to be valid. Isaacs J. was indeed prepared to hold that the Queensland Act could be supported also under cl. 22 of the Imperial Order in Council of 1859, but he alone was of that opinion, and I have the greatest difficulty in understanding his Honour's view on that point. (at p259)

12. The remaining arguments for the applicants were based on alleged non-compliance with the provisions of s. 5B, and it is now necessary to consider the circumstances which led to the bringing of the suit. For a full statement of those circumstances I refer to the joint judgment of Evatt C.J. and Sugerman J. in the Supreme Court. For my purposes the following summary of that statement will suffice. (at p259)

13. The main provisions of the Bill in question are that the Legislative Council is thereby abolished, and that no Legislative Council or other second chamber is to be created except after approval by a majority of electors at a referendum. On 2nd December 1959, the Legislative Assembly passed this Bill and by message to the Legislative Council presented it to that Chamber for its concurrence. On the night of 2nd December, the Assembly's message having been reported and read by the President, it was moved in the Legislative Council "as a matter of precedence and privilege", and resolved by the House, that the Bill be returned to the Legislative Assembly with a message stating that the Legislative Council, "in accordance with long established precedent, practice and procedure, and for that reason, declines to take into consideration a Bill which affects those sections of the [Constitution](#) Act providing for the constitution of the Legislative Council unless such bill shall have originated in that House and returns the Bill without deliberation thereon, and requests that the Legislative Assembly deem this reason sufficient". On the following day the Bill with a message signed by the President in terms of the Council's resolution, was returned to the Assembly. On 1st March 1960, the Speaker reported the Legislative Council's message to the Legislative Assembly, which on 2nd December had adjourned until that day. No motion was proposed in respect of the Council's message, and no reply thereto was sent. (at p259)

14. The Bill was passed a second time by the Legislative Assembly on 6th April 1960, and on the same day was again presented to the Legislative Council, which passed a resolution identical with its former resolution and returned the Bill to the Assembly with an identical message. On 7th April 1960 the Assembly sent a message to the Council requesting, "pursuant to the provisions of Section 5B of The [Constitution](#) Act, 1902, and having regard to the Council's message dated 6th April, 1960", a free conference with the Council in respect to the Bill, and naming the managers whom the Assembly had appointed. On the same day the Council resolved that it "does not consider that any situation has arisen whereby a free conference is necessary or proper, and accordingly it refuses" the Assembly's request; and a message was sent to the Assembly in those terms. (at p260)

15. On 13th April 1960 the Governor, by message to the President and the Speaker, naming a time and place convened a joint sitting of the members of the Council and the members of the Assembly to deliberate upon the Bill. On the same day the Legislative Council, having resolved that it did "not consider that a situation has arisen conferring constitutional power upon His Excellency the Governor to convene a joint . . . sitting pursuant to section 5B of the [Constitution](#) Act, 1902, . . . and this House resolves that for this constitutional reason the members of the House do not attend at nor participate in such joint sitting", also resolved that an address in reply be communicated to His Excellency accordingly, and further resolved that copies of the said resolution and address be

forwarded to the Legislative Assembly, which was done. Twenty-three members of the Council and eighty-five members of the Assembly attended at the time and place which had been appointed for a joint sitting. The President not being present, the Speaker presided, and, when all members who desired to do so had spoken, he declared the sitting terminated. On 12th May 1960 the Legislative Assembly by resolution directed that the Bill be submitted by way of referendum to the electors qualified to vote for the election of members of the Assembly. (at p260)

16. It is clear that s. 5B contemplates (to use for the moment a neutral word) that six events shall occur before the Assembly by resolution directs the submission of the Bill to a referendum. Omitting for the sake of simplicity the references to amendments, these may be stated as follows: (1) The Bill is to be passed by the Assembly. (2) There is to be a rejection of it by the Council or a failure by the Council to pass it. (3) The Bill is, after an interval of three months, in the same or the next Session, to be passed a second time by the Assembly. (4) There is to be for the second time a rejection of it by the Council or a failure by the Council to pass it. (5) There is to be a free conference between managers at which agreement between the Houses is not reached. (We need not pause to consider what a "free conference" is: the term is one which bears a recognized Parliamentary meaning). (6) There is to be a joint sitting of the members of the Council and the Assembly. (No vote is to be taken at the joint sitting, but agreement may, of course, be reached thereat). It is clear that the first and third of these requirements were complied with in the present case. It is equally clear that the fifth was not. As to the second and fourth, and also as to the sixth, questions arise. (at p261)

17. Owen J. in his dissenting judgment has expressed the view that the second and fourth requirements were not fulfilled. His Honour was of opinion that the Council had not, either on the first or on the second presentation of the Bill, either rejected it or failed to pass it. After full consideration I am, with great respect, unable to accept this view. It is true that the Council did not entertain the Bill at all. It merely returned it to the Assembly, standing on its point of "privilege". And I would agree that the word "rejects" connotes primarily an adverse vote which involves the defeat of a Bill. But the word is, I think, apt enough to cover what the Council did here. It is a very important fact that the Council returned the Bill to the Assembly. If it had not done so, sub-s. (4) would have applied, and after the expiration of two months it would have "failed to pass" the Bill. But I think that "rejection" and "failure to pass" (as defined in sub-s. (4)) are intended to cover everything that the Council may do with the Bill other than to accept it. When the Bill is returned to the Assembly with a refusal - on any ground or on no ground - to entertain it, I think that the Bill is "rejected" within the meaning of s. 5B. What I have called the second and fourth requirements were, in my opinion, fulfilled. (at p261)

