torts at all on the ground that the express refusal of the Privy Council to commit themselves on this point constitutes an indirect *dictum* to the effect that the direct causation test remains applicable to such torts.[47]

It would seem that no definite conclusion can be reached from prior cases or from the ambiguous statement in the *Morts Dock Case* as to whether the foreseeability test or the direct consequence test will now be applied to injuries resulting from torts of strict liability. To avoid further inconsistencies in the law, future courts may prefer to adopt the contention of Sir Frederick Pollock, which, although it does not seem to be well substantiated by the authorities relied on by that writer, may nevertheless be regarded as highly persuasive in view of the influence which he seems to have had on the Privy Council in the present case.

The judgment of the Privy Council in the *Morts Dock Case*, in replacing the foreseeability principle upon its pedestal as the major concept in the tort of negligence, must be regarded as a landmark in the law of torts, despite the restriction of the principle on which the case was decided to actions in negligence. One may only express the hope that a "loose interpretation as to the degree of definiteness in the foreseeability required", as predicted by J. A. McLaughlin, will not occur so as to result in a "transcendent elasticity in the conception of foreseeability which really leaves the court without any guide but its conscience and leaves the bar with none."[48]

RUTH JONES, Case Editor — Fifth Year Student

PROBLEMS OF CONSTITUTIONAL AMENDMENT IN NEW SOUTH WALES

CLAYTON v. *HEFFRON*

I

In November, 1959, the New South Wales Government introduced in the Legislative Assembly a Bill for the abolition of the State's Upper House, the Legislative Council, a body which has been the centre of some of the liveliest controversies in the political and constitutional history of the State. The Bill was twice passed by the Assembly (in December, 1959, and in March, 1960) but each time was returned by the Council with a message to the effect that the Upper House had resolved "as a matter of precedence and privilege" that the Bill be sent back to the Assembly without consideration since it had not originated in the Council itself.[2] Despite this refusal on the part of the Council to consider the Bill, the Government was determined to press for its adoption as law.

According to s.7A of the New South Wales Constitution Act, 1902, a Bill for the abolition of the Legislative Council requires the approval of a majority

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[47] But Professor W. L. Morison, *supra* n. 3, at 320, considers that the criticisms which the Privy Council advanced as to the undesirability of problems of closeness of causation obtruding themselves into the law of torts at all would apply to torts of strict liability.

[48] J. A. McLaughlin (1925-26) 39 *Harvard L.R.* 149, 191.

[1] (1960) 34 A.L.J.R. 378 (H.C.); (1960) N.S.W.R. 592 (S.C.).

[2] The message stated that the Legislative Council, "in accordance with long established precedent, practice and procedure, and for that reason, declines to take into consideration a bill which affects those sections of the Constitution Act providing for the constitution of the Legislative Council unless such Bill shall have originated in that House and returns the Bill without deliberation thereon, and requests that the Legislative Assembly deem this reason sufficient". For a full account of the facts see (1960) N.S.W.R. at 603-05.

of electors voting at a referendum. An earlier attempt to abolish the Upper House by ordinary legislative enactment had proved unsuccessful. On that occasion the Judicial Committee of the Privy Council (affirming the Supreme Court and the High Court) expressed the view that s.7A imposed requirements as to "manner and form" of constitutional amendment which were binding upon the Parliament for the time being.[3]

In the present instance, the Government's immediate concern was not so much with what requirements as to manner and form had to be fulfilled, as with how, in the face of a hostile majority in the Council, it could bring the issue of abolition of the Council before the electorate. Since 1932 provision has existed in the New South Wales Constitution Act for the resolution of deadlocks between the two Houses of Parliament. Under s.5B of that Act, Bills which have been passed twice by the Assembly but which the Council "rejects or fails to pass", may be submitted to the electorate at a referendum, and if approved by a majority of electors may thereupon be presented to the Governor for assent.[4]

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[3] *Trethowan* v. *Peden* (1932) A.C. 526; (1931) 44 C.L.R. 394.

[4] Section 5B provides:

(1) If the Legislative Assembly passes any Bill other than a Bill to which section 5A of this Act applies, and the Legislative Council rejects or fails to pass it or passes it with any amendment to which the Legislative Assembly does not agree, and if after an interval of three months the Legislative Assembly in the same session or in the next session again passes the Bill with or without any amendment which has been made or agreed to by the Legislative Council and the Legislative Council rejects or fails to pass it or passes it with any amendment to which the Legislative Assembly does not agree, and if after a free conference between managers there is not agreement between the Legislative Assembly, the Governor may convene a joint sitting of the members of the Legislative Council and the members of the Legislative Assembly.

The members present at the joint sitting may deliberate upon the Bill as last proposed by the Legislative Assembly and upon any amendments made by the Legislative Council with which the Legislative Assembly does not agree.

No vote shall be taken at the joint sitting.

