

*Privy Council Appeal No. 12 of 1934.*

The Honourable Thomas Patrick Doyle, M.L.C. - - - *Appellant*

*v.*

The Attorney-General of New South Wales and others - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 28TH JUNE, 1934.

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*Present at the Hearing :*

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

LORD ALNESS.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD TOMLIN.]

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This appeal raises questions as to the constitutional validity of two Acts of the Legislature of New South Wales. The Acts are first an Act (hereinafter referred to as the Reform Act) No. 2 of 1933 having the short title of the Constitution Amendment (Legislative Council) Act, 1932, and secondly an Act (hereinafter referred to as the Machinery Act) No. 5 of 1933, having the short title of the Constitution Further Amendment (Legislative Council Elections) Act, 1932.

In August, 1933, the appellant launched an action against the respondents in the Supreme Court of New South Wales in its equitable jurisdiction claiming declarations impeaching the validity of the Acts in question and seeking relief by injunction and otherwise based upon such declarations.

The respondents demurred to the statement of claim. After several days' argument the demurrer was upheld, the Court being of opinion that the whole of the matters relied upon by the appellant were matters of law, and that the challenge to the validity of the Acts in question was ill-founded.

Against this decision the appellant has appealed to His Majesty in Council.

The constitutional history of New South Wales, so far as it is material to the present case, begins in 1855 with the Imperial Statute 18 and 19 Vict. c. 54.

The Imperial Statute was passed for the purpose of enabling Her Majesty the Queen to assent, subject to certain amendments, to a Bill passed by the Legislative Council of New South Wales for establishing a bicameral parliament and reserved for the Queen's assent.

Such Bill, as amended, was scheduled to the Imperial Statute, and was referred to therein as the said reserved Bill. When it became law as the result of the Imperial Statute, it was generally known in New South Wales as, and is still called, the Constitution Act.

The Imperial Statute provided (*inter alia*) as follows :—

“ IV. 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.”

“ IX. In the Construction of this Act the Term “ Governor ” shall mean the Person for the Time being lawfully administering the Government of *New South Wales* ; and the Word “ Legislature ” shall include as well the Legislature to be constituted under the said reserved Bill and this Act, as any future Legislature which may be established in the said Colony under the Powers in the said reserved Bill and this Act contained.”

The Constitution Act set up a bicameral parliament consisting of a Legislative Council and a Legislative Assembly and empowered the new legislature to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever and (subject to conditions as to majorities, subsequently duly repealed) authorised it to alter the constitution of the Legislative Council.

From the date of the Constitution Act, therefore, within New South Wales the Crown had power, by and with the advice and consent of the Council and Assembly, to make laws for the purposes mentioned in the Constitution Act.

By the Colonial Laws Validity Act, 1865, which applied to New South Wales, a representative legislature was defined as follows :—“ Representative legislature shall signify any colonial legislature which shall comprise a legislative body of which one-half are elected by the inhabitants of the Colony.” The legislature of New South Wales was within the definition.

By section 5 of the same Act, it was provided as follows :—

“ 5. Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein ; and every representative legislature shall, in respect to the colony under its

jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such legislature ; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said colony."

In the year 1902, by an Act of the New South Wales Legislature, No. 32 of that year, and hereinafter called the Constitution Act, 1902, the constitution of New South Wales was altered and the new constitution was defined.

The sections of this Act so far as material to which it is necessary to refer, are as follows :—

"Section 3.—In this Act, unless the context or subject-matter otherwise indicates or requires, the Legislature means His Majesty the King with the advice and consent of the Legislative Council and the Legislative Assembly.

"Section 5.—The Legislature shall, subject to the procedure 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.