18. With regard to the sixth requirement - the joint sitting of the members of the Council and the members of the Assembly - another question of some difficulty arises. In fact, as has been seen, twenty-three members of the Council attended at the time and place appointed by the Governor for a joint sitting, and some deliberation apparently took place. But the Council had previously passed a formal resolution that for constitutional reasons its members "do not attend at or participate in" any joint sitting, and this resolution had been communicated to His Excellency and to the Assembly. It is argued that, because some members of the Council chose to disregard this resolution and to be present at the appointed time and place, a "joint sitting" was in fact held. But this is not, in my opinion, a correct view. Having regard to the resolution, I do not think that those members of the Council who went to the meeting place can be regarded as representing the Council or as attending in their capacity as members of the Council. The Council having, as a body, refused to participate in any joint sitting, there could not be a joint sitting, and there was not a joint sitting. (at p262)

19. The position, then, as I see it, is that, of the six events which are prescribed by s. 5B as preliminaries to the submission of the Bill to a referendum, two have not occurred. The Bill has been twice passed by the Assembly and twice rejected by the Council, but there has been no free conference between managers, and there has been no joint sitting of the members of the two Houses. What seems to me to be the decisive question in the case thus emerges. What is the legal consequence of the fact that these two prescribed preliminaries have not been performed? My answer to this question is that the consequence is that the submission of the Bill to a referendum and the subsequent assent by the Governor cannot produce a valid Act of the Legislature of New South Wales. (at p262)

20. The Bill is a proposed "law respecting the constitution of the Legislature" of New South Wales. The power to enact it is found in s. 5 of the Colonial Laws Validity Act, but the power is given subject to the proviso that it shall be passed in such manner and form as may from time to time be required by (inter alia) any Act of the Parliament of New South Wales. A manner and form are prescribed by s. 5B, and that manner and form must be observed if a valid law is to be produced. Any prescription of manner and form may be repealed or amended, but, while it stands, the process prescribed by it must be followed. That was decided by Trethowan's Case [\[1931\] HCA 3 \[1932\] UKPC 1](#); ; (1930) 31 SR (NSW) 183; (1931) 44 CLR 394; [\(1932\) AC 526](#); [\(1932\) 47 CLR 97](#) . And I think that the whole of what is prescribed by s. 5B relates to manner and form. It does not seem to me possible to say that some of the requirements of that section are matters of manner and form while others are not. The section describes one entire process - a series of steps, one following on another - and only the completion of the entire process can produce a valid law. I have cited above decisive authority for saying that the expression "manner and form" cannot be confined to matters of procedure in Parliament itself. (at p262)

21. Two answers have been made to the view which I have expressed. The first is based on the well-known distinction between enactments which are "mandatory" or "imperative" or "absolute" and enactments which are merely "directory". In Craies on Statute Law (1952) 5th ed p 240, the distinction is stated thus: "If an absolute enactment is neglected or contravened, a Court of law will treat the thing which is being done as invalid and altogether void, but if an enactment is merely directory it is immaterial, so far as relates to the validity of the thing which is being done, whether it is complied with or not". A somewhat different application of the distinction is illustrated by *Chanter v. Blackwood* (1904) [1 CLR 39](#) . There are many examples of the distinction in the reports. With all respect to the contrary view, I find myself unable to say that s. 5B is not mandatory in the relevant sense. It is conditional in form. Both the preposition "if" and the preposition "after" import conditionality. It is not possible, I think, where a statute says explicitly that, if this is done, and after that is done, something else may then be done, to say that the something else may be done although this and that have not been done. It would no doubt miss the point to say that such an interpretation makes "if" mean "whether or not" and makes "after" include "before" and "without", but it does seem to come very near to that. Again, the argument must concede that the first four requirements of s. 5B are mandatory, and there is great difficulty in treating the six preliminaries otherwise than as co-ordinate. The difficulty is seen to be increased, I think, if we contrast s. 5B with s. 5A, which requires only a single passing by the Assembly and a single rejection or failure to pass by the Council, and says nothing about a free conference of managers or a joint sitting. (at p263)

22. The other argument against my view concedes that all the requirements of s. 5B are mandatory, but introduces an implied qualification. Two implications, which are not in the last analysis precisely identical but which seem to me to be the same in substance, are suggested. One way of stating the implication is by saying that the requirements of a free conference and a joint sitting

must be treated as dispensed with if the Legislative Council has, by its own acts or omissions, made the fulfilment of either of those requirements impossible. The other way is by saying that those requirements are only imposed subject to the implied condition that the Legislative Council shall be ready and willing to do whatever is necessary on its part for the holding of the free conference and the joint sitting. (at p263)

