

‘EMBARRASSING AND EVEN RIDICULOUS’: THE SHORT-LIVED RISE AND FALL OF CHIEF JUSTICE POPE COOPER’S TWO ACT ENTRENCHMENT THESIS IN EARLY 20TH-CENTURY QUEENSLAND

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*This paper examines the brief lifespan (1907–20) 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 the Constitution Act 1867 (Qld) 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 in *McCawley v The King*; but dismissed in terms which laid the foundation for the Privy Council’s subsequent approval of the proposition (in *Trethowan v Attorney-General of New South Wales*) that Australia’s State legislatures did indeed possess the legislative competence to enact judicially enforceable entrenchment devices to prevent certain laws being enacted through the ordinary lawmaking process.*

I INTRODUCTION

As judicial dismissals of counsel’s submissions go, Lord Chancellor Lord Birkenhead’s criticism in the Privy Council judgment *McCawley v The King* (‘*McCawley*’)¹ of the argument advanced by one of his (in 1938) successors, Frederick Maugham KC, must rank among the most withering. Maugham’s case was in Lord Birkenhead’s view ‘embarrassing and even ridiculous’.² Yet this

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¹ [1920] AC 691 (‘*McCawley*’).

² *Ibid* 705.

argument had, two years earlier, commended itself to three members of Australia's High Court, including the Court's first Chief Justice, Samuel Griffith. Chief Justice Griffith was upholding a unanimous 1907 High Court judgment — *Cooper v Commissioner of Income Tax (Qld)* ('*Cooper*')³ — which forcefully approved the (then newly minted) principle which Lord 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 the *Constitution Act 1867* (Qld) ('*Constitution Act*') 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. First, the Queensland Legislature would have to enact a statute which expressly stated (but otherwise enacted in the 'ordinary way') that a provision of the *Constitution Act* 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 *Constitution 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 and 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. Thomas McCawley was a civil servant and barrister appointed (de jure) by the State's Governor (de facto by the State Premier, Tom Ryan)⁵ as a judge in Queensland's Industrial and Arbitration Court. Under s 6 of the *Industrial Arbitration Act 1916* (Qld), Industrial Court judges sat for renewable seven-year terms. However, s 6(6) further provided that an Industrial Court judge

³ (1907) 4 CLR 1304 ('*Cooper*').

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

⁵ Ryan, born to illiterate Irish immigrant parents in 1876, worked as a teacher before undertaking a law degree at Melbourne University and entering practice at the Queensland Bar. He was elected as a Labor Assembly member in 1909. He became party leader in 1912 and Premier in 1915. Ryan frequently appeared as counsel on his governments' behalf in 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 Labor 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 TW McCawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief Justice of Queensland' (1976) 9(2) *University of Queensland Law Journal* 224; Nicholas Aroney, 'Politics, Law and the Constitution in McCawley's Case' (2006) 30(3) *Melbourne University Law Review* 605.

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* 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 King's Counsel, 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's and Stumm's parts to the *Cooper* principle. 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*, and to the (valuable) role played by *Cooper* as an exemplar of 'bad law' in shaping subsequent political practice and judicial doctrine in respect of the question of whether Australia's State legislatures had the power to enact judicially enforceable entrenchment devices, 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 *New South Wales Constitution Act 1855* (UK) 18 & 19 Vict ('1855 NSW Act'), which provided, inter alia, that Queensland would have a governmental system '[i]n 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

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 (May) *Labour History* 13; Murphy (n 5) 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 (May) *Labour History* 61.

⁷ Michael White and Pieter Wessells, 'The Australian Feez Family: Its Contribution to the Law' (1998) 17(2) *Journal of the Royal Historical Society of Queensland* 76.

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 2 empowered the Queen with the advice and assent of the Assembly and Council 'to make laws for the peace, welfare and good government of the Colony in all cases whatsoever'. Clause 8 provided that the Queensland 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 30 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. Section 36 of the *1855 NSW Act* provided that any bill altering that Act's provisions concerning the Legislative Council could not be presented to the Governor unless approved by 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 30 days before assent. Section 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

⁸ The relevant provisions in the *1855 NSW Act* are ss 23 (Assembly) and 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.

¹⁰ The *1855 NSW Act* expressly preserved (in s 3) such formerly granted powers. The provision was reproduced in cl 14 of the 1859 Order.

¹¹ Section 15 did not require reservation or laying before.

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-to-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 cl 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

That presumption was seemingly confirmed and reinforced by s 5 of the *Colonial Laws Validity Act 1865* (UK) (*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 *CLVA 1865* 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.¹⁶

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 *CLVA 1865* itself, nor 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 *CLVA 1865* had not firmly fastened itself in the constitutional consciousness of the colony’s lawmakers.

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

¹³ Emphasis added. Despite its ‘all or any’ proviso, cl 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 the list of exceptions was exhaustive and that the exceptions element of cl 22 could not be amended at all by the Queensland Legislature until the Imperial Parliament empowered it to do so.

¹⁴ This seemingly meant that, in a unicameral legislature, at least half the members were elected and, in a bicameral legislature, 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) 21.

¹⁶ Discussed in Loveland (n 9), 67–80.

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.¹⁷ That government was subsequently defeated in the 1904 election and replaced by a coalition of centrists and the Labor party. Although Labor's Assembly representation was larger than its coalition partner's (34 to 21 of the Assembly's 72 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.¹⁸ Kidston took office as Treasurer and was manifestly the coalition's driving force on both policy and presentational matters.