(2) After the joint sitting and either after any further communication with the Legislative Council and the Legislative Assembly, or without any such communication the Legislative Assembly may by resolution direct that the Bill as last proposed by the Legislative Assembly and either with or without any amendment subsequently agreed to by the Legislative Council and the Legislative Assembly, shall, at any time during the life of the Parliament or at the next general election of members of the Legislative Assembly, be submitted by way of referendum to the electors, qualified to vote for the election of members of the Legislative Assembly.

The referendum shall be held and conducted as may be provided by law, and if at any time no such law exists, the law for the time being in force relating to the holding and conduct of a general election of members of the Legislative Assembly shall, *mutatis mutandis*, apply to and in respect of the holding and conduct of the referendum, with such modifications, omissions, and additions as the Governor may by notification published in the *Gazette* declare to be necessary or convenient for the purpose of such application.

(3) If at the referendum a majority of the electors voting approve the Bill it shall be presented to the Governor for the signification of His Majesty's pleasure thereon and become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill.

(4) For the purposes of this section the Legislative Council shall be taken to have failed to pass a Bill if the Bill is not returned to the Legislative Assembly within two months after its transmission to the Legislative Council and the session continues during such period.

(5) This section shall extend to any Bill whether it is a Bill to which section 7A of this Act applies or not.

And in the application of this section to a Bill to which section 7A of this Act applies:

(a) The submission of the Bill to the electors by way of referendum in accordance with this section shall be a sufficient compliance with the provisions of section 7A of this Act which require the Bill to be submitted to the electors;

(b) the referendum under this section shall, notwithstanding anything contained in section 7A of this Act, be held upon a day which shall be appointed by the Governor in such manner as may be provided by law; and

(c) the day so appointed shall, nothwithstanding anything contained in subsection two of this section, be a day during the life of the Parliament and not sooner than two months after the Legislative Assembly has passed a resolution in accordance with that subsection for the purposes of such referendum.

One of the sources of difficulty in *Clayton's Case* was that s.5B does not deal specifically with the situation which actually occurred, namely the refusal of the Council even to consider the Bill. Further, the difficulties arose when the Council declined to co-operate with the Assembly in the appointment of managers from each House for a free conference, and in the joint sitting of the two Houses. Section 5B clearly envisaged that the extraordinary legislative process prescribed for deadlock situations should be invoked only after all other means of securing agreement or compromise had failed, and to that end its framers had prescribed certain procedural requirements, among them a free conference of managers and a joint sitting, prior to the submission of Bills to a referendum. What the section failed to make explicit was whether the refusal of the Council to co-operate at what one might call "the consultative stage" had the effect of invalidating the Bill even if subsequently it were approved by the electorate and assented to by the Crown.

Although the requirements of s.5B had not been carried out in accordance with the literal terms of that section, the Assembly resolved on the 12th May, 1960, that the Bill should be submitted to a referendum "in accordance with the provisions of subsection 5 of section 5B of the Constitution Act."

At this stage five members of the Legislative Council (together with one member of the federal House of Representatives) sought to prevent the holding of the referendum by bringing a suit in the Supreme Court in Equity for injunctions restraining the Premier, other Ministers of the Crown and the Electoral Commissioner from taking any steps towards the holding of the referendum. In addition to injunctive relief the plaintiffs claimed declarations as to their rights in the circumstances. Briefly the plaintiffs' case rested on two submissions:

(a) that s.5B was invalid,

(b) assuming that s.5B was valid, the procedure there laid down had not been complied with and that even if the Bill were to be approved by a majority of electors voting at a referendum and were to receive the royal assent, it would not thereby acquire the force of law.

Both the Supreme Court[5] and the High Court rejected the contentions and the abolition Bill[6] was subsequently submitted to a referendum which was held and lost on 29th April, 1961.[7]

While the judgments of the courts resolve some of the doubts which might previously have existed concerning the powers of constitutional amendment vested in the New South Wales legislature and concerning the precise effect of s.5B of the Constitution Act, an issue which promised to be most significant, namely the question of the power and willingness of the courts to grant an injunction restraining the Government from taking a step in the legislative process, was sidestepped by the agreement of the defendants not to join issue on this point. It is the purpose of this Note to consider briefly the reasons advanced by the courts for the rejection of the plaintiffs' submissions. Further it is proposed to deal with the comments of the various judges as to the jurisdiction of the courts in cases such as this. In particular it will be asked: should a court ever entertain

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(6) A joint sitting of the members of the Legislative Council and the members of the Legislative Assembly for the purposes of this section may be convened by the Governor by message to both Houses of Parliament.

At such joint sitting the President of the Legislative Council or in his absence the Speaker of the Legislative Assembly shall preside, and until Standing Rules and Orders governing the procedure at joint sittings have been passed by both Houses, and approved by the Governor, the Standing Rules and Orders of the Legislative Council shall so far as practicable apply.