23. I do not think that in a statute of the character of s. 5B it is possible to make any such implication. What the argument really does is, as it seems to me, to treat the Council and the Assembly as contending parties and to apply, as between them, a principle of the law of contract or the law of estoppel. But there is no analogy between the constitutional relation of two Houses of Parliament and the personal relation of an obligor and an obligee. We are dealing here with a constitution which has enacted that, if or after certain steps are taken, a valid Act of Parliament will result. Those steps must be taken if that end is to be achieved, and there is no room for implications relating to impossibility of performance or excuses for non-performance. The statute is not thinking in terms of right and duty. Neither expressly nor by implication does it confer any right or impose any duty. The prescribed things are either done or not done, and, if they are not done, it cannot matter how they came not to be done. (at p264)

24. It remains to recur, in conclusion, to the agreement between the parties to which I referred at the beginning of this judgment. Normally, of course, as this Court in effect said in *Hughes and Vale Pty. Ltd. v. Gair* [1954] HCA 73; (1954) 90 CLR 203, a Court will not entertain a constitutional challenge to a measure not yet on the statute book. It will not interfere at any stage of the legislative process on the ground that a Bill, if placed on the statute book, would be invalid. In *Trethowan's Case* (1930) 31 SR (NSW) 183; (1931) 44 CLR 394 [1932] UKPC 1 [1932] UKPC 1; ; (1932) AC 526; (1932) 47 CLR 97 the Constitution expressly prohibited the presentation of the Bill to the Governor for the Royal Assent, and a declaration and injunction were granted by the Supreme Court. The question whether that relief was rightly given was expressly excluded by the order which gave special leave to appeal to this Court, and it was not decided either by this Court or by the Privy Council that the declaration or the injunction was rightly made. It was, no doubt, with these matters in mind, and because a judicial decision on the questions raised in the suit was desired at an early stage, that the parties entered into the agreement to which I have referred. That agreement is in the following terms: "It has been agreed between the parties that, for the purposes of these proceedings and in order to avoid the possibility that the Court might decide this application on grounds which left the main constitutional questions undecided, the defendants will concede that an injunction may be granted at the suit of those plaintiffs who are Members of the Legislative Council against the defendants who are Ministers of the Crown and Members of the Executive Council restraining them from proceeding to take any steps towards the issue of a writ for or the holding of a referendum if, in the events which have happened, it would be unconstitutional for the Bill to proceed to a referendum." (at p264)

25. I think that the consequence of non-compliance with s. 5B is that a resultant Act will be invalid. I cannot see any escape from this position. The power given by s. 5 of the Colonial Laws Validity Act is expressly made subject to the proviso as to manner and form, and it is to be observed that s. 6 of that Act makes the certificate of the Clerk or other proper officer no more than prima facie evidence that (inter alia) a law so certified "has been duly and properly passed and assented to". In the words of the agreement, therefore, "in the events which have happened it would be unconstitutional for the Bill to proceed to a referendum", and I am of opinion that special leave to appeal should be given, that the appeal should be allowed, and that there should be a declaration and injunction as asked. (at p265)

26. I need only add that I have not dealt with all the points raised in argument, but I have dealt with all those which I consider to be matters of substance. (at p265)

KITTO J. On one aspect only of this case do I wish to express my opinion in any detail. On every other it is sufficient to say that I share the views which have been expressed by the majority of the Court. (at p265)

2. The ultimate question which the parties have found it to their common interest to argue is whether, in the events which have happened, the Bill referred to in the statement of claim, notwithstanding that the Legislative Council has not consented to it, needs only to be approved at a referendum and assented to by the Governor in order to become a valid Act of the Legislature of New South Wales by force of s. 5B of the [Constitution](#) Act, 1902-1956 (N.S.W.). Considerations of convenience have been thought to justify our expressing our opinions upon that question without staying to decide whether an answer to it favourable to the plaintiffs would have entitled them to any relief in the Supreme Court. (at p265)

3. On the footing, which I accept, that, within the meaning of the section the Legislative Council rejected the Bill when it declined on the ground of privilege to consider it, every event prescribed by the section as preliminary to the holding of a referendum has occurred, except one. There has been no free conference between managers. The Legislative Assembly requested the Legislative Council to send managers to such a conference, but the Council declined to do so. The Governor then convened a joint sitting of the members of the Council and the members of the Assembly, notwithstanding that the only authority which the section gives him to convene such a sitting is expressed as conditional upon there not being agreement between the Houses "after" a free conference between managers. Is it the consequence of these facts that approval at a referendum and the giving of the Royal Assent will not be effectual to make the Bill a valid Act? In my opinion that is not the consequence; but since divergent reasons for that conclusion are offered both in this Court and in the Supreme Court, I must state the view that I take. (at p266)

