CRISP, J. 1937.

FRANKLIN AND ANOTHER v. MURTAGH.

I disallow interrogatories 1 to 8 inclusive.

I allow interrogatories 9, 10, and 11.

Where the defence of qualified privilege is set up there is a direct issue (and it may be the real issue) as to whether defendant was actuated by malice or not: and interrogatories are allowed which ask defendant what information he had which induced him to believe the truth of the words, and what steps he took to verify them. 10 *Hals.* (2nd ed.) p. 417; *Gatley* (2nd ed.) 670; *Elliott* v. *Garrett* (1902) 1 *K.B.* 870; *Lyle-Samuel* v. *Odhams Ltd.* 1920 1 *K.B.* 135.

Solicitors for the plaintiffs: *Gatenby, Johnson, & Walker.*

Solicitors for the defendant: *Ogilvie, McKenna, & Morris.*

Re SCULLY; IN THE MATTER OF AN APPLICATION FOR A HOTEL LICENCE.

CLARK, J.

1937.
March 1.
April 12, 13.
June 25.

Constitutional Law—Colonial Legislature—Power of Governor to enact amendments to statutes without the necessity of reserving the same for Royal assent—Competence of colonial legislature to eliminate Crown as part of Parliament—"The Australian Constitutions "Act, 1842"—*"The Australian Constitutions Act,* 1850"—*"The "Colonial Laws Validity Act,* 1865"—*Repugnancy to Imperial Acts —Statute—Construction—Statute Law Revision—"The Statute "Law Revision Act,* 1935" (26 *Geo. V., No.* 99).

"The Statute Law Revision Act, 1934," was passed for ordinary statute law revision purposes. By an amending Act passed in 1935, a new Section 8 was introduced into the statute, sub-section (1) of which provided—

"(1) It shall be lawful for the Governor on the recommendation of the "Attorney-General, by proclamation to make in any Act such verbal "amendments as he may think necessary for—

"i. Correcting any typographical, grammatical, or other patent "error:

"ii. Rectifying any omission in any amendment made for purposes "of revision: or

"iii. Ensuring consistency and co-ordination in the amendments made "to such Act—

"but no such amendment shall be made for the purpose of effecting any "alteration in the law."

By proclamations, subsequently confirmed by statute, Section 8 (1) was amended by deleting the words "but no such amendment shall be made for the "purpose of effecting any alteration of the law," and substituting the words "and making such further revision as may be required," and the word "verbal" was deleted.

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Purporting to act under Section 8 of "The Statute Law Revision Act, 1934," His Excellency the Governor made five proclamations purporting to r peal or amend various statutes. Thereupon, Parliament passed "The Proclamations " Confirmation Act, 1936." This Act recited the above proclamations, and that in certain instances doubts might arise as to whether the repeals and am nd-ments thereby effected were within the scope of the authority conferred by S ction 8 of "The Statute Law Revision Act, 1934"; and it provided that such r p als and amendments "are hereby ratified and confirmed and are declared to have been " lawfully and validly made."

On December 1, 1936, "The Proclamations Confirmation Act (No. 2), 1936," came into operation. It was expressed to amend "The Proclamations Confirma-" tion Act, 1936," as from the commencement thereof . . .

"(II) (g) by inserting therein in proper chronological sequence th several " amendments set forth in Part II. of the schedule hereund r."

The schedule contained the following:—

25 Geo. V., No. 78: "The Statute Law Revision Act, 1934."

Part or Section Amended	How Amended
Section 8	"And inserting the following new sub-section (8) " (at end):— "(8) Where during the year 1936 b th Houses " have agreed to any Bill, the provisions of which " either House has directed shall be included in the " Reprint of Statutes, such provisions may be " enacted by proclamation in the manner provided " by this section, with all such adjustments, addi-" tions and consequential amendments as may be " found necessary for giving full effect to th same, " whether or not such Bill has been formally pass d, " and it shall not be necessary for such Bill to be " presented for assent on behalf of His Majesty."

This amendment had not been included in any proclamation.

Quaere whether, inasmuch as the Act No. 1 was confined to ratifying certain repeals and amendments made by proclamation, the Act No. 2 had any operation so far as this new sub-section 8 of Section 8 of "The Statute Law Revision Act, " 1934," was concerned, which had never been the subject of a proclamation.

But dealing with "The Proclamations Confirmation Act (No. 2)," as if it operated as an amendment of "The Statute Law Revision Act, 1934," by inserting in Section 8 thereof the above sub-section 8;

Held—That it is not clear, that the circumstances that sub-section 8 is part of a Statute Law Revision Act and that it refers to "The Statutes Reprint Act," would limit its operation to enactments made for the purpose of revising th public general statutes of the State; but even if the context does impose som limit on the subject matter of the bills which fall within the sub-section, it is clear that the sub-section includes any bill dealing with any existing public general statute in the way of amending or re-framing the law on the subject dealt with in such statute.

By "The Licensing Act, 1932," it was provided that from any decision of the Licensing Court an appeal should lie to the Supreme Court, and that every such appeal should be on some question of law only, and should be instituted by notice of appeal delivered within 10 days after the date of the decision. Th notice of appeal in this case was given on December 17, 1936, i.e., 20 days after the decision of the Licensing Court.

On December 3, 1936, a bill to amend "The Licensing Act, 1932," was brought into the House of Assembly, containing provisions which, in substance, were that an appeal should lie to the Supreme Court on matters of fact as well as of law, and that such appeal should be by way of rehearing, and that notice of appeal might be given at any time before December 21, 1936. That bill, with a minor amendment, was passed by both Houses of Parliament.

