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‘EMBARASSING AND EVEN RIDICULOUS’: THE SHORT-LIVED RISE AND FALL OF CHIEF JUSTICE POPE COOPER’S ‘TWO ACT ENTRENCHMENT’ THESIS IN EARLY TWENTIETH CENTURY QUEENSLAND

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This paper examines the brief lifespan (1907-1920) of ‘Two Act entrenchment’, a curious constitutional law idea which emerged in Queensland in the early 1900s. Its origins lay in an argument formulated by Queensland’s then Chief Justice, Pope Cooper, qua defendant in criminal proceedings arising from his refusal to pay income tax on his judicial salary. That argument was that Queensland’s Constitution Act 1867 was a form of ‘fundamental’ or ‘organic’ law which could not be altered by legislation passed in the ordinary way; but which could be changed only by a Two Act legislative process in which the Legislature in Act 1 expressly empowered itself to alter the relevant provision and then in Act 2, again expressly, enacted the relevant alteration. The article considers how it was that an idea which had no textual basis in either Imperial or colonial legislation, for which there was no supportive judicial authority, and which had no precedent in Queensland’s legislative practice was repeatedly upheld by Queensland’s Supreme Court and Australia’s High Court before being dismissed as wholly without merit by the Privy Council.

I. INTRODUCTION

As judicial dismissals of counsel’s submissions go, Lord Chancellor Lord Birkenhead’s criticism in the Privy Council judgment in *McCawley v The King*¹ of the argument advanced by one of his (in 1938) successors – then Frederick Maugham QC – must rank among the most withering. Maugham’s case was in Birkenhead’s view ‘embarrassing and even ridiculous’.² Yet this argument had two years earlier commended itself to a three members of Australia’s High Court, including the Court’s first Chief Justice Samuel Griffith. Griffith was upholding a unanimous 1907 High Court judgment - *Cooper v Commissioner of Income Tax (Qld)*³ - which forcefully approved the (then newly minted) principle which Birkenhead and his colleagues so disparaged, a judgment which prior to *McCawley* had subsequently been endorsed several times by the High Court.

That principle might best be described as ‘Two Act Entrenchment’. It asserted that the provisions of Queensland’s Constitution Act 1867 were protected from repeal or amendment (whether express or implied) through the ordinary method of legislating (that is by a bare majority in each house of the Legislature⁴ and the royal assent given by the Governor; (hereafter referred to as the ‘ordinary way’ of legislating) by a dual form of entrenchment. These provisions, Maugham contended, could be amended or repealed only by a lawmaking process with two distinct phases. Firstly, Queensland’s legislature would have to enact a statute

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¹ [1920] AC 691.

² [1920] AC 691, 705.

³ (1907) 4 CLR 1304.

⁴ Comprised in 1867 of an elected (on a restrictive franchise) Legislative Assembly and appointed (by the Governor) Legislative Council.

which expressly stated (but otherwise enacted in the ‘ordinary way’) that a provision of the Constitution Act 1867 was to be repealed or amended. Secondly, that repeal or amendment would then have to be expressly effected (but again otherwise in the ‘ordinary way’) by a second, separate Act. The 1867 Act could not be repealed or amended by a single statute, irrespective of how explicit that statute might be as to its intended effect.

The Constitution Act provisions in issue in *McCawley* were ss 15-16. These provided that Queensland Supreme Court judges held office during good behaviour and could only be dismissed by the Governor consequent upon an address from both houses. McCawley was Thomas McCawley, a civil servant and barrister appointed by (de jure) the State’s Governor (de facto by the State Premier, Tom Ryan)⁵ as a judge in Queensland’s Industrial and

⁵ Ryan, born to illiterate Irish immigrant parents in 1876, worked as teacher before taking a law degree at Melbourne university and entering practice at the Queensland bar. He was elected as a Labour Assembly member in 1909. He became party leader in 1912 and Premier in 1915. Ryan frequently appeared as counsel on his governments’ behalf on major constitutional matters; see especially *Taylor v Attorney General* (1917) 23 CLR 457; *Duncan v Theodore* (1917) 23 CLR 510; *Theodore v Duncan* [1919] AC 696; *Lennon v Gibson* [1919] AC 709. Ryan entered national politics in 1919, and was on the cusp of becoming the national Labour party leader when he died of pneumonia in 1921. See Denis Murphy, *TJ Ryan: a Political Biography* (University of Queensland Press, 1975). For insightful discussions of McCawley’s personality and politics see M Cope, ‘The Political Appointment of T. W. McCawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief Justice of Queensland’ (1976) 9 *University of Queensland Law Journal* 224; Nicholas Aroney, ‘Politics, Law and the Constitution in McCawley’s Case’ (2006) 30 *Melbourne University Law Review* 605.

Arbitration Court. Under the State's Industrial Arbitration Act 1916 s 6, Industrial Court judges sat for renewable seven year terms. However, s 6(6) further provided that an Industrial Court judge might also be appointed to the State Supreme Court. Ryan exercised that power regarding McCawley in October 1917.

The challenge to McCawley's appointment in the Queensland courts, the High Court and the Privy Council rested squarely on *Cooper*. The central argument was that since McCawley's presence on the Supreme Court was a parasitic consequence of his seat on the Industrial Court, his Supreme Court tenure was just for seven years rather than - as s 15 of the Constitution Act 1867 provided - during good behaviour. *Cooper* therefore required that the Legislature enact legislation expressly empowering itself to amend s 15 and thereafter a second statute expressly amending that provision to allow Supreme Court judges to sit for time-limited terms.

The initiative for the challenge came from two Queensland KCs, Arthur Feez and Charles Stumm. Both men had acquired considerable legal and political prominence by appearing frequently in litigation challenging the lawfulness of actions taken by Ryan's government,⁶ and Feez had previously fought (unsuccessfully) an Assembly seat on a conservative platform.⁷ There was likely some sincere attachment on Feez and Stumm's part to the *Cooper* principle.

⁶ Ryan's administration pursued an aggressively social democratic economic program. Much of the legislation was largely McCawley's creation, and his role as President of the Industrial Court was a vital element of its enforcement. See Denis Murphy, 'The Establishment of State Enterprises in Queensland, 1915-1918' (1968) 14 *Labour History* 13; (1975) op cit fn 6 ch. 12: Shawn Sherlock, 'Good-bye the State's Progress': State Enterprise and Labor's Plan for a North Queensland Steel Industry, 1915-20' (2006) 90 *Labour History* 61.

⁷ Michael White and Pieter Wessells, 'The Australian Feez Family: Its Contribution to the Law' (1998) 16 *Journal of the Royal Historical Society of Queensland* 76.

They also professed a ‘constitutional’ concern that a renewable time limited judicial tenure would compromise the independence of the judges concerned, who might succumb to political pressure in discharging their judicial functions for fear that their terms of office would not be renewed.

We return (briefly) to *McCawley* in the final section of this paper. The initial sections explore how this ‘ridiculous and even embarrassing’ argument acquired such currency in Australian legal circles.

II. THE ‘ORIGINS’ OF TWO ACT ENTRENCHMENT

Queensland was created by an 1859 Order in Council, issued by the Crown per s 7 of the Constitution Act (New South Wales) 1855, which provided inter alia that Queensland would have a governmental system: ‘In manner as nearly resembling the Form of Government and Legislature which shall be at such time established in New South Wales as the circumstances of such Colony will allow’. The 1859 Order created a legislature comprising an elected Legislative Assembly and an appointive (de jure by the Governor) Legislative Council and the Governor qua the Queen granting the royal assent. Clause 1 empowered the Queen with the advice and assent of the Assembly and Council ‘to make laws for the peace, order and good government of the Colony in all cases whatsoever. Clause 8 provided that Queensland’s legislature would in terms of ‘its constitution, function and mode of proceedings’ be a carbon copy of the New South Wales legislature. The presumptive default mode of lawmaking in that legislature was bicameral bare majoritarianism plus the royal assent given by the Governor,

with the enacted statutes having either explicit or implicit effect on previously enacted legislation.⁸

However Imperial statutes creating the Australian colonies also identified several issues for which different manners of lawmaking were required. The early 1860s produced a steady stream of incidents in which Queensland’s and South Australia’s legislatures failed to respect such statutory conditions, and a steady stream of Imperial legislation retrospectively validating the ultra vires colonial statutes.⁹

Such departures from the ‘ordinary way’ took various forms. One constraint required bills dealing with certain subjects to be reserved for the Monarch’s personal assent. That constraint was sometimes coupled with a proviso that such assent could not be given until the relevant bill was laid before the Lords and Commons for thirty days. These restrictions functioned primarily to enable the Imperial government to prevent enactment of colonial laws conflicting with Imperial interests and provided a pre-emptive alternative to the power of post-enactment disallowance which the Imperial government was generally granted in colonial constitutions.¹⁰

A second type of constraint, found in New South Wales’ (and by extension Queensland’s) initial constitutional orders, imposed enhanced majority requirements. S 36 of sch 1 of the New South Wales Constitution Act 1855 provided that any bill altering that Act’s provisions concerning the Legislative Council could not be presented to the Governor unless approved by

⁸ The relevant provisions in the 1855 New South Wales Act being sch 1 s 23 (Assembly) and sch 1 s 8 (Council).

⁹ Discussed in Ian Loveland, *McCawley and Trethowan: the Chaos of Politics and the Integrity of Law: Volume 1 – McCawley* (Hart Publishing, 2021) ch 3 (‘Loveland, McCawley’).

¹⁰ The 1855 New South Wales Constitution Act expressly preserved (in s 3) such formerly granted powers. The provision was reproduced in clause 14 of the 1859 Order.

a two-thirds majority of eligible members in each house at second and third readings. Section 36 then further provided that such bills be reserved for the Queen's assent and be laid before the Commons and Lords for thirty days before assent. S 15 imposed less onerous restrictions on any bill altering the composition of the Assembly: a two thirds majority of eligible members at Assembly second and third reading was required, coupled with a bare majority of eligible Council members.¹¹

That colonial courts might invalidate colonial 'legislation' not passed in accordance with the requirements of Imperial legislation was not a contentious proposition within Imperial governmental circles in the mid-late nineteenth century.¹² Of more interest – generally and for present purposes – was the presumption that Australia's colonial legislatures, acting in 'the ordinary way' were created by Imperial legislation with the power to place judicially enforceable process-based restrictions of their own devising on their future lawmaking competence. In Queensland, that power seemingly derived from clause 22 of the 1859 Order, which provided that the Legislature would have:

full power to and authority from time to time to make laws altering or repealing *all or any of the provisions of the Order in Council* in the same manner as any other laws for the good government of the colony.....¹³

¹¹ S 15 did not require reservation or laying before.

¹² See especially Enid Campbell, 'Colonial Legislation and the Laws of England' (1965) 2 *University of Tasmania Law Review* 148; Dudley McGovney, 'The British Origins of Judicial Review of Legislation', (1944) 93 *University of Pennsylvania Law Review* 1; Attorney-General Roundell Palmer and Robert Collier, the Solicitor-General, *The Law Officers to Mr Cardwell: Colonial Laws Validity Report*, (1864); (hereafter Palmer and Collier, *Report*).