4. It is familiar law that in many contexts legislative prescriptions to be observed in the exercise of powers or authorities or in the performance of functions are to be regarded as directory only, so that if the powers or authorities are in fact exercised or the functions performed without observance of the prescriptions, what is done is nevertheless of full legal efficacy. In the case of a legislative body, the prescription of something to be done in the course of law-making should no doubt often be treated as in the nature of a direction to the Legislature or to one or more of its constituent elements, and not as laying down conditions of validity for legislation - that is to say, as matters of purely internal concern for the law-making body itself, and not of concern to courts or other bodies or persons in ascertaining what laws have been validly made. Where the principle applies, it is not necessarily because of any intention to that effect disclosed by the language of the provision; the nature of the subject matter and the importance of the prescription and its relation to the general object intended to be secured by the Act may place the prescription in a category which has nothing to do with the validity of what is done in disregard of it: cf. [Howard v. Bodington \(1877\) 2 PD 203](#), at p 211 . On the other hand, however, a prescription which these considerations by themselves might place in that category may take on the complexion of an imperative requirement because an intention that it shall be such is manifested by the terms of the provision. That is to say that the principle which otherwise would govern the matter must yield to a sufficiently clear legislative intention. Does the principle, then, apply to s. 5B, so that none, or not all, of the steps which are there so carefully prescribed as preliminaries to the submission of a Bill to a referendum should be treated as conditions of the validity of purported legislation under the section? I cannot think so. (at

p266)

5. The steps leading up to the submission of the Bill to a referendum are clearly enough of the general character to which the principle referred to applies; but I have not been able to reconcile its application with the terms of the section. They seem to me much too strong for it. Every step in the process is made conditional upon the completion of the preceding steps. The central feature of the constitutional amendment of which the enactment of s. 5B formed part was that the Legislative Council, as reformed, should remain as an integral part of the Legislature; and I find it impossible to read s. 5B without being impressed by the evident care that was employed to make certain that the Council's consent should continue to be indispensable for the enactment of a Bill, except where a defined course had been precisely followed. (at p267)

6. The core of the section is in sub-s. (3). If the Bill is approved at the referendum provided for in sub-s. (2), it is to be presented to the Governor "and become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill". It is not in fact an Act of the Legislature: see the definition in s. 3. That is to say, it is not an Act of the Sovereign with the advice and consent of the Council and Assembly; for the Council has not given its advice and consent, except in the indirect sense that they may be considered to have been given through s. 5B itself. Words of enactment are to be used which make this clear: s. 5C. But the Bill nevertheless acquires the status of an Act of the whole Legislature. (at p267)

7. That approval of the Bill at the referendum is a condition precedent to this result, I suppose no one would doubt. Sub-section (3), beginning with "If", shows plainly that its provisions do not operate to give a Bill which has not passed the Council the status of a law upon the giving of the Royal Assent, unless it has been approved at the referendum. But it is "the" referendum which alone is here referred to, that is to say the referendum by which, under sub-s. (2), the Assembly has directed the Bill to be submitted to the electors. And sub-s. (2) authorizes the direction for the submission in a particular event only, that is to say "After the joint sitting". It may be either "after" a further communication with the Legislative Council in order to bring about agreement if possible between the two Houses, or without any such communication; but it is to be "after" the joint sitting, and not without it. (at p267)

8. The joint sitting referred to is that which sub-s. (1) authorizes the Governor to convene. I may interpolate that I read the words "the Governor may convene" as conferring an authority but creating no duty or obligation. The assumption no doubt is made that the Governor will be guided by the advice of his Ministers in deciding whether to convene the meeting or not. If the Ministers think it expedient that the procedure of s. 5B shall be pursued no further, I see nothing in the section to oblige the Governor to convene the joint sitting against their advice. But however that may be, I think that on the plain words of the sub-section the Governor's authority in that regard is conditional upon there not being agreement between the Houses "after a free conference between managers". (at p268)

9. In the words just quoted, however, it seems to me that verba subaudita are necessarily implied by the nature and purpose of the section as a whole. It is a provision to ensure that if the conditions laid down are fulfilled the Council shall not be able to prevent a Bill from becoming law. The words in which a condition is stated, therefore, surely cannot mean that the very Chamber whose opposition to the Bill is to be prevented from proving a final obstacle to its enactment may, by refusing co-operation, make its opposition successful. For that reason, the assumption seems to me to be implicit

that the Council is not unwilling to send managers to a free conference. If the Council is unwilling, the situation is one to which the reference to a free conference between managers is, in my opinion, by necessary implication inapplicable. This, I should have thought, would still be the case if the provision as to the Governor's convening a joint sitting were to be understood as merely directory and therefore as not going to the validity of legislation purporting to be enacted under the section; for even if not bearing upon validity, the provision could hardly mean that even though the Council refuses to appoint managers the Governor is and remains under a direction to await the outcome of a free conference of managers before convening a joint sitting of members. (at p268)

10. Read with the implied qualification which I have mentioned, the anxiously contrived detail of the section seems to me to evince a clear intention to enable the Legislative Council to be by-passed where the conditions laid down are fulfilled, but equally to ensure that it may not be by-passed where those conditions are not fulfilled. In the latter case, I understand the section to mean, the Council's consent remains a legal prerequisite of the passing of the Bill into law. It seems to have been by a most deliberate choice of words that, in the series of events to the completion of which the section attaches the legal result that a law is enacted by part only of the Legislature, each event is given a place contingently upon its occurring "if" or "after" its immediate predecessor has occurred. (at p268)

11. In the present case, the interpretation which, as I think, should be placed upon the section does not assist the plaintiffs. The situation in which the Governor convened the joint sitting of members of the two Houses was that the Legislative Council had refused, and was maintaining its refusal, to send joint managers to a free conference. In that situation the reference in the section to such a conference had, in my opinion, no further application in relation to the Bill, and the section accordingly applied to authorize the Governor to convene the joint sitting. (at p269)