On December 7, 1936, His Excellency the Governor issued a proclamation under Section 8 of "The Statute Law Revision Act," purporting to amend "The " Licensing Act" substantially to the same effect, and in the same respects as the provisions of the abovementioned bill. And on December 24, 1936, His Excellency notified the President of the Legislative Council that he could not assent to the bill to amend "The Licensing Act" as he was advised that it was unnecessary, its provisions having been already enacted by proclamation in pursuance of Section 8 of "The Statute Law Revision Act, 1934." On January 29, 1937, His Excellency issued a proclamation notifying that he had withheld assent to the said bill.

Held—

1. That the proclamation of His Excellency the Governor, purporting to amend "The Licensing Act," could not be supported under sub-section 1 of Section 8 of "The Statute Law Revision Act, 1934," for the reasons:—

(a) That it was not competent for the Governor by proclamation to enact, under sub-section 1 of Section 8 of "The Statute Law Revision Act, 1934," the provisions of a bill, after the two Houses of the Legislature had passed it.

(b) That although the proclamations thereby authorised are permitted to effect alterations in the law, yet they are confined to such alterations as are necessary for the purpose of revision, and that the alteration of the right of appeal on questions of law only, to a right of appeal on both law and facts, would carry "revision" to its extremity, if not beyond it; but a provision conferring on a party to a curial proceeding for a fortnight a new right to challenge an adjudication in a proceeding made prior to the alteration of the law, goes quite beyond anything permissible in performance of the function of revising, and the proclamation was, therefore, not within the scope of sub-section 1 of Section 8 of "The Statute Law Revision " Act."

2. That sub-section 8 of Section 8 of "The Statute Law Revision Act, 1934," did not delegate to the Governor the power to enact laws (e.g., the amendments to "The Licensing Act, 1932," here in question), but that it purported to create a new legislative authority consisting of the Legislative Council, the House of Assembly, and His Excellency the Governor as the Executive (perhaps the Attorney-General should be included), and to confer upon them as a composite body exercising separate functions, the very extensive (if not general) authority to repeal statutes and make laws.

3. Sections 14 and 32 of "The Australian Constitutions Act, 1850," provide that the Governor of Tasmania with the advice and consent of the Legislative Council and the House of Assembly shall have authority to make laws for the peace, order, and good government of the State; that Section 5 of "The Colonial " Laws Validity Act, 1865," which enacts that "every *representative legislature* " shall in respect to the colony under its jurisdiction, have and be deemed at all " times to have had full power to make laws respecting the constitution power " and procedure of *such legislature* . . . " should be construed as referring to the authority, other than the Imperial Parliament or His Majesty in Council, competent, *with the assent of the Crown*, to make laws for any colony, and that the Section does not confer authority on a Colonial Legislature to eliminate the Crown as part of its Parliament, and that Section 31 of "The Australian Con- " stitutions Act, 1842," which provides that "every bill which has been passed by" the legislature of the State "shall be presented for Her Majesty's assent to the

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"Governor . . . " stands unqualified by "The Colonial Laws Validity Act, 1865," and therefore any State Law which is "in any respect repugnant to it," is "absolutely void and inoperative"; and therefore it is beyond the competence of the State Parliament to enact that a bill passed by both Houses need not be presented to the Governor to be dealt with by him in accordance wih the provisions of Section 31 of "The Australian Constitutions Act, 1842," and, to that extent, therefore, Section 8 (8) of "The Statute Law Revision Act, 1934," was *ultra vires.*

On November 27, 1936, the Licensing Court refused applications by William Redmond Scully and Daniel Ford respectively, for hotel licences in respect of the "Pioneer Hotel," at Bradshaw's Creek, and the "Federal Hotel," at Derby.

At that time, "The Licensing Act, 1932," provided for appeals from the Licensing Court to the Supreme Court upon questions of law only; and provided that notice of any such appeal should be given within 10 days after the decision of the Licensing Court.

Section 8 (1) of "The Statute Law Revision Act, 1934," as originally enacted empowered the Governor on the recommendation of the Attorney-General by proclamation to make verbal amendments for the purpose of correcting any typographical, grammatical, or other similar errors, but provided that no such amendment should be made for the purpose of effecting any alteration in the law. By proclamations, subsequently confirmed by statute, this section was amended by deleting the requirement that the proclamation should not be made for the purpose of effecting an alteration in the law and substituting the words "and making such further revision as may be "required" and the word "verbal" was deleted.

Proclamations made by the Governor in exercise of this power were subsequently validated by Parliament by means of "The Proclamations "Confirmation Act, 1936," and amendments. Although it had never been included in any proclamation issued by the Governor, the following provision was inserted into the schedule to "The Proclamations "Act Confirmation Act (No. 2), 1936," which was passed on December 1, 1936:

> "Where during the year 1936 both Houses have agreed to any Bill, "the provisions of which either House has directed shall be in- "cluded in the Reprint of Statutes, such provisions may be "enacted by proclamation in the manner provided by this sec- "tion, with all such adjustments, additions, and consequential "amendments as may be found necessary for giving full effect "to the same, whether or not such Bill has been formally "passed, and it shall not be necessary for such Bill to be pre- "sented for assent on behalf of His Majesty"—

as an amendment of Section 8 of "The Statute Law Revision Act, "1934."