[5] The Court comprised Evatt, C.J., McLelland, C.J. in Eq., Owen, Sugerman and Herron, JJ. (Owen, J. dissented).

[6] The High Court comprised Dixon, C.J., McTiernan, Taylor, Windeyer, Menzies, Kitto and Fullagar, JJ. (Fullagar, J. dissented).

[7] The referendum was lost by 1,089,193 votes to 802,512.

an action which involves it in the investigation of the legislative measures taken in respect of a Bill which has not yet emerged from the legislative process?

II

Counsel for the plaintiffs in *Clayton's Case* argued that the legislature constituted by s.5B for the purposes contemplated by that section was not "the Legislature" within the meaning of s.5 of the Colonial Laws Validity Act, 1865. A colonial legislature, it was submitted, could not in any event divest itself of some part of its power while still remaining in existence. Both the Supreme Court[8] and the High Court[9] agreed that the term "legislature" occurring in the Colonial Laws Validity Act and in s.5 of the Constitution Act itself did not imply the continued existence of two Houses of Parliament and that the powers of New South Wales Parliament to amend its Constitution were not limited in respect of its structure.

There are many reasons for assuming that the assent of the Crown must always remain necessary, but what ground is there for supposing that the legislature must always remain defined in terms of two Houses?[10]

The true source of the New South Wales Parliament's power to enact s.5B, said the majority in the High Court, was to be found in s.5 of the Constitution Act itself.[11] This section conferred ". . . a complete and unrestricted power to make laws with reference to New South Wales. . . . The laws may be constitutional or at the other extreme they may deal with subjects of little significance. Clearly the power extends to laws altering the Constitution Act itself."[12]

In arriving at this conclusion the Court reviewed the relevant Imperial legislation, the so-called "Constitution Statute" 1855,[13] and the "Constitution Act"[14] an act of the colonial legislature which formed the schedule to that "Statute".[15] Having regard to the history of these provisions the majority pointed out that they conferred upon the legislature power to enact a constitution which was to be interpreted as widely as its terms allowed. The present Constitution Act, 1902, had been passed in exercise of this power and s.5 thereof was to be interpreted in accordance with the general principle indicated.[16]

In view of the broad construction given to s.5 to support the enactment of s.5B, the majority of the High Court thought it unnecessary to consider whether or not authority for the enactment of the section could also be found in the Colonial Laws Validity Act, s.5.[17] The implication, however, must be that whatever authority is conferred by s.5 of the Colonial Laws Validity Act is included within s.5 of the New South Wales Constitution. What the High Court thus made clear was suggested by the Judicial Committee of the Privy Council some forty years before in *McCawley's Case*[18] but was later obscured by the same body in *Trethowan's Case*.[19]

It is unfortunate that there has ever been any doubt on this issue for, as the Board pointed out in *McCawley's Case*,[20] the Colonial Laws Validity Act

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[8] (1960) N.S.W.R. 592 at 611-14, 630-31, 639, 663.
[9] (1960) 34 A.L.J.R. 378 at 387-88, 391, 396-97.
[10] *Id.* at 388.
[11] The first paragraph of s.5 of the Constitution Act (1902) provides: "The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace welfare and good government of New South Wales in all cases whatsoever."
[12] (1960) 34 A.L.J.R. 378 at 388.
[13] 18 and 19 Vict. c. 54 (Imp.).
[14] 17 Vict. No. 41 (N.S.W.).
[15] (1960) 34 A.L.J.R. 378 at 388.
[16] *Ibid.*
[17] *Ibid.*
[18] (1920) A.C. 691 at 709.
[19] (1932) A.C. 526 at 539.
[20] (1920) A.C. 691 at 709.

was passed only to remove fears that really ought never to have existed. This is not to say that s.5 of that Act has ceased to have relevance either in New South Wales or elsewhere. Its relevance consists in the proviso that "laws respecting the constitution powers and procedure" of the legislature ". . . shall have been passed in such manner and form as may from time to time be required by any Act of Parliament Letters Patent Order in Council or colonial law for the time being in force in the said colony."[21]

However, even this proviso may not be as important as previously assumed. The decision in *Harris* v. *Donges*[22] suggested that a legislature which is not bound by the Colonial Laws Validity Act might still be able to compel a future legislature to comply with "manner and form" at least where that "manner and form" in fact defines the composition of the legislature which alone is competent to make laws on certain subjects. Such conjecture, however, is beyond the scope of this Note.