12. I do not see any ground on which, if special leave to appeal were granted, the ultimate question that has been debated should be answered favourably to the plaintiffs. (at p269)

13. I would refuse special leave. (at p269)

MENZIES J. This is an application for special leave to appeal against a judgment of the Supreme Court of New South Wales dismissing the plaintiffs' suit. There is no doubt about the jurisdiction of this Court to entertain the application and to hear the appeal, and because the jurisdiction of the Supreme Court to hear and determine the suit was, within the limits beyond which I do not find it necessary to go, conceded before that Court and not argued before us, I propose to say nothing about that problem. The Supreme Court decided that s. 5B of the [Constitution](#) Act of New South Wales was valid, that the Bill for an Act to be called "Constitution Amendment (Legislative Council Abolition) Act, 1960" was one to which s. 5B of the [Constitution](#) extended, and upon the true construction of that section and upon the facts alleged in the plaintiffs' statement of claim (to which the defendants demurred) all the requirements of the section necessary to enable the valid issue of a writ for the holding of a referendum on the Bill have been satisfied. The Court accordingly dismissed the suit that had been brought to prevent the Bill from being submitted to a referendum in the manner provided by s. 5B. Although the appellants raised many points, I think that only two have any real substance, and it is with them that I propose to deal. (at p269)

2. The first is the validity of s. 5B of the [Constitution](#) Act. If it is invalid, that is the end of the matter, for then a Bill for the abolition of the Legislative Council could, as was decided in *Attorney-General (N.S.W.) v. Trethowan* [\[1932\] UKPC 1](#); (1931) 44 CLR 394; [\(1932\) AC 526](#); [\(1932\) 47](#)

[CLR 97](#) before the introduction of s. 5B, be enacted only in the manner and form provided by s. 7A of the [Constitution](#) Act. Section 5B, however, extends to legislation within s. 7A and, if it is valid, provides for the course to be followed in respect of such legislation if, by reason of the Legislative Council rejecting or failing to pass it, the manner and form provided by s. 7A cannot be followed. If s. 5B is valid, the next question is whether there has been compliance with all the imperative requirements of the section. (at p269)

3. Section 5B was introduced in 1933 when s. 7A was part of the [Constitution](#), and because s. 5B did inter alia alter the powers of the Legislative Council, it could only be enacted in the manner and form provided by s. 7A, and that manner and form was followed. The validity of s. 5B was attacked in a variety of ways, but I think the only ground of substance is that the Parliament of New South Wales had no power to make that law under [s. 4](#) of the [Constitution](#) Statute 1855 (18 & 19 Vict. c. 54), under the [Constitution](#) Act, 1902 as amended, or under s. 5 of the Colonial Laws Validity Act 1865 (28 & 29 Vict. c. 63). (at p270)

4. In 1902, exercising the powers conferred upon it by the [Constitution](#) Statute, the [Constitution](#) Act 1855 and the Colonial Laws Validity Act s. 5, the Parliament of New South Wales passed the [Constitution](#) Act, 1902 which consolidated earlier [Constitution](#) Acts, and among the Acts thus repealed was so much of the [Constitution](#) Act 1855 as had not been repealed previously. The [Constitution](#) Statute, which provided for Royal Assent to the [Constitution](#) Act 1855, provided by s. 4 that "it shall be lawful for the Legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved Bill, in the same manner as any other laws for the good government of the said colony, subject, however, to the conditions imposed by the said reserved Bill on the alteration of the provisions thereof in certain particulars, until and unless the said conditions shall be repealed or altered by the authority of the said Legislature", and the ultimate repeal in 1902 of the remainder of the [Constitution](#) Act 1855 (which was "the said reserved Bill") affords a strong argument that [s. 4](#) of the [Constitution](#) Statute (which if it applied would amply support the enactment of s. 5B) then ceased to have any further operation, although in Trethowan's Case (1931) [44 CLR 394](#) [[1932](#)] [UKPC 1](#); ; ([1932](#)) [AC 526](#); ([1932](#)) [47 CLR 97](#) some judges were prepared to assume that [s. 4](#) of the [Constitution](#) Statute still possessed some operative effect (see ([1932](#)) [AC](#), at pp 536, 538, 539; ([1932](#)) [47 CLR](#), at pp 101, 103, 104; ([1931](#)) [44 CLR](#), at pp 411, 416, 417, 423, 436 ). If, however, the power conferred by [s. 4](#) of the Statute to alter or repeal "all or any of the provisions of the said reserved Bill" does not extend to legislation taking the place of any of the provisions of the reserved Bill, this would not involve the consequence that substituted provisions were unalterable by the New South Wales Legislature or that upon the complete repeal of the original [Constitution](#) Act of 1855, the Parliament of New South Wales was left with a smaller power of constitutional amendment than it had previously. The reason for [s. 4](#) of the [Constitution](#) Statute lay in the particular circumstance that the [Constitution](#) Act 1855 had the direct authority of the Imperial Parliament - a circumstance which it was anticipated would prove an obstacle to the power of the New South Wales Legislature to make constitutional amendments (see par. 12 of the despatch from the Secretary of State for the Colonies to the Governor of New South Wales transmitting the [Constitution](#) Statute). Once the [Constitution](#) of New South Wales, or any part of it, lost the character of legislation with the authority of the Imperial Parliament, the general legislative power conferred by [s. 1](#) of the [Constitution](#) Act 1855 and subsequently by [s. 5](#) of the [Constitution](#) Act, 1902 could properly be regarded as extending to power to alter or repeal any of the provisions of the [Constitution](#) itself which depended upon the authority of the Parliament of New South Wales. (at p271)