\* \* \* \* \*

"Section 7.—The Legislature may, by any Act, alter the laws in force for the time being under this Act or otherwise concerning the Legislative Council, and may provide for the nomination or election of another Legislative Council to consist of such Members to be appointed or elected by such persons and in such manner as by any such Act is determined :

"Provided that every Bill passed for any such purpose shall be reserved for the signification of His Majesty's pleasure thereon, and a copy of such Bill shall be laid before both Houses of the Imperial Parliament thirty days at least before His Majesty's pleasure thereon is signified.

"Section 10.—The Governor may fix the time and place for holding every Session of the Legislative Council and Assembly, and may change or vary such time or place as he may judge advisable and most consistent with general convenience and the public welfare, giving sufficient notice thereof. He may also prorogue the Legislative Council and Assembly, and dissolve the said Assembly by proclamation or otherwise whenever he deems it expedient.

"Section 16.—It shall be lawful for His Majesty, by an instrument under the Sign-Manual, to authorise the Governor to summon to the Legislative Council by instrument under the Great Seal any person he thinks fit, and every person so summoned shall thereby become a Member of the Legislative Council :

\* \* \* \* \*

"Section 23.—The Governor may, as occasion requires, in the name of His Majesty, by instrument under the Great Seal, summon and call together a Legislative Assembly."

In 1929, the Constitution Act, 1902, was amended by Act No. 28 of that year, by the insertion of a section in the following terms :—

"Section 7A.—(1) The Legislative Council shall not be abolished nor, subject to the provisions of Sub-section 6 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 1 of this section shall not be presented to the Governor for His Majesty’s assent until the Bill has been approved by the electors in accordance with this section.

“(3) On a day not sooner than two months after the passage of the Bill through both Houses of the Legislature the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly.

“Such day shall be appointed by the Legislature.

“(4) When the Bill is submitted to the electors the vote shall be taken in such manner as the Legislature prescribes.

“(5) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty’s assent.

“(6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal or amendment of any of the following sections of this Act, namely, Sections 13, 14, 15, 18, 19, 20, 21 and 22.”

By Act No. 2 of 1930, Constitution Further Amendment (Referendum) Act, 1930, provisions were made for submitting a Bill (known as the Bavin Bill) for altering the constitution of the Legislative Council to a referendum in accordance with the provisions of part III of the Act.

Part III of the Act contained provisions for the conduct of a referendum where any Bill was submitted to a referendum.

By section 4 (1) it defined referendum as meaning (unless the contrary intention appeared) the submission of a Bill to the electors in pursuance of the authority of any Act passed either before or after the commencement of Part III of the Act.

It also contained the following provisions :—

“Section 6.—Where any Bill is to be submitted to a referendum, a writ for a referendum may be issued by the Governor. The writ shall be directed to the Electoral Commissioner.”

“Section 7.—(1) The writ may be in or to the effect of the Form A in the Second Schedule to this Act, and shall appoint a day for taking the votes of the electors, and a day for the return of the writ.

\* \* \* \* \*

“Section 8.—The Governor may cause to be attached to the writ, a copy of the Bill, or a copy of a statement setting out :—

“(a) the text of the Bill ;

“(b) the text of the particular provisions (if any) of any Act proposed to be textually altered by the Bill, and the textual alterations proposed to be made therein.

“Section 9.—The Electoral Commissioner shall forthwith after the receipt of the writ :—

“(a) indorse on the writ the date of the receipt by him ;

“(b) cause to be inserted in the “Gazette” and in two or more newspapers circulating in the State a notification of the receipt of the writ, and of the days appointed for the taking of the votes of the electors and for the return of the writ ;

“(c) cause a copy of the Bill or of the statement (if any) attached to the writ to be exhibited at each court of petty sessions throughout the State ;

“(d) forward a copy of the writ and of the proposed Bill, or of the statement (if any) attached to the writ, to the returning office for each electoral district.”

The Bavin Bill referred to in the last mentioned Act was never, in fact, submitted to a referendum, nor were two further Bills (one for repealing section 7a, introduced into the Constitution Act, 1902, by the Act No. 28 of 1929, and the other for abolishing the Legislative Council) which were before their Lordships' Board in the case of *Attorney General for New South Wales v. Trethowan* [1932], A.C. 526, ever submitted to a referendum.