On December 3, 1936, a bill to amend "The Licensing Act, 1932," passed both Houses of Parliament. It provided, in substance, that an

appeal should lie from a Licensing Court to the Supreme Court upon questions of fact as well as of law, and that such appeal should be by way of rehearing, and that notice of appeal from any decision given before the passing of that bill might be given before December 21, 1936. But the bill was not assented to by His Excellency the Governor.

On December 7, 1936, His Excellency the Governor issued a proclamation under the abovementioned Section 8 (8) of "The Statute "Law Revision Act, 1934," purporting to amend "The Licensing Act, "1932," substantially to the same effect and in the same respects as the provisions of the abovementioned bill.

It was by virtue of this proclamation that the appellants claimed a right of appeal from the Licensing Court to the Supreme Court. Their notices of appeal were given on December 17, 1936.

When the appeals came on for hearing in the Supreme Court before CLARK, J., His Honour requested counsel to argue the question, whether the amendments which the proclamation dated December 7, 1936, purported to make to "The Licensing Act, 1932," were law.

Peter Crisp, for the Crown, outlined the various legislative and executive acts which gave rise to the question and submitted that the proclamation was a valid amendment of "The Licensing Act."

R. K. Green, for the appellant Ford: The function of the Governor exercising the power conferred by Section 8 (8) of "The Statute "Law Revision Act, 1934," is the same as his function in assenting to, vetoing, or reserving Acts. But if that is not so, the question arises whether the legislating body referred to in Section 8 (8) is a subordinate or an independent body. It is submitted that it is subordinate. (Counsel referred to *Moore, Commonwealth of Australia*, 2nd ed., 255; *Keith, Responsible Government*, Volume 1, p. 352; *Victorian Stevedoring Co.* v. *Dignan*, 46 *C.L.R.*, 73; *In re Initiative and Referendum* (1919), *A.C.* 935; *Clark, Constitutional Law; Powell* v. *Apollo Candle Co.*, 10 *A.C.* 282; *Taylor* v. *The Commonwealth*, 23 *C.L.R.*, 250.)

J. E. Heritage, for the appellant Scully: It was not necessary to reserve the bill to amend "The Proclamations Confirmation Act, 1936," by reason of Section 1 of "The Australian Constitutions Act, 1907." The only effect of the proclamation of December 7, 1936, is to give effect to the bill which had passed both Houses of Parliament.

Peter Crisp, in reply, adopted Green's argument. The new legislative body is subordinate to Parliament. Parliament may extinguish it; it cannot extinguish Parliament. It is submitted that a delegation of legislative power as extensive as Section 8 (8) of "The Statute "Law Revision Act, 1934," is valid. It is also submitted that "The "Proclamations Confirmation Act (1936), No. 2," by which sub-section 8 of Section 8 of "The Statute Law Revision Act, 1934," was intro-

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duced, is a valid exercise of constitutional power. (Counsel referred to "The Australian Constitutions Act, 1907," "The Colonial Laws "Validity Act, 1865," *Taylor* v. *The Commonwealth*, 23 *C.L.R.*, 250.)

C.A.V.

CLARK, J.: This case has been brought before the Court by one William Redmond Scully (I will refer to him as "the appellant") as an appeal from a determination of the Licensing Court for the district of Ringarooma, made on November 27, 1936, refusing an application made by the appellant for a hotel licence in respect of the "Pioneer "Hotel" at Bradshaw's Creek.

At the date on which the application to the Licensing Court for the said licence was made by the appellant, and thereafter until November 27, 1936, and thereafter until December 7, 1936, the enactments in force conferring a right of appeal from Licensing Courts to the Supreme Court, and prescribing the powers of the Supreme Court on the hearing of an appeal, were Sections 55, 56, and 57 of "The Licen- "sing Act, 1932."

Those sections were as follows:—

"55. Except where otherwise expressly provided, every person "who is aggrieved by any order, decision, or determination of a Court "under this Act, other than in respect of any offence against "this Act, may appeal therefrom to the Supreme Court as herein- "after provided."

"56 (1) Every such appeal shall be upon some question of law "only, and shall be instituted by notice of appeal in the form set "forth in the Second Schedule, which shall set forth the grounds upon "which the appeal is made.

"(2) The appellant shall deliver such notice to the clerk within "ten days after the date of such order, decision, or determination, "and shall within the like time serve a copy of such notice on every "person who appeared or was represented at the hearing of the "application or matter in which such order, decision, or determination "was made or given, or upon the attorney of such person.

"(3) Subject to the provisions of Section Fifty-seven, every such "appeal shall be heard by a judge of the Supreme Court."

"57 (1) Upon the hearing of any such appeal, the judge may—

"I. Remit the same to the Court for rehearing, with such direc- "tions, if any, as he may think just:

"II. Allow the appeal, and set aside, reverse, alter or vary such "order, decision, or determination, and make such order there- "on as he may think just: or

"III. Dismiss the appeal—

"and may make such order as to the costs of the appeal as he may "think fit.

"(2) The judge, in any case in which he thinks fit, upon the "application of any party thereto, or on his own motion, may refer "the appeal for hearing and determination by the Full Court, and "such Court may exercise the powers conferred by this section upon "the judge."

The notice of appeal in this case was given on December 17, 1936, that is to say, twenty days after the decision of the Licensing Court which is the subject of the appeal.