5. If therefore, [s. 1](#) of the [Constitution](#) Act 1855 which conferred power "to make laws for the

peace, welfare and good government of the said colony, in all cases whatsoever" did not extend to constitutional amendment, it was not because the words used were too narrow but because the [Constitution](#) itself was thought to have the quality of an Imperial Act; and so if, as it was argued, [s. 4](#) of the [Constitution](#) Statute and s. 5 of the Colonial Laws Validity Act were commonly regarded before 1902 as the primary sources of power to make constitutional amendments, this would have been natural enough in the circumstances which I have stated, although it is to be observed that [ss. 3](#) and [9](#) of the [Constitution](#) Statute itself recognize clearly enough that the [Constitution](#) Act was a source of power to amend the [Constitution](#) of the Legislature. In [s. 3](#) there are the words, ". . . the Legislative Council and Assembly constituted under the said reserved Bill and this Act and by any other legislative body or bodies which may at any time hereafter be substituted for the present Legislative Council and Assembly", and in s. 9 there are the words, ". . . the word 'Legislature' shall include as well the Legislature to be constituted under the said reserved Bill and this Act as any future Legislature which may be established in the said Colony under the powers in the said reserved Bill and this Act contained". When, however, the [Constitution](#) Act, 1902 was passed by the Legislature of New South Wales and it was provided by s. 5 that "the Legislature shall, subject to the provisions of the Commonwealth of Australia [Constitution](#) Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever", there existed no reason why the power thus conferred in the widest possible terms should be limited to exclude the amendment of the constitution of the Legislature itself. A similar provision in the [Constitution](#) of Victoria was construed in *McDonald v. Cain* ([1953](#)) [VLR 411](#) as covering constitutional amendment notwithstanding the existence in that [Constitution](#) of a special power. O'Bryan J. quoted the section corresponding with s. 5 of the New South Wales [Constitution](#) Act and said: "That is a plenary power of legislation and should be read as giving the amplest powers to pass all laws it thinks fit for the good government of the State. Section LX puts beyond doubt the proposition that this power includes a power to make laws altering the [Constitution](#) itself. It expressly says: 'The Legislature of Victoria as constituted by this Act shall have full power and authority from time to time by any Act or Acts to repeal alter or vary all or any of the provisions of this Act and to substitute others in lieu thereof'" ([1953](#)) [VLR](#), at p 433 . It is to be observed, too, that in *Trethowan's Case* ([1931](#)) [44 CLR](#), at pp 428, 429 , Dixon J. (as he then was) recognized the possibility that [s. 5](#) of the [Constitution](#) Act, 1902 would support the enactment of s. 7A, the validity of which was then in question, although it was for obvious reasons to s. 5 of the Colonial Laws Validity Act that attention was particularly directed in that case. (at p272)

6. There can be no doubt that between 1855 and 1902 the Legislature of New South Wales had complete constituent powers, subject only to its own determination of the procedure necessary, for the making of constitutional laws, and not only is it not necessary to come to the conclusion that in 1902 its constituent powers arising otherwise than from the Colonial Laws Validity Act were lost, but basic constitutional theory as stated by Lord Birkenhead L.C. in *McCawley v. The King* ([1920](#)) [AC 691](#); ([1920](#)) [28 CLR 106](#) affords every justification for giving the comprehensive language of s. 5, based as it is upon [s. 1](#) of the [Constitution](#) Act 1855, an unrestricted meaning. The Lord Chancellor said: "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" ([1920](#)) [AC](#), at p 706; ([1920](#)) [28 CLR](#), at p 117 . (at p272)

7. Accordingly, I regard [s. 5](#) of the [Constitution](#) Act, 1902 as itself authorizing the making of laws which determine how laws may be made both in general and in particular cases, and the only limit

that I find upon that power derives from the proviso to s. 5 of the Colonial Laws Validity Act, i.e., that laws of the nature therein described must be passed in the manner and form required by laws for the time being in force. Where the Colonial Laws Validity Act does not apply to the making of a constitutional amendment, then the power of the Parliament of the State is free from any fetter and the passing in normal manner of an Act inconsistent with the [Constitution](#) as it stands amends the [Constitution](#) without the need for a previous express amendment of the [Constitution](#). It was so decided by the Privy Council in McCawley's Case ([1920](#)) AC 691; ([1920](#)) 28 CLR 106 . Where, however, s. 5 of the Colonial Laws Validity Act does apply, the courts must decide whether there has been compliance with existing requirements of manner and form and will do so even where this involves finding out what happened within the legislature itself: Trethowan's Case (1931) 44 CLR, particularly at pp 419, 430-433 ; McDonald v. Cain ([1953](#)) VLR 411 . This case, indeed, provides another instance of this. (at p273)