¹³ Emphasis added. Despite its 'all or any' proviso, clause 22 expressly placed some matters beyond the Legislature's substantive competence, notably removing the Crown's powers of disallowance and the reservation and laying before provisos. The obvious inferences were that

That presumption was seemingly confirmed and reinforced by s 5 of the Colonial Laws Validity Act 1865 (hereafter 'CLVA 1865'), which provided (inter alia) with both prospective and retrospective effect that a colonial legislature that was (per s 1) 'representative'¹⁴ could alter its own 'constitution, powers and procedures' provided that any such alteration was enacted '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 1865 Act was introduced in part to address difficulties created in South Australia by the predilection of two of the colony's three Supreme Court judges to invalidate colonial legislation on various grounds,¹⁵ but similar difficulties in Queensland had also informed that process.

Clause 22 prima facie extended to 'all laws' (other than those expressly excepted) while the apparent reach of the CLVA 1865 s 5 was limited to the compositional and procedural identity of a colony's legislature. Neither the 1865 Act itself or its legislative history cast any light on s 5's intended impact on such generally framed powers as clause 22. And as events in Queensland soon suggested, the 1865 Act had not firmly fastened itself in the constitutional consciousness of the colony's lawmakers.

the list of exceptions was exhaustive and that the exceptions element of clause 22 could not be amended at all by Queensland's legislature until the Imperial Parliament empowered it to do so.

¹⁴ Which seemingly meant that in a unicameral legislature at least half the members were elected and in a bicameral legislature that at least one house was wholly elected.

¹⁵ See John Williams, 'Justice Boothby: a Disaster That Happened' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2007).

A Pope Cooper's Tax Bill – and Enactment of the Constitution Act 1867

'Two Act entrenchment' was an idea fashioned in 1907 by Queensland's then Chief Justice, Pope Cooper, not as a judge, but as a defendant in criminal proceedings. In 1907 Cooper was prosecuted for non-payment of his State income tax. Income tax in Queensland was introduced in 1902 by a 'Conservative' government.¹⁶ That government was subsequently defeated in the 1904 election, and replaced by a coalition of centrists and the Labour party. Although Labour's Assembly representation was larger than its coalition partner's (thirty-four to twenty-one of the Assembly's seventy-two members) the party's then leader William Kidston considered it strategically prudent to have the coalition headed formally by an electorally more familiar and (small 'c') conservative politician.¹⁷ Kidston took office as Treasurer, and was manifestly the coalition's driving force on both policy and presentational matters.

Cooper's denied that his salary as Chief Justice (£4000) was assessable income for these purposes. The root for this argument was claimed to lie in the Constitution Act 1867 s 17:¹⁸

Such salaries as are settled upon the judges for the time being by Act of Parliament or otherwise and all such salaries as shall or may in future granted by Her Majesty her heirs and successors or otherwise to any future judge or judges of the said Supreme Court shall in all time coming be paid and payable to every such judge and judges for the time being so long as the patents or commissions of them or any of them respectively shall continue and remain in force.¹⁹

¹⁶ Generally referred to as a 'Ministerialist' government, then led by Robert Philp.

¹⁷ This being Arthur Morgan, a former Ministerialist who broke with Philp in 1902.

¹⁸ Repeating clause 16 of the 1859 Order, which itself repeated s 40 of sch 1 of the New South Wales Constitution Act 1855.

¹⁹ S 17 verbatim repeated s 3 of a 1760 British statute - 1 Geo. III, c.23; (the Commission and Salaries of Judges Act 1760).

Cooper's submission was that taxing his salary meant his full salary was no longer 'paid and payable', and so the income tax legislation insofar as it applied to Supreme Court judges contradicted s 17. His primary contention was that the provisions of the 1867 Act could only be amended by Imperial legislation. The argument that amendment could only be effected by a Two Act legislative process in Queensland emerged as an alternative and secondary proposition.

Cooper's defence at trial was the first time that the 'Two Act Entrenchment' thesis had been placed before a Queensland court. It had never previously been raised in New South Wales. It had no express textual basis in either Queensland or Imperial legislation. There was nothing in the 1867 Act's enactment history to suggest it was regarded by legislators as having any elevated legal status. Indeed, that Act was just one of thirty measures passed with virtually no discussion in either house; all passed Assembly second reading in a single afternoon.²⁰

The bulky package of bills emerged from a consolidation exercise by a Royal Commission led by the colony's then Chief Justice, James Cockle²¹ and the Attorney-General, Charles Lilley.²² The Constitution Act itself was one of four measures then referred to as 'the political

²⁰ *Queensland Legislative Assembly Debates* ('QLAD') 22 October 1867, 542.

²¹ Cockle's life and career are recounted in J.M. Bennet, *Sir James Cockle: First Chief justice of Queensland*, (Federation Press, 2003). Cockle came to Queensland with the reputation of being a meticulously thoughtful judge who had no partisan political affiliations.

²² Lilley, a Scots emigree, ran a dual career in electoral politics and at the bar as a champion of liberal causes. He subsequently held office (briefly) as Queensland's Premier and then (for ten years) as Chief Justice; see J.M. Bennet, *Sir Charles Lilley* (Federation Press, 2014); Allan Morrison, 'Charles Lilley' (1959-1960) 45 *Journal of the Royal Australian Historical Society* 45; H.J. Gibbney, 'Charles Lilley: an uncertain democrat', in Denis Murphy and Roger Joyce

Acts' by Lilley at second readings.²³ The three others were respectively the Legislative Assembly Act 1867, the Electoral Districts Act 1867 and the Elections Act 1867. These three Acts all dealt with issues of obvious constitutional significance (that all featured in the 1855 New South Wales Constitution Act), but which – for no reason that Lilley made clear during the Acts' passage – evidently did not need to be identified with a 'Constitutional' label.

There is no reference to 'Two Act' entrenchment in the 1867 Act's text. No allusion was made to the principle by Lilley or any other member during the Act's legislative passage. The statute did however expressly identify several exceptions to the 'ordinary way' of legislating. The Act replicated the enhanced majority provisions in s 36 and 15 of sch 1 of the 1855 New South Wales Act, respectively in ss 9-10. Such provisions seem obviously to fall within the scope of the CLVA 1865 s 5, but no reference was made to s 5 during the bill's passage. The 1867 Act's preamble roots the Legislature's power to enact it in clause 22 of the 1859 Order, but does not mention the CLVA 1865. Nor does the 1867 Act contain any provision textually identical to clause 22. S 2 reproduces clause 2 of the Order, which stated:

Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever Provided that all Bills for appropriating any part of the public revenue for imposing any new rate tax or impost subject always to the limitations hereinafter provided shall originate in the legislative Assembly of the said colony.

(eds), *Queensland Political Portraits* (University of Queensland Press, 1978) ('Murphy, *Portraits*').

²³ *QLAD*, 22 October 1867, 542. Lilley strictu sensu was an opposition backbencher when moving the bills. The episode proceeded on a non-partisan basis.

S 2 might have been intended by legislators to have absorbed clause 22, but since there was no discussion of the point during the bill's enactment any such conclusion would be purely speculative.

Any hypothesis that 'Two Act' entrenchment was an unspoken assumption within the Legislature in 1867 might be tested by consideration of events which occurred in 1871, when the legislature enacted the Constitution Act Amendment Act 1871, which purported to repeal the s 10 enhanced majority provisions. Lilley moved the bill, which was opposed by the then government. None of the members who spoke suggested that a 'Two Act' process was required. On Cooper's argument, that 1871 Act should have been preceded by a first Act empowering the legislature to enact that 1871 Act. That this was not done would render the 1871 Act invalid; an invalidity which would presumably then attach to any subsequently enacted reapportionment legislation.

By 1907, there were other clear instances of Constitution Act matters being altered through the ordinary legislative process. These instances included Acts which modified the composition of the Supreme Court. The Constitution Act 1867 (in sch A) made provision for only two Supreme Court judges and specified their respective salaries. On the same day as that statute received the royal assent, assent was also given to the Supreme Court Act 1867; which made provision for appointment of a third judge. Subsequently the Supreme Court Act 1903 raised the permissible number of judges to five. More pertinently for present purposes, the Supreme Court Act 1867 s 33, the Acting Judges Act 1873 s 1 and the Supreme Court Act 1892 s 12 allowed for the appointment of temporary judges to the Court; which judges would obviously serve for only time limited periods. None of these measures had been enacted in accordance with the 'Two Act' process. If Cooper's thesis accurately stated the constitutional position then

presumably any judgments delivered by a Supreme Court bench containing such additional or temporary judges would have been nullities.²⁴

Nor was the ‘Two Act’ process followed on other matters of obvious constitutional significance. In 1890 the legislature enacted The Constitution Act Amendment Act 1890: s 2 fixed the maximum term between Assembly elections at three years. This modified s 29 of the Constitution Act 1867, which had specified a five year period. The 1890 Act made no express reference to s 29 and purported to make the alteration in a single statute. If the Two Act analysis was correct, then 1890 Act was invalid; with the consequence that Queensland would not have had a lawfully constituted legislature for some fifteen years and *every statute* passed in that period would have been (at least presumptively) invalid. Assembly debate on the 1890 Act had been lively and extensive. The then Premier Boyd Morehead observed at second reading that the bill proposed: ‘an important alteration in the constitution of the Colony’.²⁵ The then leader of the opposition, Sir Samuel Griffith echoed that point, describing the bill as: ‘dealing with a great public question involving the rights of the people of the colony to be duly represented in this House’.²⁶ But neither Morehead nor Griffith – nor anyone else - indicated that a Two Act legislative process was required.

Similarly, in 1896 the legislature enacted The Constitution Act Amendment Act 1896, which provided explicitly for payment of Assembly members. This had been a fiercely contested

²⁴ The nullity point had recent historical precedent. In 1888 the legislature had passed the Judges Validating Act retrospectively to validate all Supreme Court judgments in which Charles Mein had sat when it was discovered after his (1885) appointment that he did not satisfy the statutory appointment criteria.

²⁵ *QLAD* 17 July 1890, 277.

²⁶ *Ibid* at 279.

political matter for some years. The Act's preamble expressly stated that it was amending the 1867 Act and made express provision for the payments. But this was all done in a single Act. There was no suggestion from any member that the ordinary way of legislating was constitutionally inadequate for this purpose.

Cooper's argument therefore lacked either a textual basis in Imperial or Queensland legislation or an historical pedigree in previous legislative practice. This seemed not to deter him, and Cooper continued to make his constitutional objections to paying income tax sufficiently clear for the then coalition government to bring a test case before the State Supreme Court in May 1905.²⁷ This plan promptly collapsed when it transpired that none of the judges were prepared to sit and offer a reasoned judgment in such a case because of their obvious (if slight) financial interest in the outcome.

Agreement was then apparently reached that the Supreme Court would issue summary judgment in Cooper's favour²⁸ and the matter would promptly go to appeal. It soon transpired that the parties were not of one mind as to the appeal forum.²⁹ Cooper assumed the matter would go to the High Court; the government that it would go to the Privy Council.

Cooper's preference was likely influenced by the fact that the High Court had recently held in *D'Emden v Pedder*³⁰ and *Deakin v Webb*³¹ that a State could not impose a stamp duty

²⁷ The *Telegraph* (Brisbane), 5 May 1905, 2; <http://nla.gov.au/nla.news-article174668851>.

²⁸ See the speech of then Attorney-General William Blair in *QLAD*, 15 December 1905, 2193.