On December 7, 1936, His Excellency the Governor made a proclamation under Section 8 of "The Statute Law Revision Act, 1934," in the following terms:—

"WHEREAS by Section 8 of 'The Statute Law Revision Act, 1934,' "it is provided that the Governor, on the certificate of the Attorney-"General, may amend any Act in certain cases: And whereas it is "expedient that the enactments set forth in the schedule hereto "should be amended in the manner and to the extent set forth in "that schedule: Now therefore I, Sir ERNEST CLARK, Knight "Commander of the Most Honourable Order of the Bath, Commander "of the Most Excellent Order of the British Empire, Governor in and "over the State of Tasmania and its Dependencies, in the Common-"wealth of Australia, in exercise of the powers and authorities "vested in me by 'The Statute Law Revision Act, 1934,' and acting by "and with the consent of the Executive Council, and upon the certi-"ficate of the Honourable the Attorney-General, do, by this my pro-"clamation, amend the several Acts enumerated in the schedule hereto "in the manner and to the extent set forth in that schedule.

"Given under my hand, at Hobart, in Tasmania, this 7th day of "December, 1936.

"E. CLARK, Governor."

The relevant part of the schedule is as follows:—

"23 Geo. V., No. 55—'The Licensing Act, 1932.'"

"Part or Section Amended	How Amended
Section 56	By deleting—
	"Be upon some question of law only, and shall" (in sub-section (1))
	and inserting—
	the following transitory provision (after sub-section (3)):—
	"(4) Notice of appeal in respect of any "order, decision, or determination made or "given after the 31st October, 1936, and

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	"before the 9th December in that year may "be given at any time not later than the "21st December, 1936."

"Part or Section Amended	How Amended
Section 57 (1)	The following new paragraph— "I. Hear and determine afresh the applica- "tion or matter in respect of which the "appeal is lodged"— and renumbering paragraphs I to III (as originally enacted) as II to IV; and inserting— "and the procedure on any such appeal may "be prescribed by Rules of Court under 'The "'Supreme Court Civil Procedure Act, "'1932'" (at the end of sub-section (1)).

The proclamation does not state whether it was made exclusively under sub-section (1) of Section 8 of "The Statute Law Revision Act, "1934," or under sub-section (8) (which incorporates sub-section (1) so far as it deals with the manner in which the proclamation is to be made), but in fact (as will appear later) it was made under sub-section (8).

Obviously the amendments purported to be made by the proclamation, would, if valid, have made very radical changes in the extent of the right of appeal and the powers of the Supreme Court on the hearing of the appeal, and conferred a right of appeal in some cases (although, I understand that the only cases in which the right of appeal purported to be conferred by sub-section (4) was exercised, were this case and another which came before me at the same time as this case), in which a right of appeal which had formerly existed by virtue of the statute before its amendment, might have been extinguished by reason of the effluxion of the time prescribed by sub-section (2) of Section 56.

The proclamation was published in the *Gazette* on December 8, 1936.

In view of the fact that the amendments (I will refer to them as such) of "The Licensing Act, 1932," to which I have referred appeared to have been made, not by statute, but by a proclamation of His Excellency the Governor, and being desirous of satisfying myself that I could lawfully hear the appeal and exercise the powers which the amendments purported to confer, I requested Counsel for the appellant in this case, and Counsel for the appellant in the other case to which I have referred, and Counsel for the Crown respectively,

to argue the question whether the purported amendments were law, and on an adjourned hearing of the appeal they did so.

Since the argument, I have considered the question, and, as I have formed the opinion that the purported amendments are not law, I propose to state the reasons which have led me to that conclusion.

In order to do this, it is necessary to trace, to some extent, the several legislative and executive acts, leading up to the proclamation of December 7, 1936, and by virtue of some of which it is claimed the several provisions set forth in that proclamation became law. I say, to some extent, because to cover all the ground which is germane although not absolutely necessary to be stated, would make this necessarily long judgment very much longer.

I commence with "The Statute Law Revision Act, 1934," which came into force on December 13, 1934.

This Act has been much amended by statutes and proclamations confirmed by statutes, but parts only of both the original Act and the amendments need be referred to.

The parts of the original Act, to which I propose to refer, are the title, Sections 2 and 3, the opening words Paragraph III, and the last three lines of Section 4, and Section 6.

The title, the opening words Paragraph III, and the last three lines of Section 4, and Sections 2 and 6 have not been amended.

Section 3 has been amended, and I will set out the section as amended.

The title is as follows:—

"An Act to revise the Statute Law of this State; to repeal certain "Enactments which have become unnecessary; to amend certain "Acts; to eliminate certain Definitions, Provisions, and Words "rendered unnecessary by 'The Acts Interpretation Act, 1931,' and "other Acts; to assign Short Titles to Acts where necessary and to "simplify the Short Titles of certain Acts; and to secure, as far as "practicable, a greater Measure of Uniformity of Form and Expres-"sion in Legislative Enactments."

Sections 2 and 3 (as amended) and the opening words of Section 4 are as follows:—

"2 (1) The enactments enumerated in the first schedule are here-"by repealed to the extent therein indicated.

"(2) Where, in the first schedule, an Imperial Act is expressed "to be repealed, it shall be intended that the same shall no longer "extend or apply to this State."

"3 (1) The repeal by this Act of any enactment the only effect "of which was to amend a prior enactment by—

"I. Repealing, expunging, or deleting any Part, Division, section, "sub-section, schedule, word, or numeral from: or

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"II. Inserting or substituting any such matter as aforesaid in "the text of such prior enactment, shall not affect the opera- "tion of the amendment so made, but such prior enactment "shall continue to be read and construed, as altered by such "repealed enactment, as if the same had not been repealed, "subject, however, to the provisions of any subsequent Act "amending or modifying the same.