8. The conclusion I have expressed about the extent of the legislative power conferred by s. 5 makes it unnecessary to decide whether, if the section were not by itself sufficient to authorize the enactment of s. 5B, the general amplification of colonial constitutional legislative power effected by s. 5 of the Colonial Laws Validity Act would fill the gap. The decision of this Court in Taylor v. Attorney-General of Queensland [[1917](#)] HCA 45; ([1917](#)) 23 CLR 457 in relation to a Queensland section different in detail but not distinguishable for present purposes from s. 5B, was that s. 5 of the Colonial Laws Validity Act did authorize its enactment. That decision, preceding as it did the passing of s. 5B by sixteen years, is one from which I do not think I would be free to depart even if I were to think that s. 5 had there been applied too broadly, but I need not pursue this further because, for the reasons I have already given, I am satisfied that s. 5B is a valid law of the Parliament of New South Wales and that laws enacted as therein described are themselves valid laws. Taking the view I do of [s. 5](#) of the [Constitution](#) Act, 1902, I do not think it matters whether s. 5B is described as constituting a different legislature from that consisting of the Crown with the advice and consent of the Legislative Council and the Legislative Assembly or whether it merely affords an alternative mode for the enactment of laws by that Legislature subject to the conditions therein laid down, including that of approval by electors at a referendum. In the course of the argument of this case, some reference was made to the position of the Crown in the legislature of an Australian State; the observations I have made have no reference to that matter. (at p274)

9. I now pass to the question whether there has been compliance with the imperative requirements of s. 5B, and, as a preliminary to ascertaining what those requirements are, some general consideration of the purposes of the section is necessary. The section was brought into the [Constitution](#) Act as part of the [Constitution](#) Amendment (Legislative Council) Act, 1933, which substituted a Legislative Council of sixty members elected by an electoral body consisting of the members of the Legislative Council and the Legislative Assembly and holding office for a term of years for a Legislative Council of unlimited numbers appointed for life by the Governor. Before 1933 the will of the Legislative Assembly could in case of disagreement have been made to prevail against the opposition of the Legislative Council by the Governor making a sufficiently large number of appointments to the Legislative Council of persons known to be of the same mind as the majority of the Legislative Assembly, and this course had on many occasions been followed, e.g. in 1899, 1912, 1917, 1921, 1925, 1931 and 1932. Because such action could not be taken once the Legislative Council became an elected chamber consisting of a fixed number of members, a case arose for making express provision for resolving disagreements between the two Houses. For this a wide range of precedents existed (e.g., the Commonwealth [Constitution](#), [ss. 57](#) and [128](#), the South Africa Act 1909, s. 63, the Parliament Act 1911 (U.K.), the Irish Free State [Constitution](#) Act 1922, art. 38, and the Parliamentary Bills Referendum Act of 1908 (Q.), the validity of which had been

established in *Taylor v. Attorney-General of Queensland* (1917) [23 CLR 457](#) in 1917). There are substantial differences between the procedure laid down by s. 5B and that to be found in each of these precedents, but all have a common feature, viz. that a Bill may become a law notwithstanding that the second Chamber rejects or fails to pass it. Section 5B clearly has as its main purpose that a Bill may become a law against the will of the Legislative Council, but only in the last resort after an elaborate procedure designed to bring about agreement between the two Houses has been followed without success. The section, therefore, dispenses with the advice and consent of the Legislative Council to Bills where, after following the prescribed procedure, disagreement between the Legislative Assembly and the Legislative Council persists and then a referendum approves of the Bill as passed by the Legislative Assembly. The section in this way provides an alternative manner of legislating in which the Legislative Council is not disregarded but its role is negative instead of positive. Its repeated non-passage of the Bill and its continued disagreement with the Legislative Council are steps in the making of a law under s. 5B, but its refusal to act cannot prevent the enactment of the law. The overriding sense of the section is, therefore, that nothing that the Legislative Council does, short of agreeing with the Legislative Assembly, can stop the process whereby a Bill will become law. To interpret the section in any way that would allow this to happen would be to contradict its main object. At the same time, however, the section provides elaborate safeguards against precipitate action by the Legislative Assembly. It is not possible to disregard the Legislative Council in carrying through the procedure, which is directed finally towards eliminating its advice and consent as an element necessary for the making of a law. Accordingly, I construe the section as providing a manner and form of legislating which must be followed for the making of a valid law in which each step not only follows that which precedes it but depends upon it. To put it in another way, I would say that unless laws not falling within s. 5A are made with the advice and consent of the Legislative Council and the Legislative Assembly, they can be made only by following the procedure laid down in s. 5B, which, it is to be observed, is not limited to the making of constitutional laws but extends to the making of any law not within s. 5A. Moreover, when the law is a constitutional law to which s. 5 of the Colonial Laws Validity Act applies, as is the case here, that section itself treats adherence to requirements of manner and form as necessary for validity (*Trethowan's Case* (1932) AC, at p 541; (1932) 47 CLR, at p 106 ) so that once a requirement is seen as a matter of manner or form, it is not necessary to enquire whether the legislature that imposed it intended that a failure to observe it should result in invalidity. In reaching the conclusion that the requirements of s. 5B are imperative, I have, of course, considered corresponding legislation but without gaining positive assistance, and upon this I say no more than that I find a closer analogy between s. 5B and that part of corresponding legislation that, like it, is directed positively to the making of laws than to any part of corresponding legislation which when employed may do no more than break a deadlock between two chambers by some step such as double dissolution. This brings me to s. 5B in detail and in particular to the contentions that its imperative provisions have not been followed. (at p275)