Cooper denied that his salary as Chief Justice (£4,000) was assessable income for these purposes. The root for this argument was claimed to lie in s 17 of the *Constitution Act*:¹⁹

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.²⁰

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 *Constitution 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 enactment history of the *Constitution Act* to suggest it was regarded by legislators as having any elevated legal status. Indeed, that Act was just one of 30 measures passed with virtually no

¹⁷ Generally referred to as a 'Ministerialist' government, then led by Robert Philp.

¹⁸ This being Arthur Morgan, a former Ministerialist who broke with Philp in 1902.

¹⁹ Section 17 repeated clause 16 of the 1859 Order, which itself repeated sch 1 s 40 of the 1855 NSW Act.

²⁰ Section 17 verbatim repeated s 3 of a 1760 British statute: *Commission and Salaries of Judges Act 1760* (UK) 1 Geo 3, c 23.

discussion in either House; all passed Assembly second reading in a single afternoon.²¹

The bulky package of bills emerged from a consolidation exercise by a Royal Commission led by the colony's then Chief Justice, James Cockle,²² and the Attorney-General, Charles Lilley.²³ The *Constitution Act* itself was one of four measures then referred to as 'the political Acts' by Lilley at second readings.²⁴ The three others were, respectively, the *Legislative Assembly Act 1867* (Qld), the *Electoral Districts Act 1867* (Qld) and the *Elections Act 1867* (Qld). These three Acts all dealt with issues of obvious constitutional significance (that all featured in the *1855 NSW 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 text of the *Constitution Act*. 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. Sections 9 and 10 of the *Constitution Act* replicated the enhanced majority provisions in sch 1 ss 15 and 36 of the *1855 NSW Act*. 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 preamble of the *Constitution Act* roots the Legislature's power to enact it in cl 22 of the 1859 Order, but does not mention the *CLVA 1865*. Nor does the *Constitution Act* contain any provision textually identical to cl 22. Section 2 reproduced cl 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.

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

²¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 22 October 1867, 542.

²² Cockle's life and career are recounted in J.M. Bennet, *Sir James Cockle: First Chief Justice of Queensland 1863–1879*, (Federation Press, 2003). Cockle came to Queensland with the reputation of being a meticulously thoughtful judge who had no partisan political affiliations.

²³ 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 10 years) as Chief Justice. See JM Bennet, *Sir Charles Lilley: Premier and Chief Justice of Queensland* (Federation Press, 2014); Allan A Morrison, 'Charles Lilley' (1959) 45(1) *Journal of the Royal Australian Historical Society* 45; HJ Gibbney, 'Charles Lilley: An Uncertain Democrat' in Denis Murphy and Roger Joyce (eds), *Queensland Political Portraits 1859–1952* (University of Queensland Press, 1978) 71.

²⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 22 October 1867, 542. Lilley *strictu sensu* was an opposition backbencher when moving the bills. The episode proceeded on a non-partisan basis.

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 (Qld)* ('1871 Amendment Act'), 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 Amendment Act* should have been preceded by a first Act empowering the Legislature to enact it. That this was not done would render the *1871 Amendment 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. Schedule A of the *Constitution Act* made provision for only two Supreme Court judges and specified their respective salaries. On the same day as that statute received royal assent, assent was also given to the *Supreme Court Act 1867 (Qld)*, which made provision for appointment of a third judge. Subsequently, the *Supreme Court Acts Amendment Act 1903 (Qld)* raised the permissible number of judges to five. More pertinently for present purposes, s 33 of the *Supreme Court Act 1867 (Qld)*, s 1 of the *Acting Judges Act 1873 (Qld)*, and s 12 of the *Supreme Court Act 1892 (Qld)* allowed for the appointment of temporary judges to the Court (who 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.²⁵

Furthermore, the Two Act process was not followed on other matters of obvious constitutional significance. In 1890, the Legislature enacted the *Constitution Act Amendment Act 1890 (Qld)* (the '1890 Amendment Act'), where s 2 fixed the maximum term between Assembly elections at three years. This modified s 29 of the *Constitution Act*, which had specified a five-year period. The *1890 Amendment 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, the *1890 Amendment Act* was invalid with the consequence that Queensland would not have had a lawfully constituted legislature for some 15 years and *every statute* passed in that period would have been (at least presumptively) invalid. Assembly debate on the *1890 Amendment Act* had been lively and extensive. The then Premier, Boyd Morehead, observed at second reading that the bill proposed 'an important

²⁵ The nullity point had recent historical precedent. In 1888, the Legislature had passed the *Judges Validating Act 1888 (Qld)* 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.

alteration in the constitution of the Colony'.²⁶ 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'.²⁷ However, 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* (Qld), which provided explicitly for payment of Assembly members. This had been a fiercely contested political matter for some years. The Act's preamble expressly stated that it was amending the *Constitution Act* and made express provision for the payments. However, 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 a textual basis in either Imperial or Queensland legislation and an historical pedigree in previous legislative practice. This seemed not to deter Cooper, and he 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 1905.²⁸ 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 favour²⁹ and that the matter would promptly go to appeal. It soon transpired that the parties were not of one mind as to the appeal forum.³⁰ Cooper assumed that 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* ('*D'Emden*')³¹ and *Deakin v Webb* ('*Deakin*'),³² that a State could not impose a stamp duty or income tax, respectively, 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 doctrine³³ — of such a prohibition into the *Australian Constitution*, there being no express provision to that effect. The reasoning behind the

²⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 17 July 1890, 277.

²⁷ *Ibid* 279.

²⁸ The Telegraph, 'Judges' Salaries. Liability to Income Tax. Judgment Pro Forma. Tax Commissioner Will Appeal', *The Telegraph* (Brisbane, 5 May 1905) 2.

²⁹ See the speech of then Attorney-General William Blair in Queensland, *Parliamentary Debates*, Legislative Assembly, 15 December 1905, 2193.