"(2) The provisions of sub-section (1) hereof shall apply in "relation to any amending Act repealed by this Act, and, if such Act "contained a provision preserving the operation of amendments made "by any Act repealed by it, the operation of such amendments shall "be continued notwithstanding such repeal.

"(3) Where by this Act an enactment is both amended and re- "pealed, it shall be intended, unless the contrary intention appears, "that such enactment shall have effect, as so amended, in accordance "with the provisions of sub-section (1) hereof before such repeal takes "effect."

"4. In the reprinting of the Statute Law of this State, or of any "part thereof, effect shall be given to the following provisions:—

"I. ——————————————————.

"II. ——————————————————.

"III. Where there are more schedules than one to an Act, such "schedules shall be called and cited as 'the first schedule,' "'the second schedule' and so on according to their number: "and

"IV. ——————————————————.

"and it shall be lawful for the Government Printer, by direction of "the Attorney-General, to make such alterations in the text of any "Act as may be necessary to give effect to these provisions."

It will be observed, that it is the reprinting of "the Statute Law," which is here spoken of.

Section 6 is as follows:—

"6 (1) The Acts enumerated in the second schedule are hereby "amended in the manner and to the extent indicated in the fourth "column of that schedule.

"(2) Where, in the fourth column of the second schedule any "word or numeral is cited, the citation thereof shall have reference, "unless the contrary intention appears, to such word or numeral "where first occurring in the part or section in relation to which it "is cited; or, if other words or numerals of the same part or section "are previously cited, where first occurring after the last of such "words or numerals so cited."

It is not clear, I think, whether the words "the same" at the end of sub-section (1) of Section three of this Act, refer to the "prior "enactment" or the "repealed enactment."

If they refer to the repealed enactment, then sub-section (1) must contemplate an Act which has been wholly repealed as still being capable of amendment by "any subsequent Act"—but Act, not "Act "or proclamation made under this Act." (But see sub-sections (6) and (7) of Section 8.)

But sub-section (3) suggests that this is not the true construction of sub-section (1), because it provides that where the Act ("The "Statute Law Revision Act, 1934") both amends and repeals an enactment, such enactment (unless the contrary intention appears) shall have effect as so amended "in accordance with the provisions "of sub-section (1) hereof before such repeal takes effect."

On January 31, 1936, "The Statute Law Revision Act, 1935," came into force, and was repealed by a Proclamation dated June 29, 1936 (*Gazette*, June 30, 1936), which was confirmed by "The Proclamations "Confirmation Act, 1936."

This Act ("The Statute Law Revision Act, 1935") made many amendments to the Act of 1934 (as amended by an intervening Act—"The Statute Law Revision Act (No. 2), 1934"—which also was repealed by the proclamation dated June 29, 1936), including the addition thereto of a new section, viz., Section 8.

This new section has itself been much amended; and two of such amendments consist of the addition of two new sub-sections to it, viz., sub-sections (7) and (8).

At this stage I propose to set out sub-section (1) of Section 8 as enacted by the Act of 1935, sub-sections (1) to (6) as subsequently amended, and sub-section (7)—thus leaving sub-section (8) to be stated later.

The original sub-section (1) was as follows:—

"(1) It shall be lawful for the Governor, on the recommendation "of the Attorney-General, by proclamation to make in any Act such "verbal amendments as he may think necessary for—

"I. Correcting any typographical, grammatical, or other patent "error:

"II. Rectifying any omission in any amendment made for pur- "poses of revision: or

"III. Ensuring consistency and co-ordination in the amendments "made to such Act—

"but no such amendment shall be made for the purpose of effecting "any alteration in the law."

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This provision was in accordance with the English practice with regard to Statute Law Revision Acts, the effect of which is "in the "main literary only. They excise dead matter, prune off superflui- "ties and reject clearly inconsistent enactments. Farther than this, "they do not profess to go." (*Craies—Statutory Law*, 4th ed., p. 303.)

Sub-sections (2) to (7) are as follows:—

"(2) Subject to this section every amendment so made shall have "effect as from January 31, 1936, or such earlier date as may be "specified therein.

"(3) A copy of every amendment made in pursuance of this "section shall be laid on the table of each House of Parliament within "the first ten sitting days after it is so made.

"(4) If either House of Parliament, within fourteen sitting days "after any such amendment is tabled therein, by resolution disallows "the same, the amendment so disallowed shall be of no effect.

"(5) No such amendment shall be made after December 31, 1937." (This sub-section was repealed by the proclamation dated June 29, 1936, but by a proclamation dated July 17, 1936—that is to say, after "The Statute Law Revision Act, 1935," which inserted Section 8 in "The Statute Law Revision Act, 1934," had been wholly repealed —the sub-section was amended and proclaimed into a second existence, and the resuscitation and amendment were confirmed by "The "Proclamations Confirmation Act, 1936." Both the Executive and Parliament appear to have had some misgiving as to exactly what Parliament had done, when it placed some statutes, at once, amongst both the quick and the dead.)

"(6) The Governor by proclamation may repeal—

"I. Any enactment which is within the description contained in "section three, or which is no longer required:

"II. Any section of an Act which contains only the repeal of enact- "ments set forth in a schedule to such Act—

"and every such repeal shall be deemed to have been effected by this "Act and shall be subject to the provisions of section three where the "same are applicable.

"(7) All such repeals, subject to the provisions of sub-section (4) "hereof, shall be inserted in the first schedule in proper chronological "sequence, and shall be deemed to form part of that schedule."