²⁹ There are reports in the *Telegraph* (Brisbane), 20 July 1905, 2; <http://nla.gov.au/nla.news-article174290633>; and the *Brisbane Courier*, 22 July 1905, 10; <http://nla.gov.au/nla.news-article19356887>.

³⁰ (1904) 1 CLR 91.

³¹ (1904) 1 CLR 585.

(*D'Emden*) or income tax (*Deakin*) on the salary of a federal government official. *D'Emden* and *Deakin* were decided on the basis of an implication – subsequently known as the inter-governmental immunities doctrine³² – of such a prohibition into the Commonwealth Constitution Act 1900, there being no express provision to that effect. The reasoning behind the implication – which drew heavily on United States Supreme Court authority³³ – was that such taxes ‘diminished’ the official’s salary and were thus an unjustifiable State interference with the federal government’s activities.

While Cooper’s case did not raise any Federal-State issue, *D'Emden* and *Deakin* assisted him in two senses. The first, narrowly, was the High Court’s conclusion that taxing a salary equated to a diminution of that salary. The second, broadly, was that the High Court’s methodology rejected the proposition that the meaning of a ‘constitutional’ statute fell to be determined only from its express textual provisions. Rather the High Court accepted that it was legitimate to draw on both the Act’s general scheme of governance and the intentions of the Act’s framers *and* the jurisprudence of the United States Supreme Court as aids to determining its meaning. The Privy Council presented a less friendly forum; in part because English (and Scots) judges were used to paying income tax on their judicial salaries,³⁴ and in part because there was well-known Privy Council authority (dealing both with India and Canada) which firmly disapproved

³² A helpful overview is provided in Ronald Sackville, ‘The Doctrine of Immunity of Instrumentalities in the United States and Australia: a Comparative Analysis’ (1969) 7 *Melbourne University Law Review* 15.

³³ Primarily the Marshall Court’s judgment in *M’Culloch v Maryland* (1819) 17 US 316.

³⁴ See fn 42 below.

the use in the colonial constitutional law context of the American-inspired methodology used by the High Court in *D’Emden and Deakin*.³⁵

This confusion as to the locus of any appeal – if confusion it really was – is the more surprising given the eminence of the counsel which each party had instructed. Feez stood as senior counsel for the government, assisted by William Shand (who was himself appointed to the Court in 1908). Edwyn Lilley (the son of Charles Lilley) led for Cooper. But with there being no immediate prospect of the matter being resolved in a judicial forum, Morgan’s government then took a different and ostensibly bizarre tack.

One way forward would have been for the government to accept the propriety of Cooper’s constitutional reasoning and then promote a Two Act solution. Act One, styled as a Constitution Act Amendment Act, would have provided simply: ‘The Legislature may modify s 17 of the Constitution Act 1867 to provide that the salaries of Supreme Court judges be subject to any generally applicable system of income tax’. Act Two, again styled as a Constitution Act Amendment Act, need only have provided that:

S 17 of the Constitution Act 1867 is hereby amended to include as section 17A the following provision:

17A The salaries of Judges of the Supreme Court shall be subject to any generally applicable income tax.

This strategy would not have availed if Cooper’s contention that the 1867 Act could not be amended *at all* by Queensland’s legislature was correct. But again there was neither an express legal root for that proposition, nor any precedent for it in political practice. CLVA 1865 s 2 certainly precluded enactment of colonial legislation inconsistent with Imperial legislation

³⁵ Respectively *R v Burah* (1878) 3 App Cas 889; *Bank of Toronto v Lambe* [1887] AC 575.

applicable to the colony concerned,³⁶ but since the 1867 Act was a Queensland rather than Imperial statute that argument had no obvious relevance to the s 17 issue.

B A Declaratory Act

Rather than accept the Two Act argument, Kidston (then still Treasurer in the coalition government) promoted and the legislature enacted the Income Tax Declaratory Act 1905. This provided simply that:

It is hereby declared that each of the persons for the time being holding the following offices in the State of Queensland, namely, the office of -

³⁶ S 2 provides that:

2. Colonial law when void for repugnancy.

Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise be and remain

S 2 was intended to confirm that colonial judges could not invalidate colonial legislation because it was ‘repugnant’ to rules and principles of common law or more abstract presumptions about constitutionalism. This point becomes clearer when s 2 is read alongside s 3:

3. Colonial law when not void for repugnancy.

No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order or regulation as aforesaid.

Chief Justice,

Judge of the Supreme Court,

Judge of District Courts...

is and always has been chargeable with and liable to pay income tax in respect of his official salary under and in accordance with the provisions of the laws imposing a tax on income.

At second reading in December 1905,³⁷ Kidston informed the Assembly that: ‘while the great majority of the officers mentioned here have paid their income tax like other citizens, some of them refused to pay’.³⁸ Noting that the Supreme Court judges had declined to hear the case, Kidston continued: ‘[T]he only thing to do was to come to the High Court of Parliament who have made the law and ask them to declare what the law is’.³⁹ Kidston criticised the moral basis of Cooper’s position by ostensibly declining to do so: ‘I will not refer to the question of good taste’.⁴⁰ On the legal question of what Kidston referred to as Cooper’s ‘sheltering behind the constitution’, Kidston bluntly asserted that if there was any constitutional objection to subjecting judges’ salaries to income tax then the Declaratory Act would remove it.

Attorney-General William Blair addressed the objection that subjecting the judges to income tax contradicted ‘English’ constitutional traditions by citing the Imperial Parliament’s Income Tax Act 1842 s 146:⁴¹

³⁷ *QLAD* 15 December 1905, 2186.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ 1842 (5 & 6 Vict.) c.35: *QLAD* 15 December 1905, 2193.

Third.—The said Duties shall be paid on all public Offices and Employments of Profit of the Description herein-after mentioned within Great Britain ; (videlicet,) any Office belonging to either House of Parliament, or to any Court of Justice....

Some of the bill's opponents seemed unaware of this legislation. Others suggested during debate that the Queensland and United Kingdom situations were not in any event comparable. This assertion rested on the premise that Queensland was such a small society that the Supreme Court judges were known to everyone, whereas English judges in England enjoyed an invisibility among the general public.⁴² Quite what pertinence this point had was not explained. But the suggestion was perhaps exaggerated: Queensland's white male population in 1904 was some 270,000.

The bill's opponents also argued that the measure was improper because it had an essentially retrospective character. Objection was also made to the haste with which the bill was being pressed: 15 December was the session's penultimate day. Despite these objections, the bill passed second reading without division, and moved immediately into committee.⁴³ Committee proceedings occupy barely a page of Hansard; no amendments were made; third reading passed without division.

Suggestions were made in the Assembly that the bill might be blocked in the Council. Debate there was certainly fierce, and occupied members for almost as long as in the Assembly.⁴⁴ Second reading was also forced to a division, which the government won by 16 votes to 5. Third reading passed without division.⁴⁵

⁴² Ibid 2188; 2191-2192.

⁴³ *QLAD*, 15 December 1905, 2194.

⁴⁴ *Queensland Legislative Council Debates* 15 December 1905, 2175-2184.

⁴⁵ Ibid, 2183-2184.

Cooper and his judicial colleagues then sent a memorandum to the Governor asking him to reserve the bill.⁴⁶ The memorandum was distinctly self-contradictory. It began by denying that the legislature could alter s 17 at all, but ended by accepting that the legislature could do so – and in the ordinary way – and couching its criticism in terms of morality rather than legality. The memorandum made no reference to Two Act entrenchment. On Blair's advice, the Governor declined to reserve the bill, albeit noting in a despatch to London that: 'I felt some hesitation in disregarding the united representations of the judges of the State on a point of law'.⁴⁷

If the government had expected Cooper to be cowed by the Declaratory Act initiative it was soon disappointed. Morgan's distaste for the day-to-day battles of party politics led him to resign as Premier in January 1906, at which point Kidston replaced as him in what was still formally a coalition administration. Kidston's legislative program was a busy one, and expending political time and capital on resolving the issue of the judges' income tax liability was not a high priority. Cooper took the next step. He and his Supreme Court colleagues in February 1906 unsuccessfully petitioned the King to disallow the Act.

III. *Cooper* in the Queensland Courts

The test case strategy having collapsed, matters eventually proceeded when the government prosecuted Cooper. The prosecution came on in the Brisbane Small Debts Court on 8 December

⁴⁶ 18 December 1905; CO 418/47, 44.

⁴⁷ 5 January 1906; CO 418/47, 29.

1906⁴⁸ before a police magistrate, William Yaldwyn. Both parties instructed eminent counsel. Kidston had briefed Lionel Lukin, then a leading junior and soon to be appointed by Kidston to the Supreme Court. Cooper was represented by Stumm.

Describing the prosecution as ‘in the nature of a farce,’⁴⁹ Stumm argued that imposing income tax on Cooper’s salary breached s 17, and seemed to submit in the alternative either that legislature could not do that *at all* or that it could only do so if it first amended the 1867 Act. Lukin is not recorded as having made submissions on the constitutional point. His apparently sole contention was that levying income tax did not raise a ‘paid and payable’ issue under s 17.

Mr Yaldwyn issued a prompt, wholly unreasoned judgment: ‘The verdict will be for the defendant’. Lukin was evidently surprised:

Mr. Lukin : What, your Worship ?

Mr. Yaldwyn: Verdict for the defendant.

Mr Lukin: I take it then that you are of opinion that the Act is unconstitutional?

⁴⁸ There are contemporaneous accounts in *The Telegraph*, 5 December 1906 p5 - <[05 Dec 1906 - Income Tax. - Trove \(nla.gov.au\)](#)>; *The Week* 14 December 1906 p15 - <[14 Dec 1906 - Income Tax - Trove \(nla.gov.au\)](#)>. For an indication that Cooper’s position did not enjoy much popular support see *The Western Champion and General Advertiser for the Central Western Districts*, 16 December, 4 - <[16 Dec 1906 - Metropolitan Notes By THE EDITOR. - Trove \(nla.gov.au\)](#)>.

⁴⁹ Records of submissions are in the *Brisbane Courier*, 10 December 1906, 5; <<https://trove.nla.gov.au/newspaper/rendition/nla.news-article19499079.5>>; and *The Telegraph* (Brisbane), 10 December 1906, 2; <<https://trove.nla.gov.au/newspaper/article/175269203>>.

Mr. Yaldwyn: Yes, of course.

Mr Lukin : It is a question of law.

Mr. Yaldwyn: It Is not the first time I have given a verdict on an ultra vires Act or regulation.

Two days previously, the Privy Council had dealt an apparently significant blow to Cooper's longer term prospects of success. In *Webb v Outtrim*⁵⁰ the Privy Council, with Lord Halsbury presiding, forcefully rejected both the High Court's result and reasoning in *D'Emden* and *Deakin*. Halsbury's judgment – echoing the Privy Council's decisions in *Burah* and *Lambe*⁵¹ - stated bluntly that constitutional limitations on colonial legislative powers would have to be expressly stated in the relevant constitutional statute, and that it was relatedly quite inappropriate when construing such Acts for a court: 'to consider the knowledge of those who framed the constitution and their supposed preferences for this or that model which might have been in their minds'.⁵² Haldane also fiercely disapproved the High Court's use of United States Supreme Court case law as a guide.