³⁰ There are reports in, eg: 'Supreme Court. Full Court Sittings. Judges and Income Tax' *Telegraph* (Brisbane, 20 July 1905) 2; 'Judges and Income Tax' *Brisbane Courier* (Brisbane, 22 July 1905, 10.

³¹ (1904) 1 CLR 91 ('*D'Emden*').

³² (1904) 1 CLR 585 ('*Deakin*').

³³ 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(1) *Melbourne University Law Review* 15.

implication, which drew heavily on United States Supreme Court authority,³⁴ 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 issues, *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,³⁵ and in part because there was well-known Privy Council authority (dealing both with India and Canada) which firmly disapproved the use, in the colonial constitutional law context, of the American-inspired methodology used by the High Court in *D’Emden* and *Deakin*.³⁶

This confusion as to the locus of any appeal — if confusion it really was — is 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* 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: ‘Section 17 of the *Constitution Act* 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 *Constitution Act* could not be amended *at all* by the Queensland Legislature was correct. But again, there was neither an express legal root for that proposition, nor any precedent for it in political practice. *CLVA 1865s 2* certainly precluded enactment of colonial legislation inconsistent with Imperial legislation applicable

³⁴ Primarily the Marshall Court’s judgment in *M’Culloch v Maryland* 17 US 316 (1819) (*‘M’Culloch’*).

³⁵ See (n 42) below.

³⁶ *R v Burah* (1878) 3 App Cas 889 (*‘Burah’*); *Bank of Toronto v Lambe* [1887] AC 575.

to the colony concerned,³⁷ but since the *Constitution 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* (Qld). 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 -

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 1905,³⁸ 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’.³⁹ Noting that the Supreme Court judges had declined to hear the case, Kidston continued: ‘the 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’.⁴⁰ 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’.⁴¹ On the legal question of what Kidston referred to as Cooper’s ‘sheltering behind the constitution’, Kidston bluntly asserted that if there was any

³⁷ Section 2 Memorandum from Chief Justice Sir Pope Cooper to Frederic John Napier Thesiger, Baron Chelmsford, 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.

Section 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.

³⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 15 December 1905, 2186.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

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* (UK) s 146:⁴²

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.⁴³ 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.⁴⁴ Committee proceedings occupy barely a page of Hansard. No amendments were made and 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.⁴⁵ Second reading was also forced to a division, which the government won by 16 votes to 5. Third reading passed without division.⁴⁶

Cooper and his judicial colleagues then sent a memorandum to the Governor asking him to reserve the bill.⁴⁷ 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:

⁴² Ibid 2193.

⁴³ Ibid 2188, 2191–2.

⁴⁴ Ibid 2194.

⁴⁵ Queensland, *Parliamentary Debates*, Legislative Council, 15 December 1905, 2175–84.

⁴⁶ Ibid 2183–4.

⁴⁷ Memorandum from Chief Justice Sir Pope Cooper to Frederic John Napier Thesiger, Baron Chelmsford, 18 December 1905, CO 418/47, 44.

'I felt some hesitation in disregarding the united representations of the judges of the State on a point of law'.⁴⁸

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 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 occurred in the Brisbane Small Debts Court on 8 December 1906⁴⁹ 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',⁵⁰ Stumm argued that imposing income tax on Cooper's salary breached s 17, and seemed to submit, in the alternative, either that the Legislature could not do that *at all* or that it could only do so if it first amended the *Constitution 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?

Mr. Yaldwyn: Yes, of course.

Mr Lukin : It is a question of law.

⁴⁸ Frederic John Napier Thesiger, Baron Chelmsford to Colonial Office, 5 January 1906, CO 418/47, 29.

⁴⁹ There are contemporaneous accounts in, eg: 'Income Tax. Liability of Judges. Chief Justice Opposes Claim', *The Telegraph* (Brisbane, 5 December 1906) 5; 'Income Tax. Claim Against Chief Justice', *The Week* (Brisbane, 14 December 1906) 15. For an indication that Cooper's position did not enjoy much popular support, see 'Metropolitan Notes' 'The Western Champion and General Advertiser for the Central Western Districts, , Queensland, 16 December) 4.

⁵⁰ Records of submissions are in 'The Income Tax: Case Against the Chief Justice: Verdict for the Defendant', *Brisbane Courier* (Brisbane, 10 December 1906) 5; 'Income Tax. Claim Against Chief Justice. Judgment for the Defendant', *The Telegraph* (Brisbane, 10 December 1906) 2.

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* ('*Outtrim*'),⁵¹ 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 *R v Burah* ('*Burah*') and *Bank of Toronto v Lambe* ('*Lambe*'),⁵² 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'.⁵³ Haldane also fiercely disapproved of 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 replaced Schumm as Cooper's counsel.⁵⁴ 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 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'. However, s 17 did not fall into that category. Lilley buttressed his submission with a peculiar argument rooted in s 106 of the *Australian Constitution*. This section provides that:

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

Lilley submitted that s 106 had somehow endowed the constitutions of all the former colonies with the normative status of Imperial legislation and thereby

⁵¹ [1907] AC 81 ('*Outtrim*').

⁵² (n 36).

⁵³ *Outtrim* (n 53) 90–1.