10. In the first place it is contended that the Legislative Council did not reject or fail to pass this Bill. What happened on each occasion when it reached the Legislative Council from the Legislative Assembly after its passage through that House was that the Legislative Council declined to take it into consideration and returned it without deliberation. The reason for this was the Council's assertion that the Bill should have originated in the Legislative Council and not in the Legislative Assembly. I regard what occurred on each occasion as amounting to a rejection of the Bill, and I do so on the footing that according to custom, precedent, and standing orders, a Bill concerning the privileges or proceedings of either House should in courtesy commence in the House to which it relates: see Legislative Council Standing Order No. 2 and *May's Parliamentary Practice*, 16th ed.

(1957), p. 492. This convention, which is never more than a matter of courtesy, has no application to a Bill to abolish the Legislative Council. Such a Bill deals with the continued existence of the House and is not accurately described as concerning either its privileges or proceedings. Moreover, the first step in the procedure prescribed by s. 5B is clearly enough the passing of the Bill by the Legislative Assembly and, as I see it, the question of law here is whether there has been compliance with s. 5B. The so-called question of privilege bears upon why the Legislative Council did what it did, not with the character of what it did. It seems to me that to return a Bill with a refusal to accord it deliberation, whatever be the ground for doing so, is as positive a rejection of the Bill as there could be, and despite the argument to the contrary, there is nothing in the section or elsewhere to confine the notion of the rejection of a Bill to a case where the Council votes against it upon its merits. (at p276)

11. Secondly, the statement of claim shows that there was not a free conference of managers, for the simple reason that the Legislative Council refused the request of the Legislative Assembly for such a conference in respect of the Bill, and it was argued that as it did not take place, the manner and form prescribed by the section had not been followed, with consequent invalidity. Reliance in the ultimate conclusion was based upon the decision of the Privy Council in *Trethowan's Case* [[1932 UKPC 1](#); [\(1932\) AC 526](#); [\(1932\) 47 CLR 97](#)]. Although I do regard as imperative the observance of the procedure prescribed by the section as to a free conference, so that non-observance could not be regarded as having no legal consequence, I do not construe the section as requiring a free conference in all circumstances. In accordance with the principles I have already stated, the words "after a free conference between managers" are to be understood with the qualification that the failure of the Legislative Council to participate in this step does not bring the procedure which the section prescribes to a halt. If it were necessary to express what I regard as an overriding implication in some words of limitation upon the particular words "after a free conference between managers", I would say that they must be understood as if they were followed by the words "provided the Legislative Council will take part". I would prefer, however, to regard the whole section as subject to the limitation that if the Legislative Council refuses or fails to participate in any step of the procedure laid down, having been given the opportunity to do so, that refusal or failure does not have the consequence that the procedure cannot be continued effectively, for, as a matter of interpretation, I think the section means that in such a case that step is not necessary. It is not that what the section unconditionally requires becomes unnecessary because the requirement cannot be fulfilled; it is rather that as a matter of interpretation the requirement itself is to be understood as conditional upon the Council's willingness to participate. In other words, the requirement of a free conference of managers, although necessary for effective legislation, is only conditionally necessary. In this case, therefore, where the Council refused a free conference, s.5B did not require the holding of a free conference as part of the prescribed procedure. (at p277)

12. Finally it was argued that there was no joint sitting as required by s. 5B. Again, and for the reasons already stated, I do not regard the section as unconditionally requiring a joint sitting. If there had been nothing that could be regarded as a joint sitting of the members of the Legislative Council and the Legislative Assembly because the Legislative Council refused to recognize that it had been validly convened by the Governor, the condition upon which the section requires a joint sitting would not have occurred. In such a case, the further steps to be taken under s. 5B (2) could proceed notwithstanding there was no joint sitting because, for reasons already stated, the words "after the joint sitting" with which that sub-section commences would have no application in a case where the refusal of the Legislative Council to participate had made a joint sitting an unnecessary step in the procedure. In this case, however, the Governor having convened a joint sitting, it was in fact attended by members of both Houses, and the contention that there was no joint sitting merely

because the Legislative Council resolved "that . . . members of the House did not attend at nor participate in such joint sitting" must be rejected; for, contrary to the resolution of the Council, some of its members did attend the joint sitting that had been convened. (at p277)

13. For these reasons I consider that in the circumstances of this case there has been compliance with all that s. 5B imperatively requires. (at p278)

14. Because I am of the opinion that s. 5B is valid and has been complied with, and because I agree with the members of the Full Court of the Supreme Court in thinking that there is nothing in any of the other points upon which the applicants relied there and raised again in this Court, I think the applicants must fail. I would myself have been disposed to grant the application for special leave to appeal and dismiss the appeal, but I am prepared to concur in refusing the application. (at p278)

## **ORDER**

Special leave to appeal refused with costs.

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