The government promptly appealed *Cooper* to a District Court. Edwyn Lilley, son of Charles Lilley, replaced Schumm as Cooper's counsel.⁵³ Lilley was Insistent that *D'Emden* and *Deakin* made it clear that the income tax was a diminution of Cooper's salary and thus inconsistent with the 'paid and payable' provision of s 17. He then entered more grandiose territory. The

⁵⁰ [1907] AC 81.

⁵¹ Fn 36 above.

⁵² [1907] AC 81, 90-91.

⁵³ There are accounts of submissions at *The Telegraph (Brisbane)*, 9 February 1907, 13; <<https://trove.nla.gov.au/newspaper/article/175277634>>: *Brisbane Courier*, 9 February 1907, 11; <<https://trove.nla.gov.au/newspaper/article/19492151>>.

crux of Lilley's submission was that the Constitution Act was a form of law legally superior to other Queensland statutes:

The Constitution Act was not an Act which could be repealed like a Brands Act or a Marsupial Act. It was something higher and more important. It was the Charter under which the people of Queensland wished to live and it could not be altered or repealed except as provided for by the statute itself.

The obvious difficulty this submission raised – but on which Lilley was not pressed by the judge – was that 'the statute itself' (and the preceding 1859 Order) expressly provided that some (a very few, notably ss 9 and 10) of its provisions could not be altered or repealed in 'the ordinary way'. But s 17 did not fall into that category. Lilley buttressed his submission a peculiar argument rooted in the Commonwealth of Australia Constitution Act 1900 s 106. This section provided that:

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the state, as the case may be, until altered in accordance with the Constitution of the State.

Lilley submitted that section 106 had somehow endowed the constitutions of all the former colonies with the normative status of Imperial legislation and thereby rendered those constitutions immune to alteration at all by State legislatures. S 106 offers no express textual support for that argument, and the contention is flatly inconsistent with the express wording of the final clause. That 'continue as at the establishment...' phraseology also strongly indicates that s 106 was not in any sense altering the pre-confederation normative status of State constitutions nor the way those constitutions might be amended.⁵⁴

⁵⁴ There is no obviously credible basis for thinking that s 106 endowed State constitutions with entrenchment mechanisms which they did not already possess. It is perfectly credible to assume that if Two Act entrenchment had been an element of the Queensland

The logic of Lilley's s 106 argument in a strict legal sense is elusive even if intended to raise a CLVA 1865 s 2 point. If it were correct that the 1867 Act was normatively equivalent to an Imperial statute, it was an 'Imperial statute' which in express terms empowered the legislature to alter or repeal almost all of its terms by legislation passed in 'the ordinary way'. Such legislation would therefore not be inconsistent with the CVLA 1865 s 2.⁵⁵

The Two Act entrenchment principle was evidently offered in the (much lesser) alternative to the stark proposition that s 17 could not be amended *at all* by Queensland legislation. Lilley did not engage with the point – and again was not pressed by District Judge Miller – that the 1867 Act had often been amended by legislation passed in 'the ordinary way', none of which legislation had ever faced a legal challenge to its validity; (and all of which, if Cooper was correct, would likely be a nullity).

Lukin also overlooked this historical issue. In brief submissions, Lukin described Lilley's contentions as: 'a most extraordinary proposition. A proposition which will be very startling to

constitution before 1900 then s106 would have provided an additional – but unnecessary – buttress for the principle. See generally the discussion in Jeffrey Goldsworthy, 'Manner and Form in the Australian States' (1987) 16(2) *Melbourne University Law Review* 403 and especially his comment at 427-428 'In other words, it [s.106] does not make binding any restrictive procedure which is not already binding independently of it [s 106]'. See also C.D. Gilbert, 'Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council From State Supreme Courts' (1978) 9 *Federal Law Review* 348.

⁵⁵ Cooper had raised s 106 with the Governor in a further memorandum on 24 May 1906, asserting – but like Lilley without explaining how – s 106 had prevented the legislature from amending s.17. This later memorandum also made no reference to Two Act entrenchment; CO 418/47, 218.

Australia'.⁵⁶ Lukin continued by asserting that: '[T]he Constitution Act was passed by the Parliament of Queensland, and the Parliament that passed it had the power to repeal it or to alter it'. Lukin did not engage with the Two Act submission, his presumably being that repeal or alteration could be effected by legislation passed in the ordinary way. But all such discussion was in any event irrelevant, as no credible case could be made that subjecting judges to a generally applicable income tax contradicted s 17. Lukin made that latter argument only in general terms and did not engage with the High Court's treatment of that point in *Deakin*. Unlike Mr Yaldwyn, District Judge Miller felt the matter could not be dealt with in an ex tempore decision, and reserved his judgment.

Kidston then had weightier issues on his mind. He had left the Labour Party and formed – with Morgan's support – a new centrist grouping known as the Kidston party; and an Assembly election was scheduled for May 1907. Income tax reform featured prominently in his manifesto proposals. Pope Cooper's liability to pay the income tax did not.

District Court Judge Miller subsequently down a short, clearly reasoned opinion on 13 February.⁵⁷ Its ratio was that the income tax legislation did not engage section 17:

I fail to see that [the income tax legislation] can be construed as a possible blow against the independence of the judges....They can only be dismissed according to law, on the petition of the two Houses of Parliament, by the King, and that assent would only be given on good cause being show....The Income

⁵⁶ If Cooper's argument was correct for Queensland it was likely correct for other States as well.

⁵⁷ The judgment is at fn 1 of the subsequent Supreme Court judgment: *In Re the Income Tax (Consolidated Acts, 1902-1904 and the Income Tax Declaratory Act of 1905* [1907] St R Qd 110.

Tax Acts, making them subject to general taxation, does not in my opinion affect that independence in the slightest degree.⁵⁸

Miller dismissed *D'Emden* and *Deakin* as irrelevant to this case, as those judgments concerned only State competence to enact laws impinging on Commonwealth jurisdiction. Miller's opinion did not accord any merit to Lilley's suggestions that Constitution Act provisions were either per se immune to amendment by the legislature or alterable only by the Two Act method. (He noted but did not address the s 106 submission). It is not however clear if Miller considered that conclusion a matter of general principle, or if it was consequential upon his having already decided that the income tax legislation did not engage s 17. That latter inference has some force, given that during submissions Miller suggested Lilley might be on firmer ground if the income tax Acts singled judges out for particularistic treatment.⁵⁹ Miller nonetheless granted permission for appeal to the Supreme Court (whose judges had overcome their earlier unwillingness to sit) where argument resumed on 12 March 1907.

⁵⁸ Ibid at 113.

⁵⁹ *Brisbane Courier*, 9 February 1907, 11;

<<https://trove.nla.gov.au/newspaper/article/19492151>>.

The official law reports do not record which judges sat;⁶⁰ - nor do they record the parties' submissions.⁶¹ Lilley and Lukin continued as leading counsel. Lilley was however joined by a G.W. Power, who was well-connected in Philpote circles and had (unsuccessfully) contested an Assembly seat in 1907. Power took primary responsibility for submissions.

Power's main contention – as Lilley argued below – was still that s 17 could not be altered *at all* by Queensland's legislature. His alternative submission was that if the legislature did have such a power, that power would have to be exercised in express terms. Press reports do not clearly indicate that Power or Lilley pressed a 'Two Act' entrenchment argument. They relied again on *Deakin* as authority for the proposition that subjection to income tax worked a diminution on a judge's salary and so breached s 17's 'paid and payable' proviso. Lukin simply reiterated the points he made in the District Court on both the diminution and legislative competence questions. Judgment was reserved until the next day.

The sole opinion - given by Real - was terse. Referring to *Outtrim*, Real stated that the only issue was whether the income tax statutes were inconsistent with an Imperial Act and concluded that: 'We cannot discover anything in the Income Tax Acts...repugnant to any

⁶⁰ Three judges sat. Patrick Real was appointed in 1890. He had come from very humble origins before building a successful practice at the bar. He had no overt political sympathies. Real was joined in Cooper's case by Charles Chubb, appointed in 1890 and previously an Assembly member (of conservative party disposition) and the colony's Attorney-General. The third judge, Virgil Power, appointed in 1895, had like Real no party political track record.

⁶¹ Submissions are recounted in *The Telegraph* (Brisbane), 12 March 1907, 2; <<http://nla.gov.au/nla.news-article178243281>>; and *The Brisbane Courier*, 12 March 1907, 9; <https://trove.nla.gov.au/newspaper/article/19478070>.

Imperial Act extending to this State’.⁶² By implication, the Court rejected any suggestion that the 1867 Act enjoyed an elevated normative’. But the reasoning is so cursory that it raises an obvious inference that the judgment was a mere way station for appeal to the High Court; permission for which was granted on 5 April 1907.

IV *Cooper* in the High Court of Australia

When *Cooper* reached the High Court, the Court had increased in size from its original three members to five.⁶³ The three founder members were the Chief Justice Samuel Griffiths, Sir Edmund Barton and Richard O’Connor. All came to the Court after distinguished careers as politicians. Griffith had been Premier of Queensland; Barton had served as Australia’s first Prime Minister; O’Connor was previously a minister in various New South Wales governments. Only Griffith had previous judicial experience – ten years as Queensland’s Chief justice.

The original Court had adopted in *D’Emden* and *Deakin* a (from a traditional British perspective that courts should derive the meaning of a statute’s provision primarily from that statute’s text) rather unusual – indeed adventurous - methodology in judgments construing the Commonwealth of Australia Constitution Act 1900; a methodology which accepted that the intentions of the Australian framers of the text which the Imperial Parliament subsequently enacted and the jurisprudence of the United States Supreme Court were appropriate aids to determining the Act’s meaning. Griffith’s attachment to those principles – personally and professionally – was strong. Griffith had played a major role in drafting the original version of the 1900 Act. He had been much influenced by American constitutional law and theory when

⁶² [1907] St R Qd 110 at 113.

⁶³ Effected by the Judiciary Act 1906.

doing so, and borrowed wholesale from the letter of the United States constitution in formulating his own text. That borrowing was much discussed, and substantially adopted, in the resultant Act.⁶⁴ Barton and O'Connor had little difficulty in endorsing Griffith's almost reverent approach to American constitutional law.

The two new appointees were Isaac Isaacs, a man of broadly liberal political sentiments who had previously held office as Attorney-General both in Victoria and in the national government; and Henry Higgins, also a career politician of liberal persuasion, who served as Attorney-General in Australia's first (short-lived) Labour government. Isaacs and Higgins appeared as opposing counsel in *D'Emden* and *Deakin*. Quite where – as judges – they would stand in respect of both the outcome and methodology of those cases was a much anticipated question in Australian legal circles.

A Submissions and Questions

Cooper opened in Melbourne on 22 April 1907. Lilley and Power appeared for Cooper, with Lilley taking prime responsibility for argument. Lukin again led for the government. The Commonwealth Law Reports contain a summary of submissions and questions from the bench; (hereafter 'CLR submissions').⁶⁵ These are difficult to reconcile in some respects with press accounts.

⁶⁴ See generally John Reynolds 'A.I. Clark's American Sympathies and His Influence on Australian Federation' (1958) 32 *Australian Law Journal* 62; John Williams 'The Emergence of the Commonwealth Constitution' in H.P. Lee and George Winterton (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003).

⁶⁵ (1907) 4 CLR 1304, 1305-1310.