⁵⁴ There are accounts of submissions at 'Income Tax. Chief Justice's Case. Appeal to District Court', *The Telegraph* (Brisbane, 9 February 1907), 13; 'Income Tax Case. Claim Against the Chief Justice. Appeal to the District Court. Judgment Reserved', *Brisbane Courier* (Brisbane, 9 February 1907) 11.

rendered those constitutions immune to alteration at all by State legislatures. Section 106 offers no express textual support for that argument, and the contention is flatly inconsistent with the express wording of the final clause. The 'continue as at the establishment' phraseology also strongly indicates that s 106 was not in any sense altering the pre-federation normative status of State constitutions nor the way those constitutions might be amended.⁵⁵

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 *Constitution 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 *CLVA 1865* s 2.⁵⁶

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 Miller J, that the *Constitution 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 Australia'.⁵⁷ Lukin continued by asserting that 'the 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 submission 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, Miller J felt the

⁵⁵ 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 *Constitution Act* 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 427–8: 'In other words, [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(3) *Federal Law Review* 348.

⁵⁶ 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: Memorandum from Chief Justice Sir Pope Cooper to Frederic John Napier Thesiger, Baron Chelmsford, 24 May 1906, CO 418/47, 218.

⁵⁷ If Cooper's argument was correct for Queensland, it was likely correct for other States as well.

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 Labor 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. Cooper's liability to pay the income tax did not.

Judge Miller subsequently handed down a short, clearly reasoned opinion on 13 February.⁵⁸ Its ratio decidendi was that the income tax legislation did not engage s 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 shown ... The Income Tax Acts, making them subject to general taxation, does not in my opinion affect that independence in the slightest degree.⁵⁹

Justice 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. Justice 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 (his Honour noted, but did not address, the s 106 submission). It is not, however, clear if Miller J 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 J suggested Lilley might be on firmer ground if the Income Tax Acts singled judges out for particularistic treatment.⁶⁰ Miller J, 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.

The official law reports do not record which judges sat,⁶¹ nor do they record the parties' submissions.⁶² Lilley and Lukin continued as leading counsel. Lilley was, however, joined by GW Power, who was well-connected in Philpote circles

⁵⁸ 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.

⁵⁹ *Ibid* 113.

⁶⁰ *Brisbane Courier* (n 54).

⁶¹ 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.

⁶² Submissions are recounted in 'Income Tax. Chief Justice's Case. Appeal to Supreme Court. Judgment Reserved', *The Telegraph* (Brisbane, 12 March 1907) 2; 'The Law Report', *The Brisbane Courier* (Brisbane, 12 March 1907) 9.

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 the Queensland 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 J, was terse. Referring to *Outtrim*, Real J stated that the only issue was whether the income tax statutes were inconsistent with an Imperial Act and concluded that '[w]e cannot discover anything in the Income Tax Acts ... repugnant to any Imperial Act extending to this State'.⁶³ By implication, the Court rejected any suggestion that the *Constitution Act* enjoyed an elevated normative status. However, 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.⁶⁴ The three founding members were: Chief Justice Griffith, Sir Edmund Barton, and Richard O'Connor. All came to the Court after distinguished careers as politicians. Chief Justice Griffith had been Premier of Queensland; Barton J had served as Australia's first Prime Minister; O'Connor J was previously a minister in various New South Wales governments. Only Griffith CJ had previous judicial experience — 10 years as Queensland's Chief Justice.

The original Court had adopted in *D'Emden* and *Deakin* (from a traditional British perspective that courts should derive the meaning of a statute's provision primarily from that statute's text) a rather unusual — indeed adventurous — methodology in judgments construing the *Australian Constitution*. This methodology 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. Chief Justice Griffith's attachment to those principles — personally and professionally — was strong. His Honour had played a major role in drafting the original version of the *Australian Constitution*. He had been heavily influenced by

⁶³ *In Re the Income Tax (Consolidated Acts, 1902–1904, and the Income Tax Declaratory Act of 1905)* [1907] St R Qd 110, 113.

⁶⁴ Effected by the Judiciary Act 1906 (Cth).

American constitutional law and theory when doing so and borrowed wholesale from the letter of the *United States Constitution* in formulating his own text. His Honour's borrowing was much discussed and was substantially adopted.⁶⁵ Justices Barton and O'Connor had little difficulty in endorsing Griffith CJ'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) Labor government. Isaacs and Higgins appeared as opposing counsel in both *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.⁶⁶ These are difficult to reconcile, in some respects, with press accounts.

The *Telegraph* of 23 April⁶⁷ records an exchange which indicates that Cooper still asserted that the *Constitution Act* could not be amended by the Queensland 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.⁶⁸

Lilley could not identify a clear legal source for that necessity, although he alluded once again to the possibility that s 16 of the *Australian Constitution* created this effect.

⁶⁵ See generally John Reynolds 'A.I. Clark's American Sympathies and His Influence on Australian Federation' (1958) 32(3) *Australian Law Journal* 62; John Williams 'The Emergence of the Commonwealth Constitution' in HP Lee and George Winterton (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 1.

⁶⁶ *Cooper* (n 3) 1305–10.

⁶⁷ 'Income Tax Case. Sir P.A. Cooper's Appeal. High Court in Brisbane', *The Telegraph* (Brisbane, 23 April 1907) 5.

⁶⁸ This exchange does not feature in the Commonwealth Law Reports.

Apparently in the alternative, Lilley also suggested that if the Queensland Legislature could amend the *Constitution Act* it could only do so in what he termed ‘the proper way’⁶⁹ as laid down in cl 22 of the Order and ss 2, 9 and 10 of the *Constitution Act* itself. This is a peculiar submission. Sections 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 because the *Constitution Act* was ‘the Constitution’ and thus necessarily possessed an enhanced normative status relative to other Queensland Acts.⁷⁰ However, this submission, evidently very much the second string on Lilley’s bow, seemed to morph at O’Connor J’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.⁷¹

Lukin’s submissions⁷² on the constitutional point largely⁷³ repeated his arguments below. The *Constitution Act* was an exercise of the power given to the Legislature in cl 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 *Constitution 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 of repugnancy and (presumably s 2 of) the *CLVA 1865*, but maintaining that no Imperial statutory restraint precluded amendment of the *Constitution Act* by a subsequent Queensland Act.