Sub-section (6) was amended , and sub-section (7) inserted in Section 8, by the proclamation dated July 17, 1936, that is to say, after "The Statute Law Revision Act, 1935," which had inserted Section 8 in "The Statute Law Revision Act, 1934," had been wholly repealed. But the proclamation was confirmed by "The Proclamations Con- "firmation Act, 1936."

By the proclamation, dated July 17, 1936 (*Gazette*, July 21, 1936) and confirmed by "The Proclamations Confirmation Act, 1936" (the provisions of which will be stated presently), sub-section (1) was amended by deleting the words "but no such amendment shall be "made for the purpose of effecting any alteration of the law" and substituting the words "and making such further revision as may be "required."

By a proclamation, dated October 23, 1936 (*Gazette*, November 3, 1936) sub-section (1) was further amended by the deletion of the word "verbal" ("such verbal amendments") and the amendment was confirmed by "The Proclamations Confirmation Act (No. 2), 1936" (the provisions of which will be stated presently).

I will defer dealing with the genesis of sub-section (8) until I come to deal with "The Proclamations Confirmation Act (No. 2), 1936."

The next statute to be considered is "The Statutes Reprint Act, "1935," which came into operation on January 16, 1936.

I refer to this Act because sub-section 8 of Section 8 (of "The "Statute Law Revision Act, 1934") speaks of the provisions of any Bill agreed to by both Houses (the Legislative Council and House of Assembly) which either House "has directed shall be included in the "Reprint of Statutes."

This Act ("The Statutes Reprint Act, 1935") was amended by "The Proclamations Confirmation Act (No. 2), 1936," or by a proclamation confirmed by that Act.

The provisions of the Act as amended are as follows:—

"An Act to make provision in relation to the Publication of an "Annotated Reprint of the Public General Acts of Tasmania under "the Title of 'The Public General Acts of Tasmania (Reprint),' and "to empower the Courts to take Judicial Notice of such Reprint.

"Whereas arrangements have been made for the publication com-"mencing in the year 1936 of an annotated reprint of the Public "General Acts of Tasmania, with amendments incorporated, under "the title of 'The Public General Acts of Tasmania (Reprint).'

"And whereas it is desirable that all courts and persons acting "judicially should be directed to take judicial notice of the said "reprint:

"Be it therefore enacted by His Excellency the Governor of Tas-"mania, by and with the advice and consent of the Legislative Coun-"cil and House of Assembly, in Parliament assembled, as follows:

"1. This Act may be cited as 'The Statutes Reprint Act, 1935.'

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"2. In this Act—

"'The Editorial Board' means the Board appointed for the pur-
"poses of the reprint:

"'The reprint' means the annotated reprint of the Public General
"Acts of Tasmania, with amendments incorporated, proposed
"to be published in and after the year 1936 under the title
"of 'The Public General Acts of Tasmania (Reprint).'

"3 (1) On being satisfied, after receipt of a report from the "Editorial Board, that the reprint correctly expresses and sets forth "the law enacted in the several Public General Acts contained in each "volume of the reprint, the Attorney-General shall sign a certificate "in the form in the schedule.

"(2) A copy of the certificate of the Attorney-General shall be "printed with and incorporated in each volume of the reprint other "than the Index volume, and such certificate shall, in relation to any "enactment contained in the reprint, be proof, until the contrary is "proved, either by the production of the official volume of statutes "in which such enactment was originally contained or otherwise, that "the reprint correctly expresses and sets forth the law enacted by "that enactment and the amendments thereof, if any, as in force at "the date mentioned in such certificate."

"4 (1) All courts and persons acting judicially shall take judicial "notice of the reprint so far as the same sets forth the text of the "Acts therein reprinted.

"(2) In the application of section six of 'The Acts Interpretation "'Act, 1931,' to the reprint, all descriptive headings (not being cross-"headings reproduced from the original text) printed at the begin-"ning of sections, or parts of sections, shall be deemed to be mar-"ginal notes; and all annotations appended to any section or part of "any Act shall be deemed to be footnotes.

"(3) No annotations or explanatory matter preceding or follow-"ing any Act in the reprint shall be deemed to be part of such Act "or be judicially noticed."

(Section 4 was inserted by a proclamation confirmed by "The Pro-"clamations Confirmation Act (No. 2), 1936.")

It will be observed that Section 2 speaks of the "Public General "Acts of Tasmania with amendments incorporated," and that sub-section (2) of Section 3 speaks of "the official volume of statutes in "which such enactment was originally contained or otherwise that the "reprint correctly expresses and sets forth the law enacted by that "enactment and the amendments thereof," and that the preamble speaks of "The Public General Acts of Tasmania" (amendments are not mentioned), and sub-section (1) of Section 3 of "the several Public "General Acts" (again amendments are not mentioned—and see also opening words of Section 4 of "The Statute Law Revision Act, 1934").

It might, therefore, seem that the amendments referred to in Section 2 and Section 3 (2) are amendments made by statute.

But the principal Act of the several Acts providing for the revision of the statute law of the State is "The Statute Law Revision Act, "1934" (as amended), and Section 8 of that Act provides for the amendment of statutes by a proclamation made by the Governor as the Executive, and a proclamation, made by the Governor under that Section is not a statute (unless it has been confirmed as a statute by statute).