The *Telegraph* of 23 April⁶⁶ records an exchange which indicates that Cooper still asserted that the 1867 Act could not be amended by Queensland's legislature *at all*:

Mr Justice Isaacs: Do you go as far as to say that [Queensland's] Parliament could not repeal that section?

Mr Lilley: Only with the assent of the Imperial Parliament.

Mr Justice Isaacs: Where do you get the necessity for the assent of the Imperial Parliament? That means an Imperial Act.

Mr Lilley: Practically so.⁶⁷

Lilley could not identify a clear legal source for that necessity, although he alluded once again to the possibility that the Commonwealth Constitution Act 1900 s 106 created this effect.

Apparently in the alternative, Lilley also suggested that if Queensland's legislature could amend the 1867 Act it could only do so in what he termed 'the proper way'⁶⁸ as laid down in clause 22 of the Order and ss 2, 9 and 10 of the 1867 Act itself. This is a peculiar submission. Ss 9 and 10 had indeed specified 'a proper way' in which assembly reapportionment and Legislative Council reform had to be effected. Clause 22 certainly placed issues relating to the Crown's powers of reservation and disallowance beyond Queensland's legislative competence. But those matters aside, there was no expressly 'proper way' identified anywhere in the Order or Act which prevented the legislature making laws on other matters in 'the ordinary way'.

Lilley submitted that 'Two Act entrenchment' was a departure from 'the ordinary way' of lawmaking that arose impliedly simply – but necessarily – because the Constitution Act 1867

⁶⁶ At p5; <<https://trove.nla.gov.au/newspaper/article/175565143>>.

⁶⁷ This exchange does not feature in the CLR report.

⁶⁸ (1907) 4 CLR 1304, 1306: *Brisbane Courier*, 23 April 1907, 3; <[23 Apr 1907 - INCOME TAX APPEAL. - Trove \(nla.gov.au\)](#)>.

was ‘the Constitution’.⁶⁹ But this submission, evidently very much the second string on Lilley’s bow - seemed to morph at O’Connor’s instigation into the proposition that the previously referred to ‘proper way’ might only require express language in a *single Act*:

Mr Justice O'Connor: That is what you have to argue— that you cannot have an implied repeal of a Constitution. It must be a direct repeal.⁷⁰

Lukin’s submissions⁷¹ on the constitutional point largely⁷² repeated his arguments below. The Constitution Act 1867 was an exercise of the power given to the legislature in clause 22 to alter any Queensland law in the ordinary way (subject to specific and express exceptions requiring reservation of assent or special majorities). Once enacted, the 1867 Act was simply a statute like any other Queensland legislation. Its terms could be altered or repealed (expressly or impliedly) by any subsequent Act passed in ‘the ordinary way’. Lukin obviously accepted that Queensland legislation which was inconsistent with Imperial legislation applicable to the colony was invalid to the extent of that inconsistency, alluding both to the common law concept

⁶⁹ See especially the account in *The Week*, 26 April 1907, 23; <[26 Apr 1907 - Income Tax. - Trove \(nla.gov.au\)](#)>.

⁷⁰ *The Telegraph (Brisbane)*, 23 April 1907, 5; <<https://trove.nla.gov.au/newspaper/article/175565143>>.

⁷¹ (1907) 4 CLR 1304, 1310.

⁷² Lukin with evident reluctance accepted that there were parts of clause 22 (the reservation and disallowance provisos) that the legislature could not repeal or amend. But these he characterised as but ‘very faint recognition’ of ‘fundamental law’ status; (1907) 4 CLR 1304 at 1309. He seemed not to appreciate that these provisos had an explicit textual basis in the 1859 Order and so were really not ‘faint’ at all.

of repugnancy and (presumably s 2 of) the CLVA 1865; but maintained that no Imperial statutory restraint precluded amendment of the 1867 Act by a subsequent Queensland Act.

The hearing concluded with three distinct constitutional law propositions aired on Cooper's behalf. All assumed that the 1867 Act was normatively superior to 'ordinary' Queensland legislation. (Lilley had indeed styled the 1867 Act as 'fundamental' or 'organic' law, as distinct from 'ordinary' law).

The first – most extreme – was that such alteration was wholly beyond the Queensland legislature's competence. Only the Imperial Parliament could achieve that effect. The second was that changes to the 1867 Act could be effected only by a Two Act process, within which in Act 1 the legislature expressly empowered itself to amend or repeal part(s) of the 1867 Act and then in Act 2 the provided for alteration was enacted. The third was that modifying the 1867 Act could be achieved in a single statute expressly stating that the 1867 Act was being altered. The first proposition stood consistently at the forefront of Cooper's submissions throughout the litigation. The second appeared with less consistency and was more faintly argued. The third was offered by Power in the State Supreme Court, but in the High Court seemed to owe more to O'Connor's prompting than Lilley, Power or Cooper's design.

Strictu sensu, these 'constitutional' points would be relevant only if Lilley surmounted the initial hurdle of persuading the Court to accept that subjecting Cooper's judicial salary to income tax breached section 17. On that issue Lukin and Lilley rehearsed the submissions made below.

Regardless of the case's outcome, the proceedings imposed some personal and political costs on Cooper. In February 1907, Governor Chelmsford had explained to the Secretary of State that in the light of the litigation he did not feel that he could appoint Cooper as Lieutenant

Governor: to do so 'would be distasteful to my Ministers'.⁷³ Morgan was appointed instead. In May Chelmsford passed Cooper over as Deputy Governor, lamenting in a despatch that: 'It is unfortunate for me that [Cooper] is a gentleman to whom grave exception can be taken on various grounds for the position...'.⁷⁴

B Judgments

Judgment was issued on 28 June 1907. (In the interim, Kidston successfully fought and won the May 1907 Assembly election). Four judges offered reasoned opinions. Isaacs simply concurred with Griffith.

For the purposes of resolving Cooper's case on its merits, the question of whether subjection to income tax raised a s 17 issue was the predominant question. Griffith, like all of his colleagues had no difficulty in finding in the government's favour:

The tax is not....a deduction from the salary at the source and before payment. I think that the inclusion of a Judge's salary with the rest of his income in an aggregated fund, upon the balance of which, after specified deductions, an income tax is charged in common with the incomes of all other citizens of the State, is different in principle from a direct diminution of his salary *quâ* salary.⁷⁵

While that might seem in the abstract *prima facie* a credible decision, it is in context a remarkable conclusion. Three years earlier in *Deakin*⁷⁶ Griffith had addressed the question of

⁷³ CO 418/54, 117

⁷⁴ CO 418/54, 87.

⁷⁵ (1907) 4 CLR 1304, 1316.

⁷⁶ (1904) 1 CLR 585.

whether a State's attempt to bring the governmental salaries paid to federal government officials within a generally applicable income tax regime was a 'diminution' of that salary. His conclusion was this:

...[T]he substance of the [tax]. is the exaction of a fixed sum from the taxpayer, computed according to the value or quantity of the thing in respect of which the tax is payable. Nor can it make any difference in substance whether, in the case of an income tax, the tax is deducted 'at the source'...or collected from the taxpayer after the receipt of the income. In either case the effect, if any, of the imposition as a diminution of the net emoluments of the taxpayer is identical.... This is the accepted view in the United States....⁷⁷

Griffith made no attempt in *Cooper* to reconcile the obvious inconsistency of his conclusion there on the diminution issue with his decision in *Deakin*. Indeed, he did not mention *Deakin* at all.

More notably, Griffith took the diminution point as the second, subsidiary, part of his opinion. The first part addressed what was to him the more important question; whether the 1867 Act could be altered by Queensland legislation passed in 'the ordinary way'. The answer was 'No'.

Griffith ignored Cooper's primary submission – that an Imperial statute was required to amend the 1867 Act. Nor did he evaluate the suggestion that the 1867 Act could be amended by a single Queensland statute drafted in express terms. His 'No' rested entirely on the proposition that Queensland's legislature could alter the 1867 Act only by an express Two Act process.

⁷⁷ Ibid, 612. The 'Constitution' reference is to s 3 of chapter I of the Commonwealth of Australia Constitution Act 1900.

Griffith identified an important political purpose – to enhance legislative transparency and accountability - for such a principle.⁷⁸ What his judgment did not offer was any remotely credible legal or historical basis to support the existence of Two Act entrenchment. Griffith did not acknowledge that there was no explicit textual basis at all in the 1867 Act itself, in the 1859 Order or in any other Imperial or Queensland legislation for Two Act entrenchment. Griffith did not identify a single judicial authority from any British colonial constitution in which Two Act entrenchment – or indeed any other departure from the presumptive ‘ordinary way’ of legislation - could be *implied* into a statutory constitutional text. He made no reference to the fact that Lilley in promoting the 1867 Act gave no indication that a Two Act amendment process would be required. Nor did Griffith acknowledge that the 1867 Act had many times been amended – including when he sat in the Assembly – by legislation passed in the ‘ordinary way’ without any allusion having been made by any member of either house that a two Act process was required.

The Chief Justice apparently did not see these lacunae as obstacles to accepting Cooper’s assertion as correct. The crux of Griffith’s ‘reasoning’ – the term is used guardedly – was simply that it was an inherent or implicit characteristic of the 1867 Act that the Act’s terms could not be changed by a Queensland statute enacted in the ‘ordinary way’. This quality evidently existed because the 1867 Act was in substance the 1859 Order and the 1859 Order was in turn Queensland’s ‘fundamental’ or ‘organic’ law’. That clauses 2 and 22 of the Order empowered the legislature to make law – including laws amending the Order itself – in the ‘ordinary way’ apparently did not detract from the Order’s ‘fundamental’ status, since the text of those specific provisions had to be read with the ‘rest of the Order’. And ‘the rest of the Order’ – Griffith did not specify which bits - precluded the legislature altering the Order (which

⁷⁸ (1907) 4 CLR 1304, 1315.

now on Griffith’s view existed in form as the 1867 Act) without first legislating to give itself the power to do so:

I think that the mere re-enactment of the provisions of the original Constitution *totidem verbis* did not alter the fundamental character of the provisions themselves, which still took effect as substituted in, and, so to say, forming part of, the Order in Council. In my opinion therefore, the legislature could not alter the Act of 1867, any more than before, disregard the provisions of the Constitution as existing for the time being, so as to be able to pass a law inconsistent with them, without first altering the Constitution itself.⁷⁹

And then Griffith suddenly announced that the 1867 Act was in substantive terms not just the Order, but: ‘I am of opinion that the Constitution of Queensland for the time being has the force of an Act of the Imperial Parliament extending to the colony...’.⁸⁰

Griffith’s judgment makes little legal sense. The objections to his conclusion are both obvious and profound.

Firstly, the 1867 Act was not a ‘mere re-enactment’ of the 1859 Order. The 1867 Act added to, subtracted from and altered the 1859 Order in significant ways. Griffith must have been perfectly well aware that his assertion was inaccurate.

Secondly, Griffith also failed to appreciate the point (or failed to acknowledge it) that the ‘logic’ of his conclusion was internally not just contradictory but self-destructive. For if the 1867 Act was the Order in Council in another form – and if the 1867 Act could be amended in Queensland only by a Two Act process – then a fortiori the Order could only have been amended by Queensland’s Parliament through a Two Act process. Since the 1867 Act purported to do so in a single Act it must itself have been ultra vires. The 1867 Act – on

⁷⁹ Ibid, 1314.

⁸⁰ Ibid, 1315.