⁶⁹ *Cooper* (n 3) 1306; ‘Income Tax Appeal. Chief Justice’s Case’, *Brisbane Courier* (Brisbane, 23 April 1907) 3.

⁷⁰ See especially the account in ‘Income Tax. Chief Justice’s Salary. Argument before High Court’, *The Week* (Brisbane, 26 April 1907) 23.

⁷¹ ‘Income Tax Case. Sir P.A. Cooper’s Appeal. High Court in Brisbane’, *The Telegraph* (Brisbane, 23 April 1907) 5.

⁷² *Cooper* (n 3) 1310.

⁷³ Lukin, with evident reluctance, accepted that there were parts of cl 22 (the reservation and disallowance provisos) that the Legislature could not repeal nor amend. However, these he characterised as but ‘very faint recognition’ of ‘fundamental law’ status: *ibid* 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.

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

The first, most extreme, proposition was that such alteration was wholly beyond the competence of the Queensland Legislature. Only the Imperial Parliament could achieve that effect. The second proposition was that changes to the *Constitution 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 *Constitution Act* and then, in Act 2, the provided for alteration was enacted. The third proposition was that modifying the *Constitution Act* could be achieved in a single statute expressly stating that the *Constitution Act* was being altered. The first proposition stood consistently at the forefront of Cooper's submissions throughout the litigation. The second proposition appeared with less consistency and was more faintly argued. The third proposition was offered by Power in the State Supreme Court, but in the High Court seemed to owe more to O'Connor J'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 s 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 September 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 because to do so 'would be distasteful to my Ministers'.⁷⁴ Morgan was appointed instead. In May, Chelmsford had passed Cooper over as Deputy Governor, lamenting in a despatch to the Colonial Office that: 'It is unfortunate for me that [Cooper] is a gentleman to whom grave exception can be taken on various grounds for the position ...'⁷⁵

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. Justice Isaacs simply concurred with Griffith CJ.

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

⁷⁴ Memorandum from Frederic John Napier Thesiger, Baron Chelmsford to Colonial Office, 30 September 1907 CO 418/54, 117.

⁷⁵ Memorandum from Frederic John Napier Thesiger, Baron Chelmsford to Colonial Office, 4 May 1907, CO 418/54, 87.

question. Chief Justice 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.⁷⁶

While that might seem, in the abstract, a *prima facie* credible decision, it is in context a remarkable conclusion. Three years earlier in *Deakin*,⁷⁷ Griffith CJ had addressed the question of 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 Honour's 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 States⁷⁸

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

More notably, Griffith CJ 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 *Constitution Act* could be altered by Queensland legislation passed in 'the ordinary way'. The answer was 'no'.

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

Chief Justice Griffith identified an important political purpose — to enhance legislative transparency and accountability — for such a principle.⁷⁹ What his judgment did not offer was any remotely credible legal or historical basis to support the existence of Two Act entrenchment. Chief Justice Griffith did not acknowledge that there was no explicit textual basis at all in the *Constitution Act* itself, in the 1859 Order, or in any other Imperial or Queensland legislation for Two Act entrenchment. He did not identify a single judicial authority from any

⁷⁶ *Cooper* (n 3) 1316.

⁷⁷ (n 32).

⁷⁸ *Ibid* 612. The 'Constitution' reference is to ch 1 s 3 of the *Australian Constitution*.

⁷⁹ *Cooper* (n 3) 1315.

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 *Constitution Act*, gave no indication that a Two Act amendment process would be required. Nor did Griffith CJ acknowledge that the *Constitution 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 CJ’s ‘reasoning’ — the term is used guardedly — was simply that it was an inherent or implicit characteristic of the *Constitution Act* that its terms could not be changed by a Queensland statute enacted in the ‘ordinary way’. This quality evidently existed because the *Constitution Act* was in substance the 1859 Order, and the 1859 Order was in turn Queensland’s ‘fundamental’ or ‘organic’ law. That cls 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 CJ did not specify which bits, precluded the Legislature altering the Order (which now on Griffith CJ’s view existed in form as the *Constitution 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.⁸⁰

And then Griffith CJ announced that the *Constitution 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’.⁸¹

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

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

Secondly, Griffith CJ also failed to appreciate the point (or failed to acknowledge) that the ‘logic’ of his conclusion was internally not just

⁸⁰ Ibid 1314.

⁸¹ Ibid 1315.

contradictory but self-destructive. For if the *Constitution Act* was the Order in Council in another form, and if the 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 *Constitution Act* purported to do so in a single Act, it must itself have been *ultra vires*. The *Constitution Act*, on Griffith CJ's reasoning, could only have been valid if it had been preceded by another Act expressly providing for its own enactment.

Thirdly, Griffith CJ 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 NSW Act* could not give it that status per se.⁸² While Parliament could have expressly provided for this in the *1855 NSW Act*, it did not do so. Griffith CJ 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 s 106 of the *Australian Constitution* had created this consequence. Although Griffith CJ'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 CJ'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' of an Imperial Act. The 1859 Order would certainly fall within s 2. The *Constitution 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 CJ 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.

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

Fifthly, even if the Order/*Constitution Act* indeed had somehow acquired the force of an Imperial Act, then, absent an express grant of power from the Imperial

⁸² The authorisation in s 7 was required because Queensland was carved out of colonial territory (New South Wales) delineated by statute.