III

Two judges in *Clayton's Case* (Owen, J. in the Supreme Court and Fullagar, J. in the High Court) dissented from the majority decisions by finding for the plaintiffs on the grounds that in the circumstances s.5B had not been complied with by the Government and that as a result the Bill, even if approved by the electorate and assented to by the Crown, would nevertheless be invalid. Fullagar, J. in his judgment, listed six requirements laid down by the terms of s.5B:

1. The Bill is to be passed by the Assembly.
2. There is to be a rejection of it by the Council or failure by the Council to pass it.
3. The Bill is, after an interval of three months in the same or the next session, to be passed a second time by the Assembly.
4. There is to be for the second time a rejection of it by the Council or a failure by the Council to pass it.
5 There is to be a free conference between managers at which agreement between the Houses is not reached.
6. There is to be a joint sitting of the members of the Council and the Assembly.[23]

In the present case, condition 5 had not been fulfilled because of the refusal of the Legislative Council to appoint managers. There was also doubt as to whether the Bill had in fact been twice "rejected" by the Council and whether the meeting which took place in April, 1961, was a "joint sitting" within the meaning of s.5B. It was open to the Court, then, to find that requirements as to manner and form prescribed by s.5B had not been complied with and that therefore the Bill if later approved by the electorate and assented to by the Crown would nevertheless not be valid by virtue of the proviso to s.5 of the Colonial Laws Validity Act. Such was the view of Fullagar, J.[24] Nothing short of literal compliance with the six steps would satisfy the proviso to s.5 which, in the words of Rich, J. in *Trethowan's Case* ". . . was intended to enjoin fulfilment of every condition and compliance with every requirement which existing legislation imposed upon the process of lawmaking."[25] Kitto, J. and Menzies, J., on the other hand, preferred to treat s.5B as a provision which would allow a Bill to become law even though the Legislative Council

[21] Colonial Laws Validity Act, 1865, s.5.
[22] (1952) (2) S.A. 429 (A.D.).
[23] (1960) 34 A.L.J.R. 378 at 392.
[24] *Id.* at 389-94, 392ff.
[25] (1931) 44 C.L.R. 394 at 418-19.

did not consent to it. Although the section was "mandatory" or "imperative" in its terms, it nevertheless introduced an implied qualification to the effect that as to all the provisions of the section which require the co-operation of the Legislative Council, the Council should be ready and willing to co-operate. If it did not, they said, the Assembly could proceed without fulfilment of these requirements.[26]

In contrast, however, the majority of the Court characterized the provisions as to the free conference of managers as "directive" only.[27] Non-compliance with the provisions would not operate to invalidate an Act otherwise in accordance with s.5B. Supposing the Bill were so passed, ". . . would it be possible for the Court to investigate the legislative process and hold the enactment void because there has not been a conference of managers?"[28] The Court said:

> . . . according to the principles governing the invalidation of statutes for deviation from the legislative procedure laid down by law no such invalidation should be held to ensue as a consequence of the lack of a meeting of managers in free conference. Once that conclusion is reached there is an end of any contention that the proviso to section 5 of the Colonial Laws Validity Act, 1865, can apply; there is no imperative requirement.[29]

The difference between this view and that expressed by the rest of the Court is basic. If the provision as to the conference of managers is "directive" only, then, according to the majority, it would not have mattered if the Legislative Council had been prepared to send managers to a free conference and yet no conference had been held. However, for the rest of the Court, such a failure would have been fatal to the ultimate validity of the Bill.

Underlying the opinions of the majority is the conviction that a court of law should not intervene in the legislative process so long as the "manner and form" laid down is followed substantially.[30] Because of this conviction the Court took the view that the only proper way of approaching the problem before it was to ask: assuming that the Bill had been approved by the electorate and had been assented to by the Governor, would the deviation from s.5B be sufficient to invalidate the legislation? Looking at what had been done from this vantage point the majority of the Court categorized the requirement of a free conference of managers as directive only.

It now seems clear that provided the Legislative Assembly attempts to follow the provisions of s.5B as nearly as possible, then a Bill may be validly enacted under that section with the approval of the electorate and the assent of the Crown, no matter what action the Legislative Council might take to prevent it becoming law.

What still remains unsettled by judicial pronouncement is the extent to which the Government may deviate from the terms of s.5B without invalidating the purported legislation. The majority judgment in *Clayton's Case* suggested that the Government may ignore the formality of holding a free conference of managers no matter what the attitude of the Legislative Council might be. And from the judgment it might also be inferred that the same principle holds as to the requirement of a joint sitting of members of the two Houses. In any event, it seems that the Assembly cannot ignore the Council completely and legislate with the approval of the electorate alone; for the majority of the High Court in *Clayton's Case*, in holding that the Legislative Council had on two occasions rejected the Bill, said that had it not done so "that might form a very important question in the case."[31] Beyond this, there is no real guide in

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[26] (1960) 34 A.L.J.R. 378, at 394-396, 398-99.
[27] *Id.* at 385.
[28] *Ibid.*
[29] *Id.* at 386.
[30] *Id.* at 380-2, 385, 386 and see *infra* the discussion as to the injunction issue.
[31] *Id.* at 384.

Clayton's Case as to the extent to which the Government must comply with the terms of s.5B.