Griffith's reasoning – could only have been valid if it had been preceded by another Act expressly providing for its own enactment.

Thirdly, Griffith offered no explicit explanation of how the Order – an element of the Monarch's common law prerogative powers – acquired the normative status of an Imperial Act. That it was issued under s 7 of the 1855 Act could not per se give it that status.⁸¹ While Parliament could have expressly provided for this in the 1855 Act, it did not do so. Griffith did not cite any authority to suggest such a consequence could arise as a matter of implication. Cooper had submitted at various stages of the litigation that the Commonwealth of Australia Constitution Act s 106 had created this consequence. But although Griffith's judgment quoted s 106 verbatim it appears there as an isolated passage, separated by several pages from his 'force of an Imperial Act' conclusion, and without any explanation as to why it had this effect. It may be that the unexpressed rationale informing Griffith's reasoning was informed by or derived from the CLVA 1865 s 2. This applied the repugnancy doctrine to Imperial Acts and/or orders or regulation made under such Acts and/or such orders or regulations (ie exercises of the prerogative or statutory instruments) which had in the colony the 'force or effect' an Imperial Act. The 1859 Order would certainly fall within s 2. The 1867 Act would however be a 'colonial law' per s 2, and could only acquire the 'force' (per s 2) of an Imperial Act if the Imperial Parliament gave it such 'force'. Griffith did not identify any Imperial statute expressly so doing (and nor is there any such provision in the Order), and offered no authority to sustain the conclusion that such 'force' could arise as a matter of implication.

⁸¹ The authorisation in s 7 was required because Queensland was carved out of colonial territory (New South Wales) delineated by statute.

Fourthly, even assuming Griffith's 'force' argument to be correct, clause 22's plain words empowered Queensland's legislature to alter the provisions of the Order (other than those expressly excepted) in the same manner as it might alter any other law. Griffith's less than compelling rebuttal of that proposition was that clause 22 did not mean what it plainly said, but that it had to read in conjunction with the (unidentified) 'rest' of the Order and once so read would have to be seen as meaning that the legislature could not alter *any* of the terms of the Order (and consequently of the 1867 Act) without first empowering itself by an expressly framed statute to do so.

Fifthly, even if the Order/1867 Act indeed had somehow acquired the force of an Imperial Act, then absent an express grant of power from the Imperial Parliament to Queensland's legislature to amend the Order/1867 Act, the Queensland legislature could not alter it *at all*. This was of course Cooper's primary submission throughout the litigation. Griffith manifestly did not accept this argument. But, once again, he offered no authority whatsoever for the proposition that a colonial legislature could amend a colonial law which had 'the force' of an 'Imperial Act' by a Two Act process.

Barton's brief judgment endorsing the Two Act entrenchment principle⁸² replicated the ordering of Griffith's opinion: the 'constitutional' point issue was addressed first; whether the income tax Acts impinged on s 17 (Barton agreed they did not) was the second(ary) matter.

On the constitutional question, Barton rested his conclusion on some abstract musings of general 'principle'. According to Barton, no lawmaking body 'created by and acting under a

⁸² Like Griffith Barton did not address – but by omission must surely be taken implicitly to have rejected – Lilley's submission that only the Imperial Parliament could amend the 1867 Act. He also rejected the possibility that express amendment in a single Act was adequate.

written constitution’⁸³ could make laws inconsistent with that constitution without first empowering itself to do so. This principle applied even if (and this presumably a nod to clause 22 of the Order) : ‘the authority conferred by that instrument includes a power to alter or repeal any part of it’. The enactment of the first empowering Act was evidently a condition precedent to enacting the amending or repealing Act. Applied to Queensland’s legislature, this principle meant that:

Legislation, which could not be undertaken at all without the antecedent authority of the fundamental law, cannot overstep the bounds set for it by that law and yet stand good. Before it can avail, the bounds must have been lawfully extended. That is a condition precedent, even if the makers of the disputed law had power to make the extension themselves. They cannot omit to make it, and at the same time proceed as if it had been made.⁸⁴

Like Griffith, Barton was evidently not troubled that his conclusion was not supported by any legislative text, judicial authority, nor Queensland legislative history. Neither did Barton seem to realise that if his reasoning were correct, then all the amendments ever made to the various States’ constitutions would be void if they had not been preceded by an anterior enabling statute.

In contrast to Barton and Griffith, O’Connor devoted the first (and larger)⁸⁵ part of his judgment to addressing and resolving in the government’s favour the issue of whether the income tax Acts were inconsistent with s 17. Answering the constitutional question was

⁸³ (1907) 4 CLR 1304, 1317.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, 1320-1326.

therefore not essential: ‘But as the question is one of far-reaching importance, I think it right to state my view of the law’.⁸⁶

O’Connor followed his colleagues in ignoring Cooper’s primary submission – that only an Imperial statute could amend the 1867 Act. The question was simply whether the Act could be amended in the ordinary way or only by a Two Act process. O’Connor J concurred with Griffith’s suggestion that the Constitution Act 1867 was normatively equivalent to an Imperial statute, but then took that argument rather further than the Chief Justice had by expressly reasoning that any Queensland statute which purported to repeal or amend a provision of the 1867 Act would be invalid by virtue of the CLVA 1865 s 2. The obvious objection to that analysis was outlined above. It may be that in developing the s 2 argument expressly, O’Connor was seeking to root responsibility for his judgment in Imperial legislation to forestall any criticism that the High Court was engaging in inappropriate judicial activism. The – to put it kindly – imaginative judicial reasoning required to sustain that conclusion would however make any such attempted transfer of responsibility difficult to sustain. Like Griffith, O’Connor could not identify any statutory source (whether Imperial or colonial) which expressly identified a Two Act lawmaking process as required to amend the 1867 Act; and, again like Griffith, did not identify any supportive judicial authority.

Higgins’ brief judgment merely assumed without deciding that the Two Act entrenchment thesis was correct. He saw no need to explore the point as it was as obvious to him as it was to his colleagues that subjecting judges to generally applicable income tax could not contradict s 17.

It is ostensibly surprising that none of the judgments – nor of the submissions – considered whether Two Act entrenchment was a ‘manner and form’ of legislating within CLVA 1865 s

⁸⁶ Ibid, 1326.

5. Insofar as a provision of the Constitution Act 1867 fell within s 5's substantive reach, the special method of legislating which the Court concluded was required to amend or repeal that provision would obviously seem to have that character. Two Act entrenchment would therefore be a 'colonial law' in this sense.⁸⁷ The explanation for the omission may be that the income tax legislation was universally seen as not raising an issue within s 5(1).⁸⁸ That does however seem unlikely given the substantive significance Cooper accorded to s 17 and the very imaginative nature of the Two Act principle itself. A more likely explanation is that it that never actually occurred to any of the parties or judges that section 5 might be relevant to this matter;⁸⁹ which is in itself surprising given the intensity of the problems (in which Queensland was very much involved) that led to the CLVA 1865's passage just forty years earlier.

Nor did the judges appear alert to the potential significance of their conclusion on the Two Act entrenchment point. The judgment manifestly cast a potential pall of invalidity over every

⁸⁷ Collier and Palmer's 1864 report on which the CLVA 1865 was seemingly based asserted that that there was no reason to prevent the doctrine of implied repeal applying to all colonial statutes, including those defining the identity and powers of colonial legislatures themselves; (see Loveland, *McCawley*, 103-105). Requiring express repeal or amendment in a single Act would be a 'manner and form' proviso; as would requiring Two such Acts.

⁸⁸ S 5(1) relates to a colonial legislature's power to: 'establish courts of justice, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein...'.
The (1) is my own addition as s 5 contains multiple concepts not textually demarcated by any sub-divisional lettering or numbering.

The (1) is my own addition as s 5 contains multiple concepts not textually demarcated by any sub-divisional lettering or numbering.

⁸⁹ The CLR report does not record Lilley mentioning the 1865 Act at all. Lukin's one allusion to it is to s 2; (1907) 4 CLR 1304, 1309.

amendment made to Queensland’s constitution since 1867. Furthermore the principle that applied in Queensland presumably would also apply in the other Australian states. In 1902 the New South Wales legislature had – acting in the ordinary way – significantly amended its original 1855 constitution; (which had itself been amended piecemeal many times since 1855). That a Two Act process might be required was a point notable only for its absence from the relevant parliamentary debates.⁹⁰ But if *Cooper* was correct, important elements of New South Wales’ constitutional architecture – such as a recent reduction in the number of Assembly members and the introduction of a referendum mechanism - would lack a legal base.⁹¹

The judgment attracted considerable press attention in Queensland and the other States.⁹² Much coverage expressed incredulity at the inconsistency of the Court’s reasoning on the diminution point in *Deakin* and *Cooper*.⁹³ But newspaper reports did not question – nor appreciate the implications of - the Two Act entrenchment point. *The Argus* – a leading Melbourne paper - considered it uncontentious:

Queensland, like other Australian States, has a Constitution Act which determines, in general, the frame of government, legislative, executive and judicial. This Act can be altered only by a special method – a method distinct from that used in the case of ordinary legislation...The Constitution Act is a ‘fundamental law’ and

⁹⁰ The Act’s passage is discussed at Loveland, *McCawley*, 202-206.

⁹¹ The Electorates Redistribution Act 1904 and the Reduction of Members Referendum Act 1903.

⁹² A search on the Trove newspaper website (search terms: ‘high court income tax queensland’; date range 27 June to 31 July) produces 263 hits.

⁹³ For example *The Age* (Melbourne), 3 July 1907,6; <<http://nla.gov.au/nla.news-article198606545>>: ‘A perusal of those judgments leaves the reader amazed at the reasons assigned by the learned judges for their decision’.

any ordinary Act of Parliament which is inconsistent with it, to the extent of the inconsistency, invalid and inoperative.⁹⁴

V AN EXPLANATION FOR THE *COOPER* CONCLUSION ?

The High Court's judgment is so weak in terms of its doctrinal base, of its roots in legislative practice and of its appreciation of its possible impact on the validity of much State law that it is initially difficult to see it as anything other than – in a purely legal sense - an aberration. An article in *The Age*, looking at *Cooper* alongside *Deakin*, had concluded: 'There may be, probably there is, a good answer to these seeming inconsistencies, but we confess that at present we cannot find it'.⁹⁵ That all five High Court judges concurred in the result might suggest a 'good answer' could be uncovered by some mildly diligent searching, but deeper digging may be required to explain why the Court produced a decision more readily categorised as an exercise in politics rather than law.

An initial clue might be found in the Court's terminology. The case turned on the legal status of Queensland's Constitution Act 1867. On *three* occasions, Griffith referred in his judgment to that measure as the 'Constitution Act'. On *nineteen* occasions Griffith referred to it as 'the Constitution'. Barton's opinion references the statute as 'The Constitution' seven times; 'The Constitution Act' five times. O'Connor's terminology is more evenly split: seventeen mentions of the Constitution Act 1867 and twenty-three of the Constitution.⁹⁶ In Higgins' judgment, the statute is described as 'the Constitution' nineteen times and as the 'Constitution Act 1867' just

⁹⁴ 5 July 1907, 9; <<http://nla.gov.au/nla.news-article10144615>>.

⁹⁵ 3 July 1907, 6; <<http://nla.gov.au/nla.news-article198606545>>.