And as "The Statutes Reprint Act, 1935," was enacted as a part of the legislative scheme for the revision of the statute law of the State, it would seem that the "amendments" referred to in that statute include amendments made by proclamation under Section 8 of "The "Statute Law Revision Act, 1934," as amended by "The Statute Law "Revision Act (No. 2), 1934," and "The Statute Law Revision Act, "1935," and also as amended by clause (g) of Paragraph II of Section 2 of "The Proclamations Confirmation Act (No. 2), 1936" (the provisions of which will be stated presently), *if* that clause operates on any part of Part II of the schedule to that Act which had not been previously proclaimed as an amendment under the then existing provisions of Section 8 of "The Statute Law Revision Act, 1934" (as amended by "The Statute Law Revision Act (No. 2), 1934," and "The Statute Law Revision Act, 1935").

If this is so, then "The Statutes Reprint Act, 1935," means that the "amendments" and "enactments" therein referred to which have not been made by statute are to be printed in "The Reprint" as if they were part of the Public General Statutes of the State; and the amendments and enactments which have been made by proclamation and have not been confirmed by statute or have been "enacted" by a proclamation under sub-section (8) of Section 8 of "The Statute Law "Revision Act, 1934," founded on a Bill which has not been assented to by the Crown, are to masquerade through the Reprint as statutes.

The difficulty would seem to have arisen from the fact that Parliament naturally hesitated to call laws not made or confirmed by the Crown in Parliament "statutes," but desired to treat them, for the purposes of the Reprint, as if they were statutes.

Even the Parliament of Henry VIII., which enacted the "Statute "of Proclamations" (31 Hen. VIII., C.8), found that it could go no further than to enact that His Majesty's Proclamations "should be observed and kept as though they were made by Act of Parliament." (Cf. sub-sections (6) and (7) of Sec. 8 of "The Statute Law Revision Act, 1934.")

But it was not contended, and I do not think that the effect of "The "Statutes Reprint Act, 1935," is, that everything which is printed as part of "The Reprint" becomes a statute or part of a statute (descriptive headings, annotations, explanatory notes, marginal notes, and footnotes are, of course, expressly denied that effect), not-

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withstanding that it was not enacted as a statute by the Crown in Parliament, and may even not have been in existence when "The "Statutes Reprint Act, 1935," came into operation (e.g., the alleged amendments to "The Licensing Act, 1932," here in question).

Nor was it contended that Section 8 of "The Statute Law Revision "Act, 1934," makes the amendments made under it "statutes"—that would only raise the same question.

Between December 13, 1934 (the date on which "The Statute Law "Revision Act, 1934," came into operation) and August 10, 1936 (the date on which "The Proclamations Confirmation Act, 1935," came into operation), His Excellency the Governor made five proclamations under and by virtue of, or which purported to be made under and by virtue of, "The Statute Law Revision Act, 1934" (as amended by the Act No. 2 of 1934 and the Act of 1935).

These were gazetted on February 25, 1936, March 24, 1936, May 5, 1936, June 30, 1936, and July 21, 1936, respectively, and each of them repealed or purported to repeal a number of statutes or parts thereof, and to make a number of amendments to other statutes.

On August 10, 1936, "The Proclamations Confirmation Act, 1936," came into operation.

The preamble to the Act is as follows:—

"An Act to ratify and confirm certain Repeals and Amendments "made by Proclamation under the provisions of 'The Statute Law "'Revision Act, 1934.'"

And it contains the following recitals:—

"Whereas the Governor is empowered under the provisions of 'The "'Statute Law Revision Act, 1934,' to make certain amendments and "to repeal certain enactments for the purposes of that Act: And "whereas, by proclamations gazetted on February 25, March 24, May "5, June 30, and July 21, respectively, of the present year, the re-"peals and amendments set forth in Parts I and II of the schedule "respectively were made by the Governor under the said Act: And "whereas, in certain instances, doubts may arise as to whether the "said repeals and amendments, or some of them, are within the scope "of the authority conferred by the said Act, and it is desirable to "ratify and confirm the same and to remove any doubt as to their "validity and effect:"

The enacting part of the Act is as follows:—

"1. This Act may be cited as 'The Proclamations Confirmation "'Act, 1936.'

"2 (1) The repeals set forth in Part I of the schedule, and the "amendments of the several enactments enumerated in Part II of the "schedule, as set forth in the fourth column thereof, are hereby "ratified and confirmed, and are declared to have been lawfully and

"validly made, and all such repeals and amendments shall have, and "be deemed to have had, effect according to the tenor thereof.

"(2) The repeals and amendments set forth in the schedule com- "prising a consolidation of the repeals and amendments made by the "several proclamations recited in the preamble, with the corrections "of earlier proclamations by later proclamations embodied therein, "shall be deemed to express the combined effect of all the said pro- "clamations, and in the event of any accidental variance, not being a "mere typographical error or misprint, being found to exist between "the amendments in the schedule and the corresponding amendments "contained in the proclamations, the amendments in the schedule shall "prevail, and shall be construed as correcting the proclamations as "from the commencement thereof."

The repeals and amendments referred to in the body of the Act are set out in the schedule to it.

Between August 10, 1936 (the date on which the last mentioned Act came into operation) and December 1, 1936, His Excellency the Governor made further proclamations under and by virtue of, or which purported to be made under and by virtue of, "The Statute "Law Revision Acts of 1934 and 1935." On December 1, 1936, "The "Proclamations Act (No. 2), 1936," came into operation.

The title to this Act is:—

"An Act to amend 'The Proclamations Confirmation Act, 1936.'"