IV

In *Clayton's Case* it was agreed between the parties that:

> . . . for the purposes of these proceedings and in order to avoid the possibility that the Court might decide this application on grounds which left the main constitutional question undecided, the defendants would concede that an injunction may be granted at the suit of those plaintiffs who are Members of the Legislative Council against the defendants who are Ministers of the Crown and Members of the Executive Council restraining them from proceeding to take any steps towards the issue of a writ for or the holding of a referendum if, in the events which have happened, it would be unconstitutional for the Bill to proceed to a referendum.[32]

The precise effect of this concession was never satisfactorily settled in this case. In a joint judgment in the Supreme Court Evatt, C.J., and Sugerman, J. clearly took the view that the concession had no effect because in any event the Court could and ought to intervene in the circumstances, provided the plaintiffs established that the Bill, if enacted, would be invalid.[33] However, almost all the other Judges in both Courts held that the concession enabled them to disregard the question of whether in the circumstances the Court ought to intervene.

In the High Court it was said that: "It may be assumed that the suit would not have been entertained by the Supreme Court sitting in Equity, had it not been for a concession made by the defendant."[34]

By this the majority of the High Court could not have meant that without the concession the Supreme Court of New South Wales sitting in Equity would not have had jurisdiction to hear the suit. The Supreme Court in Equity has an unlimited jurisdiction,[35] in the strict sense of the word, to hear a suit unless specifically prevented by statute.[36] As pointed out by the Supreme Court in *Clayton's Case* the question of whether the Court would intervene was:

> . . . not one of jurisdiction in the strict sense so much as of the principle upon which the court should proceed in any particular matter in determining the circumstances in which it should intervene and those in which it would regard the authority of the Legislature or its Houses as exclusive in relation to their own proceedings or to their officers or others charged with giving effect to their directions.[37]

The High Court, then, in suggesting that but for the concession the Supreme Court would not have "entertained" the suit, can only have meant that the Supreme Court would have felt bound to dismiss the suit because of the inflexible rule that the Court will not intervene to restrain the Government or its officers from taking a step in the legislative process. In the same way it might be said that the Court cannot entertain a suit for specific performance of a contract for personal services, but all this really means is that the Court has adopted the principle that it will never grant the relief requested.[38] In both cases the Court

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[32] *Id.* at 380.

[33] (1960) N.S.W.R. 592 at 610-11.

[34] (1960) 34 A.L.J.R. 378 at 380.

[35] See K. S. Jacobs (as he then was) "Law and Equity in New South Wales After the Supreme Court Procedure Act 1957, Section 5". (1959) 3 *Syd. Law Rev.*, 83 at 89.

[36] The English cases supporting the view that consent does not give jurisdiction: *Farquharson* v. *Morgan* (1894) 1 Q.B. 552 at 564; *Jones* v. *Owen* (1848) 5 D. & H. 669; *Hill* v. *Bird* (1648) Sty. 102; *R.* v. *Cumberland* . . . (1835) 1 Har. & W. 497, are confined to county courts of "inferior jurisdiction".

[37] (1960) N.S.W.R. 592 at 610.

[38] See *Rigby* v. *Connol* (1880) 14 Ch. D. 482 at 487; *Scott* v. *Rayment* (1868) L.R. 7 Eq. 112.

has jurisdiction to hear the suit and grant the relief sought but in the latter case the Court will invariably refuse to make a decree. The question posed in *Clayton's Case* was: Would the Court ever grant an injunction?

According to Evatt, C.J. and Sugerman, J. the Court would do so in an appropriate case;[39] according to the majority of the High Court it would never do so because the grant of such an injunction would be outside the "traditional functions" of the courts.[40] The only exception to this rule was where the defendants as in *Clayton's Case* conceded that the Court should grant an injunction provided the plaintiffs could establish the ultimate invalidity of the Bill. Apparently the concession was treated by the High Court on much the same footing as an agreement setting forth certain rules by which the parties agree their conduct should be regulated.

Although the effect of the concession was to enable the courts to examine the constitutionality of the procedures followed by the Government in the particular instance, there are at least two questions which even the concession did not permit the courts to resolve conclusively. These are:

a. Whether in any circumstances the courts will grant an injunction to restrain parliamentary processes?

b. Assuming that such an injunction will issue, what is the nature of the interest the plaintiff must show to obtain injunctive relief?

With regard to the first question, English courts have taken the view that they do not have power to restrain Parliament in the process of enacting legislation or that if they do have such power it will never be exercised.[41] Australian courts, however, have in the past granted injunctions to restrain the presentation of the Bill for the royal assent or to prevent the taking of some other step in the process of legislation. In *Taylor's Case*[42] such an injunction was granted by the Supreme Court of Queensland. Although the case went on appeal to the High Court, the injunction issue was not raised by the applicant since at that late stage Government action was not threatened and all that was sought was a declaration of right.