⁹⁶ The count excludes references to the Constitution directed at the pre-1867 period.

once. If language is any guide, the judges did not see themselves as conducting an ordinary process of statutory construction.

That this should be so is perhaps unsurprising. All five judges had significant experience of practice at the bar. But all five also had very substantial track records as legislators and ministers. Of the five, only Griffith had any noteworthy experience as a judge before being appointed to the Court. All were as much as – if not more than – politicians as judges in their professional personas. During the 1890s, all had devoted much of their respective political energies to arguing the merits of creation for Australia qua nation a ‘constitution’ whose provisions would stand in normative terms above legislation passed in ‘the ordinary way’ by the national Parliament which that constitution would create. Griffith in particular in doing so had steeped himself deeply in the constitutional jurisprudence of the United States Supreme Court and the judicial methodology of John Marshall. That methodology embraced inter alia the suppositions that the Constitution’s text provided only a starting point for judicial attempts to discern its meaning; that judges had been entrusted with an authority to fill in the myriad detailed gaps in the country’s governmental system, a system which the Constitution’s text had sketched out only in broad principles; and that in filling those gaps it was legitimate for judges to take account of moral or political factors which could not defensibly be invoked within traditional British understandings of statutory interpretation. As Marshall memorably put it in *M’Culloch v Maryland*: ‘We must never forget it is a constitution [as opposed to an ordinary statute] that we are expounding’.⁹⁷ In cases such as *D’Emden* and *Deakin* Griffith made it

⁹⁷ (1819) 17 US 316, 407.

abundantly clear that he considered that methodology entirely appropriate when searching for the meaning of provisions of the 1900 Act.⁹⁸

But Marshall's methodology was not a distinctively American (in the sense of counterposed to British) phenomenon. Writing in 1899,⁹⁹ the future Lord Chancellor Richard Haldane (then a backbench Liberal MP and a QC with a well-established practice in colonial constitutional law matters)¹⁰⁰ had suggested in respect of the Privy Council's colonial constitutional jurisprudence that judges frequently found themselves occupying a dual role – perhaps more precisely alternate roles – as either 'jurists' or 'statesmen'. Haldane suggested that Imperial legislation was often drafted in terms that necessarily required Privy Council judges to adopt interpretive techniques quite different from those applied in ordinary cases of statutory construction:

His function is to be a statesman as well as a jurist, to fill in the gaps which Parliament has deliberately left in the skeleton constitutions and laws that it has provided for the British colonies. The Imperial Legislature has taken the view that these constitutions and laws must, if they are to be acceptable, be in a large measure

⁹⁸ Barton also played a substantial role throughout the 1890s both in keeping the idea of creating a 'national' constitution in the forefront of political debate, and then in making the case that the text which Griffith had been so influential in drafting was eventually adopted. Isaacs had also played a prominent role in the constitution-making process.

⁹⁹ Richard Haldane, 'Lord Watson', 11 *Juridical Review*, (1899), 278; (hereafter 'Haldane, 'Watson'').

¹⁰⁰ Haldane's constitutional law practice is described and analysed in Jonathan Robinson, 'Lord Haldane and the BNA' (1970) 20 *University of Toronto Law Journal* 55; Stephen Wexler, 'The Urge to Idealise: Viscount Haldane and the Constitution of Canada' (1983-84) 29 *McGill Law Journal* 608.

unwritten, elastic, and capable of being silently developed and even altered as the colony develops and alters....¹⁰¹

Although Haldane did not expressly make the link, the Privy Council judge qua ‘statesman’ was snugly shod in Marshall’s shoes.

Lord Halsbury qua Privy Council judge in *Outtrim* – judgment was given on 6 December 1906 - had forcefully disapproved this approach being adopted by *Australia’s High Court* in constitutional matters. In Halsbury’s view it seemed Privy Council judges might properly function as statesmen; colonial judges had to content themselves with being jurists. Griffith manifestly disagreed with and refused to bow to such strictures. Reports of the *Cooper* submissions record Griffith announcing (to laughter): ‘you might say *Deakin v Webb* has been overruled by the Privy Council’.¹⁰²

Several weeks before *Cooper* was decided – six months after *Outtrim* was handed down - the High Court decided *Baxter v Commissioners of Taxation*,¹⁰³ the latest instalment in the by then multi-part dispute between the High Court and the Privy Council over – in the narrow sense – the inter-governmental immunities doctrine and – more broadly – the ‘correct’ approach to be taken to the construction of Australian constitutional law. For present purposes, a passage in Griffith’s opinion in *Baxter* relating to an episode in Queensland’s pre-confederation constitutional history has particular significance, because it suggests he saw no difficulty applying his Marshall-inspired approach to interpreting Australia’s Constitution (Act) to the High Court’s role in determining the meaning of State Constitutions (Acts).

¹⁰¹ Haldane, ‘Watson’ 279.

¹⁰² *The Week*, 26 April 1907, 23; <<https://trove.nla.gov.au/newspaper/article/183103946>>.

¹⁰³ (1907) 4 CLR 1087; (argued 8-15 May; judgment 7 June).

The passage relates to a fierce dispute in the 1880s between Queensland's Legislative Assembly and Council.¹⁰⁴ The then government – led by Griffith - had clear Assembly support for a bill providing for payment of expenses to Assembly members. The Council blocked the bill, which led the government to tack the sum concerned to a general appropriations bill. The Council then refused to pass the appropriations bill unless the tack was removed. Griffith regarded that refusal as 'unconstitutional', on the basis that the Council was in such matters politically subordinate to the Assembly just as the House of Lords was (albeit as a matter of convention and not law) vis a vis the Commons in Britain. The Assembly and Council subsequently referred the matter to the Privy Council, asking firstly: 'Whether the Constitution Act 1867 confers on the Legislative Council powers coordinate with those of the Legislative Assembly in the amendment of all bills, including money bills?'; and secondly if the Assembly was correct in asserting that the Council had no power to amend money bills.

As a question of law, the answers to those questions would seem obviously to be 'Yes' and – therefore – 'No'. Construed in the ordinary way, the text of the Constitution Act 1867 Act placed the two houses on a footing of perfect equality, save for a caveat in s 2 that appropriations bills should originate in the Assembly.

Unbeknown to either house, Griffith covertly sent his own commentary to the Privy Council:

...I think I am right in saying that the literal interpretation of the words of the Constitution Act is regarded as a matter of small importance as compared with the larger question, Whether, on a true construction of the written and *unwritten constitution* of the colony, the two Houses of the legislature should be regarded

¹⁰⁴ Discussed in Loveland, *McCawley*, 135-140.

as holding and discharging, relatively to one another, positions and functions analogous to those of the House of Lords and House of Commons.¹⁰⁵

The Privy Council answered the questions in a fashion¹⁰⁶ which Haldane (in 1899) would surely have characterised as that of the statesman rather than the jurist: ‘No’ to question one; and ‘Yes’ to question two.

Twenty years later in *Baxter*, Griffith presented this as an ‘excellent illustration’ of how the content of Queensland’s constitution should be discovered by a court:

No formal reasons were given for the report, but the ground on which it proceeded is sufficiently apparent. The arguments of the Legislative Assembly were accepted, and it was held that, the legislature of Queensland having been constituted on a basis analogous to that of the United Kingdom, the express limitation of the power to originate supply to the elective House carried with it by implication a limitation of the power of the Legislative Council analogous to that which is recognized as imposed on the House of Lords. If the Queensland Constitution had been technically construed without regard to its subject matter the result must have been different.¹⁰⁷

In *Cooper*, it might be suggested, the absence of Two Act entrenchment in the Constitution Act’s text was ‘a matter of small importance’; and ‘by implication’ – construing the Act with ‘regard to its subject matter’ – it was necessarily the case that its terms could not be amended by legislation passed in the ordinary way. This explanation is tentative, but perhaps gains some strength from the absence of any obvious alternative.

¹⁰⁵ Ibid, 138; emphasis added.

¹⁰⁶ Such questions were then merely answered without accompanying explanation.

¹⁰⁷ (1907) 4 CLR 1087, 1107.

One might wonder, however, what useful purpose *Cooper* served. Whether ‘Two Act entrenchment’ was a departure from ‘the ordinary way’ of legislating which presented any significant political obstacles to amendment or repeal of the 1867 Act’s provisions is obviously doubtful. The principle did not demand even slightly enhanced majorities in either house: it did not insert an extra-parliamentary stage (such as a referendum) into the lawmaking process; it placed no time delays on the interval between the two necessary Acts.¹⁰⁸ The requirement that the legislature use language which (twice) made clear in express terms that the 1867 Act was being amended might prompt press and public opposition to proposed changes, or deter governments even from embarking on such projects. But it seems unlikely that Two Act entrenchment would meaningfully alter the balance of political forces attending any such future reforms.

Cooper would likely have been reversed if appealed to the Privy Council. But in a narrow legal sense Kidston’s government had won the case: the High Court’s conclusion on the meaning of ‘paid and payable’ within s 17 was *strictu sensu* the ratio. Despite their presentation as the point of primary significance in Griffith’s opinion, the Court’s views on ‘Two Act entrenchment’ were just *obiter*. They were not something against which the government could appeal. Cooper did not press the matter to the Privy Council; presumably in part because he regarded ‘victory’ on Two Act entrenchment as much more important than shaving a few pounds off his annual tax bill; and in part because the implications of the Privy Council’s judgment in *Outtrim* were very unfavourable for his prospects of succeeding on the broad constitutional issue.

¹⁰⁸ The houses frequently suspended standing orders to take bills through their entire passage in a day. Presumably the required two Acts could be passed on successive days or even the same day.

But Cooper’s constitutional victory did not impress itself with much weight on Queensland’s political landscape. The legislature’s 1907 session began on 23 July and ran to late November. The major event was the resignation of Kidston’s government, consequent upon the refusal of the then Governor (Lord Chelmsford) to accept Kidston’s advice to appoint sufficient government supporting members to the Legislative Council to overcome the Council’s refusal to pass Kidston’s electoral reform and old age pension bills. *Cooper* did not feature at all in debate or questions in either house during the 1907 session. The Colonial Office records for 1907¹⁰⁹ do not contain a single mention of the case either in Chelmsford’s despatches to London nor in any memorandum from Kidston. A brief interregnum of a Philp ministry was ended by an Assembly election early in 1908, which returned Kidston to power leading de jure a minority government but which enjoyed a substantial de facto majority consequent on informal Labour support, and which promptly pursued a constitutional reform alongside which subjecting judges’ salaries to income tax seemed very small beer indeed.

VI AFTERMATHS - THE 1908 REFORMS, THE *TAYLOR* LITIGATION AND *MCCAWLEY*

Kidston’s primary constitutional concern was to remove the Legislative Council’s power to block bills passed in the Assembly. The first step was to repeal the special majority proviso in s 9 of the 1867 Act. The 1871 repeal of s 10 suggested that only a bicameral bare majority required to repeal s 9. But *Cooper* obviously required the repeal be effected by two separate bicameral bare majority Acts: the first expressly empowering the Legislature to repeal s 9 and the second Act expressly doing so. Kidston’s government proceeded however with a single

¹⁰⁹ CO 418/54.

bill. This was expressly titled the Constitution Act Amendment Act, and provided simply in s 2 that s 9 was repealed.