The Bill for the Reform Act passed through both Houses of the Legislature by the 16th December, 1932.

By an Act, No. 1 of 1933, it was provided that such last-mentioned Bill should be submitted by way of referendum to the electors qualified to vote for the election of members of the Legislative Assembly, and the 13th day of May, 1933, was appointed as the date upon which the votes of the electors at such referendum should be taken, and it was also provided that the referendum should be conducted in accordance with the provisions of Part III of the Act No. 2 of 1930 as thereby amended.

The Bill for the Reform Act was duly submitted to a referendum in accordance with Act No. 1 of 1933, and thereafter received the Royal assent.

The Reform Act amended the Constitution Act, 1902, as amended by subsequent Acts, and by so doing in substance provided for the reconstitution of the Legislative Council. The principal changes made were the reduction of the number of members to 60, the limitation of the term of service of a member of the Legislative Council from life to 12 years, the substitution for nomination of election by a system of proportional representation, the electors being the members of the Legislative Council and the members of the Legislative Assembly voting as one electoral body and recording their votes at sittings of the respective Houses of the Parliament.

The amendments introduced by the Reform Act also provided that the voting for members of the Legislative Council should be by secret ballot, and that the elections should be held and conducted and the votes should be counted and transferred as might be provided by law.

Further amendments added to section 7a of the Amended Constitution Act, 1902, a sub-section (7) to the effect that in any case in relation to which the expression "as might be provided by law" was used in the Reform Act, the law might be made as if section 7a was not in force, and might be so made at any time, either before or after the appointed day being the day as from which the Legislative Council should be reconstituted.

Another amendment made was the omission from the Constitution Act, 1902, of section 16.

The Bill for the Machinery Act had passed both Houses before the Bill for the Reform Act received the Royal Assent. The Bill for the Machinery Act was not submitted to a referendum, and in due course received the Royal Assent.

The Machinery Act still further amends the Constitution Act, 1902, for the purpose of regulating the elections to the Legislative Council under the alterations in the Constitution made by the Reform Act.

Now the complaints of the appellant, as their Lordships understand them, may be put in this way. It is said *First* that the Reform Act was *ultra vires* the New South Wales Legislature, because it violated, in its provisions with regard to the election of the new Legislative Council, certain fundamental principles which, so far as such Legislature is concerned, are inviolable. *Secondly*, that it was not properly submitted to the electorate, and therefore was never qualified to receive the Royal assent, and is therefore no Act at all. *Thirdly*, that the deletion of section 16 from the Constitution Act, 1902, was an interference with the Royal prerogative, and as such was *ultra vires*. *Fourthly*, that the Machinery Act is not a valid Act because it ought to have been submitted to a referendum before being presented for the Royal assent; and *Fifthly*, that the law according to which the elections of members must be conducted must be a law, every step in the process of enacting which must have occurred after the Reform Act became law, and that the Machinery Act does not satisfy this description and cannot therefore be relied on as the law regulating the conduct of such elections.

In their Lordships' opinion, all these objections to the Acts in question are unsustainable.

As to the first point, the fundamental principles alleged to be infringed were not clearly specified or defined, but their infringement was said to arise from the provisions which, in effect, for the purpose of the elections, create an electoral college of the members of the two houses and from the provision for a secret ballot.

The argument on this part of the case was based, in their Lordships' view, upon a misconception. The electors are, it is true, identified by reference to their quality as members of one or other of the two Houses, but when they elect they are not exercising the function of members of either House, but the function of electors, and in the provisions made for the exercise of these functions, no violation of fundamental principle is involved.

It was clearly within the power conferred by section 7 of the Constitution Act, 1902, to make the Legislative Council elective, and to select the electors from such category or categories of persons as should be determined by the Act making the alteration. Nor is it suggested that section 7 or any Act passed in exercise of the powers of section 7 is otherwise than valid under section 5 of the Colonial Laws Validity Act, 1865.