Not long afterwards yet another occasion for authoritative pronouncement by the High Court on the injunction issue arose but was not utilised. In *Trethowan's Case*[43] the New South Wales Supreme Court granted an injunction restraining presentation of Bills for the royal assent on the ground that such presentation was unlawful under s.7A of the Constitution.[44] Sufficient damage to the plaintiffs was found in the threat to their rights and privileges as Members of Parliament in the period intervening between the assent to the Bill by the Crown and the declaration by the Courts that the Bills were *ultra vires*.[45] In granting the defendants special leave to appeal, the High Court confined its attention to the constitutional question of the effect of the "manner and form" proviso of s.5 of the Colonial Laws Validity Act on the ultimate validity of the Bills and expressly declined to consider whether the injunction had been properly granted.[46] At the time, Dixon, J. (as he then was) ventured some remarks on the injunction question,[47] but strictly they rank only as *dicta*. On the basis of *Trethowan's Case* interlocutory injunctions were granted to the plaintiffs in *McDonald* v. *Cain*[48] by Sholl, J. of the Victorian Supreme Court in a situation where it was alleged that presentation of a particular Bill for the royal assent

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[39] (1960) N.S.W.R. 592 at 610-11.
[40] (1960) 34 A.L.J.R. 378 at 380-81.
[41] *Bilston Corpn.* v. *Wolverhampton Corpn.* (1942) Ch. 391; *Harper & Ors.* v. *The Secretary of State for the Home Department* (1955) 1 Ch. 238.
[42] (1917) Q.S.R. 208.
[43] (1931) 31 S.R. (N.S.W.) 183.
[44] *Id.* at 205.
[45] *Ibid.*
[46] See the judgment of the High Court in *Hughes & Vale Pty. Ltd.* v. *Gair* (1954) 90 C.L.R. 203 at 204-5.
[47] (1931) 44 C.L.R. 394 at 426.
[48] (1953) V.L.R. 411; and see the discussion (1957) 31 *A.L.J.* 240 at 253.

would breach an express statutory prohibition.

Subsequent pronouncements of the High Court suggest that in considering the availability of the remedy of injunction, a distinction should be drawn between the kind of situation exemplified in *Trethowan's Case* in which the Act sought to be restrained, *viz* the presentation of a Bill for royal assent, is itself prohibited and therefore unlawful, and the situation in which the Court is asked to intervene in the process of legislation because the procedure is in some way misconceived so that the Bill even if assented to will still be invalid.[49] In *Hughes and Vale* v. *Gair*[50] Dixon, C.J. expressed doubts as to whether an injunction could properly be granted in the first type of case. Nevertheless the High Court gave no clear reason why an injunction should not be granted in the second class of case. The only question which was directly in issue in this case and which the Court found necessary to decide was whether an injunction should be granted to restrain presentation for assent of a Bill which if it became "law" would be *ultra vires*. On this matter the law is now reasonably clear. In his judgment, Dixon, C.J. observed that: ". . . an application for an injunction restraining the presentation of a Bill for the Royal Assent is . . . not unprecedented but is at least very exceptional. We do not think it should be granted on this occasion or later or in any case."[51] "The applicant", the Chief Justice added . . . once the Bill is assented to will have its remedy and if it thinks fit to apply and make out a *prima facie* case this Court will not be slow to intervene to give that interlocutory relief which is appropriate. The Court would treat it as an urgent matter."[52]

To these observations should perhaps be added the views subsequently expressed by the Chief Justice in reply to discussion by the Tenth Legal Convention of the Law Council of Australia of his paper entitled "Common Law as an Ultimate Constitutional Foundation".[53] He said on that occasion:

> If you have an Act such as was in question in *Trethowan's Case*, an Act of Parliament saying that the speaker or whatever officer is involved shall not present a Bill for the Royal Assent, then, if the Royal Assent will make the Bill law, what business have the Courts to interfere and say the law shall not be made by the addition of the Royal Assent to what has already been done? If, on the other hand, the Act will be void notwithstanding the Royal Assent why do you want an injunction? Why should it not be left until afterwards? That is the view that I have hereto adopted.[54]

In *Clayton* v. *Heffron* the majority of the Court distinguished *Trethowan's Case* from the case in hand. There a breach of a statutory prohibition was involved whereas the present case was:

> . . . one in which during the course of a legislative process which may or may not end in the adoption of the measure proposed, it is sought to obtain the interposition of a Court of Equity to enjoin those taken to be responsible for carrying forward the measure from further proceeding with it.[55]

While the majority agreed that without the defendant's concession they would not have entertained the suit they also said that they would decide for the plaintiff only if they found:

> . . . such a want of constitutional procedure as would result in its being impossible that the Bill should become a valid law even if approved by a majority of the electors voting at the proposed referendum. Even so (if the concession is given full effect) the Court in acting upon the concession must

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[49] *Hughes & Vale Pty. Ltd.* v. *Gair* (1954) 90 C.L.R. 203 at 204-05.
[50] *Ibid.*
[51] *Ibid.*
[52] *Id.* at 205.
[53] (1957) 31 *A.L.J.* 240.
[54] *Id.* at 254.
[55] *Id.* at 380.