Parliament to the Queensland Legislature to amend the Order/*Constitution Act*, the Legislature could not alter it *at all*. This was, of course, Cooper's primary submission throughout the litigation. Griffith CJ manifestly did not accept this argument. However, 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.

Justice Barton's brief judgment endorsing the Two Act entrenchment principle⁸³ replicated the ordering of Griffith CJ's opinion: the 'constitutional' point issue was addressed first; whether the income tax Acts impinged on s 17 (Barton J agreeing that they did not) was the second(ary) matter.

On the constitutional question, Barton J rested his conclusion on some abstract musings of general 'principle'. According to Barton J, no lawmaking body 'created by and acting under a written constitution'⁸⁴ could make laws inconsistent with that constitution without first empowering itself to do so. This principle applied even if (and this is presumably a nod to cl 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 the Queensland 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.⁸⁵

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

In contrast to Barton J and Griffith CJ, O'Connor JJ devoted the first (and larger)⁸⁶ 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, therefore, not essential but 'as the question is one of far-reaching importance, I think it right to state my view of the law'.⁸⁷

⁸³ Like Griffith CJ, Barton J 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 *Constitution Act*. He also rejected the possibility that express amendment in a single Act was adequate.

⁸⁴ *Cooper* (n 3) 1317.

⁸⁵ *Ibid.*

⁸⁶ *Ibid* 1320–6.

⁸⁷ *Ibid* 1326.

Justice O'Connor followed his colleagues in ignoring Cooper's primary submission — that only an Imperial statute could amend the *Constitution Act*. The question was simply whether the Act could be amended in the ordinary way or only by a Two Act process. Justice O'Connor concurred with Griffith CJ's suggestion that the *Constitution Act* 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 *Constitution 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 J 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. To put it kindly, the imaginative judicial reasoning required to sustain that conclusion would, however, make any such attempted transfer of responsibility difficult to sustain. Like Griffith CJ, O'Connor J could not identify any statutory source (whether Imperial or colonial) which expressly identified a Two Act lawmaking process as required to amend the *Constitution Act*; and, again like Griffith CJ, his Honour did not identify any supportive judicial authority.

Justice 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 neither the judgments nor the submissions considered whether Two Act entrenchment was a 'manner and form' of legislating within *CLVA 1865 s 5*. Insofar as a provision of the *Constitution Act* fell within the substantive reach of s 5, 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.⁸⁸ The explanation for the omission may be that the income tax legislation was universally seen as not raising an issue within s 5(1).⁸⁹ 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 never actually occurred to any of the parties or judges that s 5 might be relevant to this matter;⁹⁰ which is in itself surprising given the

⁸⁸ Collier and Palmer's 1864 report, on which the *CLVA 1865* was seemingly based, asserted 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 (n 9)103–5). Requiring express repeal or amendment in a single Act would be a 'manner and form' proviso, as would requiring Two such Acts.

⁸⁹ Section 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.

⁹⁰ The Commonwealth Law Report does not record Lilley mentioning the *CLVA 1865* at all. Lukin's one allusion to it is to s 2: *Cooper* (n 3) 1309.

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 cast a pall of potential invalidity over every amendment made to the *Constitution Act* since 1867, since none of those amendments had been made through the Two Act process. 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.⁹¹ 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.⁹²

The judgment attracted considerable press attention in Queensland and the other States.⁹³ Much coverage expressed incredulity at the inconsistency of the Court's reasoning on the diminution point in *Deakin* and *Cooper*.⁹⁴ 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 any ordinary Act of Parliament which is inconsistent with it, to the extent of the inconsistency, invalid and inoperative.⁹⁵

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 that '[t]here may be, probably there is, a good answer to

⁹¹ The Act's passage is discussed in Loveland (n 9) 202–6.

⁹² *The Electorates Redistribution Act 1904* (NSW) and the *Reduction of Members Referendum Act 1903* (NSW).

⁹³ A search on the *Trove* newspaper website (search terms: 'high court income tax queensland'; date range 27 June to 31 July) produces 263 hits.

⁹⁴ See, eg, 'Melbourne, Wednesday, 3rd July, 1907', *The Age* (Melbourne, 3 July 1907) 6: '[a] perusal of those judgments leaves the reader amazed at the reasons assigned by the learned judges for their decision'.

⁹⁵ 'Contradictory Judgments. High Court and Income Tax', *The Argus* (Melbourne, 5 July 1907) 9.

these seeming inconsistencies, but we confess that at present we cannot find it'.⁹⁶ 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 than in law.

An initial clue might be found in the Court's terminology. The case turned on the legal status of Queensland's *Constitution Act*. On three occasions, Griffith CJ referred in his judgment to that measure as the 'Constitution Act'. On 19 occasions Griffith CJ referred to it as 'the Constitution'. Barton J's opinion references the statute as 'The Constitution' seven times and 'The Constitution Act' five times. O'Connor J's terminology is more evenly split: 17 mentions of 'the *Constitution Act*' and 23 of 'the Constitution'.⁹⁷ In Higgins J's judgment, the statute is described as 'the Constitution' 19 times and as the '*Constitution Act*' just 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. However, all five judges also had very substantial track records as legislators and ministers. Of the five, only Griffith CJ 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 CJ, 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 *Australian 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 *Australian 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*, '[w]e must never forget it is a constitution [as opposed to an ordinary statute] that we are expounding'.⁹⁸ In cases such as *D'Emden* and *Deakin*, Griffith CJ made it abundantly clear that he

⁹⁶ 'Melbourne, Wednesday, 3rd July, 1907', *The Age* (Melbourne, 3 July 1907) 6.

⁹⁷ The count excludes references to the Constitution directed at the pre-1867 period.