If, therefore, the argument based upon the alleged infringement of fundamental principles fails, as their Lordships think it

does, the validity of the provisions in regard to the elections and secret ballot cannot be impeached.

As to the second point, it is urged that a submission of the Bill to a referendum necessarily involves bringing to the attention of each elector the contents of the Bill, and that this was not done as required by the terms of the Constitution Act, 1902, as amended by subsequent Acts, and therefore the Bill for the Reform Act was never qualified to receive the Royal assent.

The argument, in their Lordships' judgment, involves placing upon the words of the relevant sections meanings which they will not bear.

Section 7A of the Amended Constitution Act, 1902, provides that the Bill shall not be presented for the Royal assent until it has been approved by the electors in accordance with the section. It further provides that on a day not sooner than two months after the passage of the Bill through both Houses, the Bill shall be submitted to the electors, and that when the Bill is submitted to the electors the vote shall be taken as the Legislature prescribes. All this points, in their Lordships' opinion, to the view that submission to the electors means submission to the votes of the electors, and does not mean putting a copy of the Bill before each elector. This view of the matter is confirmed by the definition of referendum in section 4 of Act No. 2 of 1930, and by the language of section 2 of Act No. 1 of 1933. If this be so, the only question is whether the procedure prescribed by the relevant statutes was complied with. It is not alleged that there was any failure to comply with the requirements of sections 6, 7, 8 and 9 of the Act No. 2 of 1930, unless they can be construed in the sense for which the appellant contends. He argued that section 9 (b) requires the Electoral Commissioner to publish not merely a notification of the receipt of the writ, but also to insert in the notification a copy of the Bill, or of any statement annexed to the writ, and this the Commissioner did not do.

This construction of the language cannot, in their Lordships' opinion, be supported. It is impossible to enlarge the content of the phrase, "a notification of the receipt of the writ," so as to include that which the appellant desires to make it cover.

It is for the Legislature to determine what is sufficient to bring the meaning and effect of this Bill before the electorate. That it has done, and the language employed cannot be stretched because, to some, the provisions are not satisfactory.

It was also argued that the Bill in question could not be submitted to the electorate without the earlier Bills dealing with the Legislative Council being also submitted. No support can be found for any such argument.

As to the third point, with reference to the deletion of section 16, the argument of the appellant seems to their Lordships to be based upon a misconception of the function of section 16. That section contains the machinery by which the members of

the former Legislative Council were selected, namely, by the nomination of the Crown, and nothing else. Its omission was necessary, having regard to the introduction of election, and does not impinge upon any prerogative, right, or duty of the Crown to summon to Parliament the members of the Legislative Council who have been duly elected members under the new constitution, nor is this position rendered otherwise because in the case of the Legislative Assembly express provision is made for summons by the Crown.

As to the fourth and fifth points, their Lordships are of opinion that the Machinery Act having received the Royal assent after the Reform Act, exactly satisfies the words "as may be provided by law" in subsection 6 of the section 17A inserted by the Reform Act in the amended Constitution Act, 1902, and that notwithstanding that the Bill for the Machinery Act may have passed both Houses before the Reform Act received the Royal assent. Further, in their Lordships' judgment, the additional subsection 7 added by the Reform Act to section 7A of the Amended Constitution Act, 1902, expressly exempted such a Bill as that which became the Machinery Act from the necessity of being submitted to a referendum.

For these reasons, their Lordships are of opinion that the appeal fails and should be dismissed, and they will humbly advise His Majesty accordingly.

The costs of the appeal must be paid by the appellant.





In the Privy Council.



THE HONOURABLE THOMAS PATRICK, DOYLE  
M.L.C.

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THE ATTORNEY-GENERAL OF NEW SOUTH  
WALES AND OTHERS.



DELIVERED BY LORD TOMLIN.

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