> go beyond its function of deciding whether an Act of Parliament assented to by the Crown does not go beyond the legislative power of the Parliament so that it cannot form part of the law of the land and must enter upon an inquiry into the lawfulness and regularity of the course pursued within the Parliament itself in the process of legislation and before its completion. It is an inquiry which according to the traditional view courts do not undertake. The process of law-making is one thing; the power to make the law as it has emerged from the process is another. It is the latter which the Court must always have jurisdiction to examine and pronounce upon.[56]

In a situation where no breach of a statutory prohibition is involved, the courts would seem to have adopted the view that they should not interfere with the legislative process and will be prepared to examine the validity of the measure only when it has appeared on the statute books. The validity of the Bill cannot be tested because of "the traditional functions of the Courts". Even if the way s.7A was characterized in *Clayton's Case* may be taken as an indication that the courts might be prepared to interfere when the Government has breached an express statutory prohibition by the taking of some step in the legislation process, nevertheless, if the view of the Chief Justice is accepted, a plaintiff would still not be able to obtain an injunction until after the Bill had actually received royal assent. No relief could be granted at an earlier stage since the plaintiff would never be able to show the damage to himself necessary to support his application for an injunction.

The conclusions to which the previous analysis have led may be summarised as follows:

a. The courts will in no circumstances issue an injunction to restrain parliamentary processes save possibly where the taking of a step in the legislative process on a particular case involves breach of an express statutory prohibition.

b. Even in the latter case it will be difficult if not impossible for the plaintiff to show sufficient interest to maintain a grant of the injunction at an earlier stage since he will have an adequate remedy after the Bill has emerged from the Parliamentary process.

In reaching the first of these conclusions the High Court has done no more than adopt the traditional attitude of the English courts as exemplified by the decisions in the *Bilston Corporation Case*[57] and in *Harper's Case*.[58] It should be noted, however, that in *Harper's Case* the Court assumed that the grant of an injunction in *Trethowan's Case* was correct and that the reason for not regarding that case as relevant to British conditions was that the New South Wales Legislature is a legislature with only "limited legislative functions."[59] It may also be surmised that the attitude taken by English courts has been inspired at least in part by the realization that injunctions in restraint of parliamentary process would run counter to two fundamental British constitutional doctrines: the exclusive jurisdiction of the Houses of Parliament over their internal proceedings and the non-reviewability of Acts of Parliament by a court of law.[60]

Where, however, as in Australia, Acts of Parliament are reviewable by the courts, there seems no reason why judicial review should not extend to the review of acts whose supposed (or alleged) invalidity stems from contravention of legislative procedure prescribed by statute. The majority of the High Court in *Clayton's Case* acknowledged that the courts could review legislation passed in a manner contrary to statute, but only at a point when the legislative process had run its full course:

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[56] *Ibid.*
[57] (1942) Ch. 391.
[58] (1955) 1 Ch. 238.
[59] *Id.* at 253.
[60] See *Kielley* v. *Carson* (1841-2) 4 Moore P.C.C. 63 at 89; also see Viscount Kilmuir, *The Law of Parliamentary Privilege* (1959) 10.

> Of course the framers of a constitution may make the validity of a law depend upon any fact, event or consideration they may choose and if one is chosen which consists in a proceeding within Parliament the courts must take it under their cognizance in order to determine whether the supposed law is a valid law; but even then one might suppose only after the law in question has been enacted and when its validity as law is impugned by someone affected by its operation.[61]

It is difficult to see how this supposition can be supported on any basis other than that until a Bill is assented to there is nothing which binds the plaintiff and until he is bound he cannot be affected by the operation of the law and therefore is unable to show sufficient interest to sustain the grant of an injunction.

The Chief Justice of the High Court has argued, as has been shown,[62] that there will never be circumstances in which the plaintiff can show such sufficient interest before the enactment of the legislation. But it must be remembered that the injunction in equity is available not only to restrain actual injury but also to restrain threatened injury. Further, there are cases where the rights and privileges of the plaintiff will be affected materially by the legislation in question and no matter how quickly recourse is had to the courts after a Bill receives the royal assent, to withhold remedy until that time seems neither just nor adequate.