⁹⁸ (n 34) 407.

considered that methodology entirely appropriate when searching for the meaning of provisions of the *Australian Constitution*.⁹⁹

However, Marshall's methodology was not a distinctively American (in the sense of counterposed to British) phenomenon. Writing in 1899,¹⁰⁰ the future Lord Chancellor, Richard Haldane (then a backbench Liberal MP and QC with a well-established practice in colonial constitutional law matters),¹⁰¹ 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 unwritten, elastic, and capable of being silently developed and even altered as the colony develops and alters ...¹⁰²

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 CJ manifestly disagreed with and refused to bow to such strictures. Reports of the *Cooper* submissions record Griffith CJ announcing (to laughter), 'you might say *Deakin v Webb* has been overruled by the Privy Council'.¹⁰³

Several weeks before *Cooper* was decided and six months after *Outtrim* was handed down, the High Court decided *Baxter v Commissioners of Taxation* ('*Baxter*').¹⁰⁴ *Baxter* was the latest instalment in the, by then, multi-part dispute between the High Court and the Privy Council over — in the narrow sense — the

⁹⁹ Justice 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 CJ had been so influential in drafting was eventually adopted. Isaacs J had also played a prominent role in the constitution-making process.

¹⁰⁰ Richard Haldane, 'Lord Watson' (1899) 11(3) *Juridical Review* 278.

¹⁰¹ Lord Haldane's constitutional law practice is described and analysed in Jonathan Robinson, 'Lord Haldane and the British North America Act' (1970) 20(1) *University of Toronto Law Journal* 55; Stephen Wexler, 'The Urge to Idealise: Viscount Haldane and the Constitution of Canada' (1984) 29(4) *McGill Law Journal* 608.

¹⁰² Haldane (n 100) 279.

¹⁰³ 'Income Tax. Chief Justice's Salary. Argument before High Court', *The Week* (Brisbane 26 April 1907) 23.

¹⁰⁴ (1907) 4 CLR 1087 ('*Baxter*').

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 CJ’s opinion in *Baxter*, relating to an episode in Queensland’s pre-confederation constitutional history, has particular significance because it suggests that his Honour saw no difficulty applying his Marshall-inspired approach to interpreting the *Australian Constitution* to the High Court’s role in determining the meaning of State Constitutions.

The passage relates to a fierce dispute in the 1880s between Queensland’s Legislative Assembly and Council.¹⁰⁵ 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 CJ 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-à-vis the Commons in Britain. The Assembly and Council subsequently referred the matter to the Privy Council, asking firstly, ‘[w]hether the *Constitution Act* confers on the Legislative Council powers coordinate with those of the Legislative Assembly in the amendment of all bills, including money bills?’, and secondly, whether 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* 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 CJ 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 as holding and discharging, relatively to one another, positions and functions analogous to those of the House of Lords and House of Commons.¹⁰⁶

The Privy Council answered the questions in a fashion¹⁰⁷ 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 CJ presented this as an ‘excellent illustration’ of how the content of Queensland’s constitution should be discovered by a court:

¹⁰⁵ Discussed in Loveland (n 9) 135–40.

¹⁰⁶ Ibid 138 (emphasis added).

¹⁰⁷ Such questions were then merely answered without accompanying explanation.

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.¹⁰⁸

In *Cooper*, it might be suggested that the absence of Two Act entrenchment in the text of the *Constitution Act* 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.

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 provisions of the *Constitution Act* 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, and it placed no time delays on the interval between the two necessary Acts.¹⁰⁹ The requirement that the Legislature use language which (twice) made clear in express terms that the *Constitution Act* was being amended might prompt press and public opposition to proposed changes, or deter governments even from embarking on such projects. However, 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. Although, 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 CJ’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.

However, *Cooper*’s constitutional victory did not impress itself with much weight on Queensland’s political landscape. The Legislature’s 1907 session began

¹⁰⁸ (n 104) 1107.

¹⁰⁹ 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.

on 23 July and ran to late November. The major event was the resignation of Kidston's government. This 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 and 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 1907¹¹⁰ 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 Labor support, and which promptly pursued a constitutional reform alongside which subjecting judges' salaries to income tax seemed very small beer indeed.

VI AFTERMATH — 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 *Constitution Act*. The 1871 repeal of s 10 suggested that only a bicameral bare majority required to repeal s 9. However, *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 bill. This was expressly titled the *Constitution Act Amendment Act 1890* (Qld), 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. However, 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,¹¹¹ nor did the Act (the bill was assented to on 3 April 1908) face any immediate legal challenge in Queensland's courts.¹¹²

¹¹⁰ The 1907 records are held in the United Kingdom National Archives as CO 418/54.

¹¹¹ Telegram from Frederic John Napier Thesiger, Baron Chelmsford to Colonial Office, 19 March 1908, CO 418/63, 144. The answer was 'no'.

¹¹² Any presumption that *Cooper* would apply to all the States had little traction. In 1912, the New South Wales Legislature enacted the *Parliamentary Representatives Allowance Act 1912* (NSW), which expressly amended the *Constitution Act 1902* (NSW) s 28. No anterior enabling statute was passed. Similarly, the *Constitution Amendment Act 1914* (NSW) was enacted as a single statute. In Victoria, the *Adult Suffrage Act 1908* (Vic) (which began its parliamentary passage shortly after *Cooper* was decided) expressly amended the State's Constitution Act, again in a single statute.