If *Cooper* was indeed ‘correct’ the 1908 Act could not have repealed s 9. But – even though *Cooper* had been decided just months earlier - that point was not taken by any member of either house during the bill’s passage. Chelmsford had asked the Colonial Office if a two-thirds majority was required. His inquiry made no reference to *Cooper* Two Act entrenchment.¹¹⁰ Nor did the Act (the bill was assented to on 3 April 1908) face any immediate legal challenge in Queensland’s courts.¹¹¹

Kidston shortly afterwards promoted a measure enacted as the Parliamentary Bills Referendum Act 1908; (hereafter the ‘PBRA 1908’). His objective was to create an alternative legislative process. A bill twice passed in the Assembly but twice blocked in the Council could thereafter be submitted to a referendum, and if approved by a bare majority of voters would become an Act on receiving the royal assent. S 1 did expressly state that the Act should be read as amending the 1867 Act; although it did not identify which parts and did not take the form of an insertion into the 1867 Act. As with the first 1908 Act, this measure was enacted as a single statute. Per *Cooper*, the Act was undoubtedly invalid. And, again, the point was not taken by legislators during its passage. Nor did anyone immediately initiate any legal

¹¹⁰ Telegram of 19 March 1908; CO 418/63, 144. The answer was ‘No’.

¹¹¹ Any presumption that *Cooper* would apply to all the States had little traction. In 1912 New South Wales’ Legislature enacted the Parliamentary Representatives Allowance Act 1912, which expressly amended the Constitution Act 1902 s 28. No anterior enabling statute was passed. Similarly, the Constitution Amendment Act 1914 was enacted as a single statute. In Victoria, the Adult Suffrage Act 1908 (which began its parliamentary passage shortly after *Cooper* was decided) expressly amended the State’s Constitution Act – again in a single statute.

proceedings to challenge the PBRA 1908’s validity. That challenge eventually emerged in 1917, when Tom Ryan’s Labour government invoked the Act to abolish the Legislative Council.

A *The Taylor Litigation*

Cooper was still Chief Justice when *Taylor v Attorney-General*¹¹² came before the Supreme Court on 25 April 1917. Chubb and Real remained in situ, and had been joined – since 1910 by Lukin. Ryan led for the government: Feez and Stumm for Dr Taylor.

Taylor’s case had three alternative strands, all rooted in the assumption that the Council’s existence was a matter of ‘organic’ rather than ‘ordinary’ law. Firstly, that only the Imperial Parliament could abolish the Legislative Council. Secondly, if Queensland legislature had such power, then that ‘legislature’ had to take the form identified in the 1867 Act: the legislature created by the PBRA 1908 was a mere delegate of the 1867 Act legislature and had no power to alter ‘organic’ law. Thirdly, applying *Cooper*, the original legislature could only alter organic law through the Two Act process.

Ryan’s significant innovation in *Taylor* was to argue that CLVA 1865 s 5 controlled Queensland legislation relating to the powers and composition of the colony’s courts and legislature, and that s 5 should be seen as a narrowly focused alternative to a more general competence created in clause 22. Under s 5, Queensland’s legislature *could create* judicially enforceable entrenchment devices regulating what section 5 termed the ‘manner and form’ of the legislative process. And it could do so through the ‘ordinary way’ of legislating. But since the legislature *had not done so* in respect of its capacity to alter its own powers and composition, the alterations effected by the PBRA 1908 could properly have been enacted in

¹¹² [1917] ST R Qd 208. Taylor was a member of the Legislative Council.

the ‘ordinary way’. A departure from the ‘ordinary way’ of legislating could not arise as a matter of inference or implication as had been held in *Cooper*. Alternatively, Ryan also contended that if *Cooper* Two Act entrenchment was indeed a ‘manner and form’ proviso per CLVA 1865 s 5, it could be satisfied by a single, expressly framed Act.

Ryan’s ingenuity did not avail however. Lukin, evidently unpersuaded by his own submissions in *Cooper*, authored a majority (including Cooper) judgment which approved all of Taylor’s contentions, rejected all of Ryan’s, and expressly approved the Two Act entrenchment principle.¹¹³

On further appeal to the High Court,¹¹⁴ Ryan persuaded the bench – which included Barton and Isaacs of the *Cooper* judges¹¹⁵ - that the CLVA 1865 s 5 provided a legal root for the PBRA 1908 which overrode the Two Act entrenchment principle. Nonetheless Barton and Isaacs both held that *Cooper* was correctly decided: ‘organic’ law which fell beyond the scope of the CLVA 1865 s 5 could be altered only through the Two Act process.¹¹⁶ None of the other judges demurred from that conclusion.

¹¹³ Ibid, 241.

¹¹⁴ The Court allowed the referendum to take place pending the appeal. The electorate voted against the bill.

¹¹⁵ Griffith was ill. O’Connor died in 1912. Higgins did not sit. The *Taylor* bench included three judges appointed by the Commonwealth Labour government in 1913: Charles Gavan Duffy, George Rich and Charles Powers. Only Powers had had a significant party political career (of liberal inclination).

¹¹⁶ (1917) 23 CLR 457, 469 and 476 respectively. Isaacs had also expressly confirmed *Cooper* was correct in *Baxter v Ah Wey* (1909) 8 CLR 626, 643.

Taylor’s subsequent permission application to the Privy Council in March 1918¹¹⁷ was dismissed, in part because – given the referendum result – the issue was temporarily moot, but primarily because the Court (with Haldane presiding) considered that Ryan’s reliance on the CLVA 1865 s 5 raised questions of such general Imperial importance that they ought to be resolved only in litigation in which many colonies were represented. By then however, *McCawley* was awaiting argument before Australia’s High Court.

B *McCawley*

The *McCawley* litigation was in essence initiated by Feez and Stumm. Queensland’s Supreme Court – Cooper still presiding – had concluded that the Industrial Arbitration Act 1916 s 6 was invalid on the basis that it purported to amend sections 15 and 16 of the Constitution Act 1867 without having been preceded – as *Cooper* required – by an enabling statute.¹¹⁸ The Court saw no merit in Ryan’s submissions that this was a matter falling – as in *Taylor* – within the CLVA 1865 s 5. Therefore, since no specific ‘manner and form’ of legislating had been introduced in Queensland to control the issue, judicial tenure was amenable to change through legislation passed in the ordinary way.

The High Court appeal was heard by a seven judge bench.¹¹⁹ The Court divided three to three on the correctness of the *Cooper* principle. Griffith and Barton – joined by Powers - maintained the position they adopted in *Cooper*, dismissing the CLVA 1865 s 5 argument

¹¹⁷ [1918] ST R Qd 194.

¹¹⁸ [1918] St R Qd 62.

¹¹⁹ (1918) 26 CLR 9.

accepted in *Taylor* as irrelevant. The seventh judge, Gavan Duffy, decided against McCawley without addressing the Two Act entrenchment point.

Isaacs, in a joint opinion with Rich, dissented, casting the *Cooper* principle as wholly indefensible. The opinion has no clear explanation of why Isaacs changed his mind, nor any candid admission that he had done so. The thrust of the judgment was that both clause 22 and s 2 of the 1867 Act, and also the CLVA 1865 s 5, empowered the legislature to create a great variety of entrenchment devices. Ss 9 and 10 were examples of such devices which a court would enforce. However, Two Act entrenchment had no textual legislative basis. The mere fact that the Constitution Act 1867 was styled as a *Constitution* Act did not and could not per se lend any of its terms a normative status which rendered them immune to repeal or amendment by Acts passed in the ordinary way. Neither the Queensland courts nor the High Court had the power to ‘insert’ any such device – as Isaacs and Rich considered had occurred in *Cooper* – into the Act.¹²⁰ Higgins produced a similar judgment.

The Privy Council appeal was not heard until March 1920.¹²¹ The assembled bench was notably strong: Lords Birkenhead, Haldane, Dunedin, Buckmaster and Atkinson. As noted above, its opinion, authored by Birkenhead, scathingly dismissed the *Cooper* principle. But Feetz and Stumm did not lose the case because Queensland’s legislature *did not have the power*

¹²⁰ There is an obvious parallel here with Isaacs’ near contemporaneous judgment in *Engineers (Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129), in which he led the High Court – now without either Griffith or Barton in its ranks, towards a much more textually driven construction of the federal constitution in respect of the intergovernmental immunities doctrine. I have developed this analysis more fully at Loveland, *McCawley*, 288-296, 330-33.

¹²¹ [1920] AC 691.

to subject legislation affecting judicial tenure to a Two Act entrenchment process. They lost it because the legislature *had not exercised* that power. The Privy Council’s judgment clearly accepts that such power did exist, and that the power derived both from clause 22 and the CLVA 1865 s 5. The power to enact legally enforceable departures from the ‘ordinary way’ of lawmaking had been exercised – unwittingly perhaps – by Queensland legislators in ss 9 and 10 of the 1867 Act. But such legislative devices could not be inserted by judges into legislative texts. If *Cooper* was indeed correct, if Two Act entrenchment was indeed a feature of Queensland’s constitution, then Feez and Stumm:

...would have no difficulty in pointing to specific articles in the legislative instrument or instruments which created the constitution, prescribing with meticulous precision the methods by which, and by which alone it could be altered. The respondents to this appeal are wholly unable to reinforce their arguments by any such demonstration. And their inability has involved them in dialectical difficulties which are embarrassing and even ridiculous.¹²²

VII Conclusion

Despite being so strongly disapproved by the Privy Council in *McCawley*, *Cooper* was – in a negative sense – a significant judgment. Shortly afterwards, relying on *McCawley* to do so through legislation passed ‘in the ordinary way’, Queensland’s legislature abolished the State’s Legislative Council. In 1929, following Birkenhead’s ‘meticulous precision’ proviso, the then Dean of the University of Sydney law school, Sir John Peden, accepted an invitation from the New South Wales Premier, Sir Thomas Bavin, to draft a ‘meticulously precise’ entrenching provision for the New South Wales constitution which would prevent abolition of the State’s Legislative Council unless the relevant bill was approved in a referendum as well as by the

¹²² Ibid 705.

legislature's two houses. Bavin's initiative was undertaken in (well-founded) anticipation of his conservative administration losing the next Assembly election to a Labour party committed to abolishing the Council. Peden's formulae, enacted as section 7A in the Constitution Act 1929, was subsequently upheld as a valid, judicially enforceable entrenchment device by the High Court and the Privy Council in *Trethowan v Attorney General for New South Wales*.¹²³

Trethowan in turn immediately prompted Queensland's legislature to entrench the abolition of the Legislative Council by requiring its reinstatement to be approved by a referendum. And *Trethowan* has since stimulated vigorous, continued debate about the possibility of such entrenching legislation being effective in the United Kingdom context.¹²⁴ Pope Cooper's role in this ongoing matter has rarely attracted considered attention, presumably because the argument he advanced was so unceremoniously dismissed in the Privy Council. Insofar as the rise and fall of Two Act entrenchment merits more attention than it has hitherto received, it is because the episode illustrates rather nicely the value of bad legal arguments – and bad appellate court judgments - as contributors to the eventual production of more defensible legal principles.

¹²³ (1931) 44 CLR 394 and [1932] AC 526.

¹²⁴ See especially H.R.W. Wade, 'The Basis of Legal Sovereignty' (1955) 13 *Cambridge Law Journal* 172; Ivor Jennings, *The Law and the Constitution*, (5th ed., University of London Press, 1959), 144-177; Michael Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade', (2009) *Public Law* 519.