For instance, if a taxing law which is *ultra vires* receives the assent of the Crown, the usual practice is for it to be enforced immediately and until such time as it is declared invalid or an injunction restraining its enforcement is granted. Any delay, however slight, on the part of the courts may place a person in a serious financial predicament in that he must raise money immediately to discharge the liability upon him. If the statute imposes criminal liability the liberty of citizens may be endangered. These are extreme examples, but the possibility that they may arise should not be disregarded. If the remedy of injunction is excluded by judicial precedent the danger inherent in these situations becomes the more great. Indeed the courts have recognised this, albeit in a roundabout way. Thus in *Trethowan's Case* the High Court would not allow an appeal on the question of the availability of the remedy of injunction. They took this attitude: ". . . because it was thought inconvenient to allow a procedural question of this sort to intrude itself into such a matter calling for urgent and definite decision."[63]

But what better reason for holding that the remedy of injunction is available? If a matter calls for "urgent and definite decision" it must be because to some extent the rights and privileges of the plaintiffs are in jeopardy — there must in fact be adequate reasons for granting an injunction. Similar reasons were given in the Supreme Court of New South Wales in *Clayton's Case* for justifying the view that the Court had jurisdiction to consider the matter:

> . . . a degree of convenience amounting virtually to necessity makes it proper to determine at an appropriately early stage whether such a measure, if ultimately enacted, will have been enacted with constitutional validity and in accordance with the forms required for its enactment.[64]

In New South Wales, of course, no such determination can be made unless the plaintiff is entitled to an injunction or other equitable relief since proof of such entitlement is necessary in this State to support a declaration of right.[65] By making the concession they did, the defendants in *Clayton's Case* were able to obtain what amounted to a declaration of right before the Government incurred the expense of holding a referendum. Otherwise there would have been

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[61] (1960) 34 A.L.J.R. 378 at 381.
[62] See *supra* and (1957) 31 A.L.J.R. 240 at 253.
[63] (1954) 90 C.L.R. 203.
[64] (1960) N.S.W.R. 592 at 611 (*per* Evatt, C.J. and Sugerman, J.).
[65] See *David Jones* v. *Leventhal* (1927) 40 C.L.R. 357; *Tooth & Co. Ltd.* v. *Coombs* (1925) 42 W.N. (N.S.W.) 93; *Clayton* v. *Heffron* (1960) 34 A.L.J.R. 378 at 380.

no way of obtaining a declaration as to the validity of the legislation until a referendum was eventually carried. Conceivably situations may arise in which so fundamental is the procedural irregularity that even if the referendum is successful, any resulting Act is void *ab initio*.

Finally, it should be emphasised that in denying, on the one hand, that a plaintiff is entitled to injunctive relief before a Bill becomes law and, on the other hand, giving effect to an agreement whereby the defendant agrees to waive the application of the strict law, the courts have provided governments with the whip-hand in the whole proceedings. Thus a government, confident that the referendum will be resolved in its favour, may deter potential plaintiffs by the fear that it will not grant a concession. A Member of Parliament may well feel that the dismissal of a suit even on procedural grounds will cause him to lose face in tht eyes of his electors. If, on the other hand, the Government is less sure of its success at a referendum but confident of its legal position it might well encourage litigation and grant the necessary concession in the hope that a favourable verdict, well publicised, might sway the electors to its cause.

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The major effect of the decision in *Clayton* v. *Heffron*, then, is to establish the Constitution Act, 1902, as the primary source of the power of the New South Wales legislature not merely to make law but also to alter its constitution. Further, the decision establishes beyond doubt that the Legislative Assembly has power to abolish or reform the Legislative Council with the consent of the electorate, no matter what steps the Council takes to prevent this being done.

However, the disquieting feature of the decision, to this writer, is the strong *dicta* in the majority judgment in the High Court to the effect that the courts will never intervene in the legislative process to restrain procedural irregularities committed in contravention of provisions save perhaps in circumstances where the irregularities contravene an express statutory prohibition. Even then the plaintiff will have to show an interest sufficient to support the granting of an injunction and this, from what the High Court has said, may be impossible in many cases.

It is submitted that the courts should not hold themselves bound by an inflexible rule that they will not intervene in the legislative process and refrain from declaring as to the invalidity of a Bill until after it has been carried into operation. Rather they should be prepared to grant an injunction to prevent a parliament from taking a step in the legislative process at the suit of a plaintiff who can show:

> Firstly, that the step proposed is part of a legislative process which can never result in the adoption of a valid law because of some irregularity or invalidity in the procedure undertaken, and second that the taking of the step in question will cause irreparable injury to his interests.

The latter requirement would sufficiently limit the scope of the relief to prevent any charge that the courts were frequently meddling in the affairs of parliament; yet it would leave open a remedy to a deserving plaintiff in appropriate circumstances.

Falling short of extension of the equitable remedy of injunction in the manner suggested, it would seem highly desirable that some attention might be given in New South Wales to the possibility of relaxation of the now stringent rules regarding the making of declarations of right. A mere declaration of right affords no positive relief, but on the other hand, in the political sphere, what Government would commit the folly of proceeding with a course of action which the courts had characterized as illegal? At the present time identical principles are applied to determine whether either form of equitable relief is available.

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