Shortly afterwards, Kidston promoted a measure enacted as the *Parliamentary Bills Referendum Act 1908* (Qld) ('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. Section 1 did expressly state that the Act should be read as amending the *Constitution Act*; although it did not identify which parts and did not take the form of an insertion into the *Constitution Act*. As with the first 1908 Act, this measure was enacted as a single statute. Per *Cooper*, the Act was undoubtedly invalid. Again, the point was not taken by legislators during its passage. Nor did anyone immediately initiate any legal proceedings to challenge the PBRA 1908's validity. That challenge eventually emerged in 1917, when Tom Ryan's Labor government invoked the Act to abolish the Legislative Council.

A *The Taylor Litigation*

Cooper was still Chief Justice when *Taylor v Attorney-General* ('Taylor')¹¹³ came before the Supreme Court on 25 April 1917. Justices Chubb and Real remained in situ, and had been joined, since 1910, by Lukin J. Ryan led for the government, Feez and Stumm led 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. The first strand was that only the Imperial Parliament could abolish the Legislative Council. Secondly, if the Queensland Legislature had such power, then that 'Legislature' had to take the form identified in the *Constitution Act*: the Legislature created by the PBRA 1908 was a mere delegate of the *Constitution 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 cl 22. Under s 5, the Queensland Legislature *could create* judicially enforceable entrenchment devices regulating what s 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 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

¹¹³ [1917] St R Qd 208 ('Taylor'). Taylor was a member of the Legislative Council.

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. Justice Lukin, evidently unpersuaded by his own submissions in *Cooper*, authored a majority (including Cooper J) judgment which approved all of Taylor's contentions, rejected all of Ryan's, and expressly approved the Two Act entrenchment principle.¹¹⁴

On further appeal to the High Court,¹¹⁵ Ryan persuaded the bench, which included Barton and Isaacs JJ of the *Cooper* judges,¹¹⁶ 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 JJ 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.¹¹⁷ None of the other judges demurred from that conclusion.

Taylor's subsequent permission application to the Privy Council in March 1918¹¹⁸ was dismissed, in part because, given the referendum result, the issue was temporarily moot, but primarily because the Court (with Lord 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. However, by then, *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 J still presiding — had concluded that the *Industrial Arbitration Act 1916 (Qld) s 6* was invalid on the basis that it purported to amend ss 15 and 16 of the *Constitution Act* without having been preceded, as *Cooper* required, by an enabling statute.¹¹⁹ 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.

¹¹⁴ Ibid 241.

¹¹⁵ The Court allowed the referendum to take place pending the appeal. The electorate voted against the bill.

¹¹⁶ Chief Justice Griffith was ill. Justice O'Connor died in 1912. Justice Higgins did not sit. The *Taylor* bench included three judges appointed by the Commonwealth Labor government in 1913: Charles Gavan Duffy, George Rich and Charles Powers. Only Powers had had a significant party political career (of liberal inclination).

¹¹⁷ *Cooper* (n 3) 469, 476. Justice Isaacs had also expressly confirmed *Cooper* was correct in *Baxter v Ah Wey* (1909) 8 CLR 626, 643.

¹¹⁸ *Taylor v Attorney-General* [1918] St R Qd 194.

¹¹⁹ *In Re McCawley* [1918] St R Qd 62.

The High Court appeal was heard by a seven-judge bench.¹²⁰ The Court divided three to three on the correctness of the *Cooper* principle. Griffith and Barton JJ, joined by Powers J, maintained the position they adopted in *Cooper*, dismissing the *CLVA 1865 s 5* argument accepted in *Taylor* as irrelevant. The seventh judge, Gavan Duffy J, decided against McCawley without addressing the Two Act entrenchment point.

Isaacs J, in a joint opinion with Rich J, dissented, casting the *Cooper* principle as wholly indefensible. The opinion has no clear explanation of why Isaacs J changed his mind, nor any candid admission that he had done so. The thrust of the judgment was that both cl 22 and s 2 of the *Constitution Act*, and also the *CLVA 1865 s 5*, empowered the Legislature to create a great variety of entrenchment devices. Sections 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* 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 JJ considered had occurred in *Cooper* — into the Act.¹²¹ Justice Higgins produced a similar judgment.

The Privy Council appeal was not heard until March 1920.¹²² The assembled bench was notably strong, comprised of Lords Birkenhead, Haldane, Dunedin, Buckmaster and Atkinson. As noted above, its opinion, authored by Birkenhead, scathingly dismissed the *Cooper* principle. But Feez and Stumm did not lose the case because the Queensland Legislature *did not have the power* 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 cl 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 *Constitution 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

¹²⁰ *McCawley v The King* (1918) 26 CLR 9.

¹²¹ There is an obvious parallel here with Isaacs J’s near contemporaneous judgment in *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 JJ in its ranks—towards a much more textually driven construction of the *Australian Constitution* in respect of the intergovernmental immunities doctrine. I have developed this analysis more fully: Loveland (n 9) 288–96, 330–3.

¹²² *McCawley v The King* [1920] AC 691.

their inability has involved them in dialectical difficulties which are embarrassing and even ridiculous.¹²³

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’, the Queensland 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 Legislature’s two Houses. Bavin’s initiative was undertaken in (well-founded) anticipation of his conservative administration losing the next Assembly election to a Labor party committed to abolishing the Council. Peden’s formulae, enacted as s 7A in the *Constitution Act 1929* (NSW), 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* (*‘Trethowan’*).¹²⁴

Trethowan, in turn, immediately prompted the Queensland 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.¹²⁵ 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 Ibid 705.

¹²⁴ (1931) 44 CLR 394; [1932] AC 526 (*‘Trethowan’*).

¹²⁵ See especially HRW Wade, ‘The Basis of Legal Sovereignty’ (1955) 13(2) *Cambridge Law Journal* 172; Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959)144–77; Michael Gordon, ‘The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade’ (2009) July (3) *Public Law* 519.