The enacting part (so far as the same is relevant to the matter in hand) is as follows:—

"1. This Act may be cited as 'The Proclamations Confirmation "'Act.(No. 2), 1936.'

"2. The Principal Act is hereby amended as from the commence- "ment thereof—

"I. As to the first schedule thereto—

"(a) By substituting——————————:

"(b) By expunging——————————: and

"(c) By inserting——————————:

"II. As to the second schedule thereto—

"(a) By substituting——————————: and

"(b) By inserting——————————:

"(c) By deleting——————————:

"(d) By inserting——————————:

"(e) By substituting——————————:

"(f) By inserting——————————: and

"(g) By inserting therein in proper chronological sequence "the several amendments set forth in Part II of the "schedule hereunder.

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"3 (1)——————————————————

"(2)——————————————————

"4. The provisions of section two of the Principal Act shall apply "to the several proclamations which are consolidated and embodied in "the schedule as if the same had been recited in the preambl to the "Principal Act."

Section 2 of this Act speaks of the "first schedule" and "second "schedule" of "The Proclamations Confirmation Act, 1936."

The Act of 1936 contains only one schedule, which is divided into two parts denominated as "Part I" and "Part II," and therefore unless the case falls within Paragraph III of Section 4 of "The Statute Law "Revision Act, 1934," the words "the first" and "the second" respectively must be read as "Part I of the" and "Part II of the."

The repeals and amendments referred to in the body of this Act are set out in the schedule to it, and included in the amendments is the insertion in Section 8 of "The Statute Law Revision Act, 1934" (as amended by the Act (No. 2) of 1934 and the Act of 1935) of a new sub-section—sub-section (8).

The part of the schedule by which this amendment was made is as follows:—

"25 Geo. V., No. 78—The Statute Law Revision Act, 1934."

"Part or Section Amended	How Amended
Section 8	"And inserting the following new sub-section "(8) (at end):— "(8) where during the year 1936 both "Houses have agreed to any Bill, the provi- "sions of which either House has directed shall "be included in the Reprint of Statutes, such "provisions may be enacted by proclamation "in the manner provided by this section, with "all such adjustments, additions, and conse- "quential amendments as may be found neces- "sary for giving full effect to the same, "whether or not such Bill has been formally "passed, and it shall not be necessary for such "Bill to be presented for assent on behalf of "His Majesty."

This amendment had not been included in any proclamation made under "The Statute Law Revision Acts" prior to December 1, 1936 (the date on which "The Proclamations Confirmation Act (No. 2), "1936," came into operation), and it had not been the subject of any proclamation made under those Acts since that date.

I will defer an examination of the terms of sub-section (8), until I have discussed the question of the operation of "The Proclamations "Confirmation Act (No. 2), 1936," so far as this sub-section is concerned.

The title to "The Proclamations Confirmation Act, 1936" (which, for the purpose of the question now under discussion, I will refer to as the Act No. 1), is an Act to ratify and confirm certain repeals and amendments "made by Proclamation under the provisions of 'The "'Statute Law Revision Act, 1934.'"

The Act recites that by five proclamations (the dates of which are set out above) the repeals "and amendments set forth in Parts I and "II of the schedule respectively were made by the Governor under the "said Act" (i.e., "The Statute Law Revision Act, 1934"), and that in certain instances doubts might arise (no doubt had arisen) whether the said repeals and amendments, or some of them, were within the scope of the authority conferred by that Act, and that it was desirable to ratify and confirm the same and remove such doubts.

And then sub-section (1) of Section 2 enacts that the repeals set forth in Part I of the schedule, and "the amendments of the several "enactments enumerated in Part II of the schedule as set forth in "the fourth column thereof, are hereby ratified and confirmed, and "are declared to have been lawfully and validly made, and all such "repeals and amendments shall have and be deemed to have had effect "according to the tenor thereof."

And sub-section (2) of the same Section enacts that the repeals and amendments set forth in the schedule "comprising a consolidation of "the repeals and amendments made by the several proclamations "recited in the preamble" with the corrections of earlier proclamations by later proclamations should be deemed to express the combined effect of all the said proclamations.

The operation of this Act, then, is most explicitly—by the title, preamble, and enacting section—confined to ratifying and confirming repeals and amendments made by certain recited proclamations made or purporting to have been made under "The Statute Law Revision "Act, 1934."

The title to "The Proclamations Confirmation Act (No. 2), 1936" (which for the purpose of the present discussion I will refer to as the Act No. 2) is "an Act to amend 'The Proclamations Confirmation "'Act, 1936.'"

Clause (g) of Paragraph II of Section 2 provides (*inter alia*) that Part II of the schedule to the Act No. 1 (which is confined to amendments made by certain recited proclamations) shall be amended "by "inserting therein in proper chronological sequence the several "amendments set forth in Part II of the schedule hereunder"; and a number, if not the most, of those amendments had previously been proclaimed under "The Statute Law Revision Act, 1934."

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Then Section 4 enacts that the provisions of Section 2 of the Act No. 1 shall apply to "the several proclamations which are consoli- " dated and embodied in the schedule as if the same had been recited in " the preamble to the" Act No. 1.

But the amendment in Part II of the schedule to the Act No. 2, inserting in Section 8 of "The Statute Law Revision Act, 1934," sub-section (8) thereof, had not been proclaimed under "The Statute Law " Revision Act, 1934," or either of the Acts amending it.

Section 4 therefore of the Act No. 2 cannot operate to bring sub-section (8) of Section 8 of "The Statute Law Revision Act, 1934," within the operation of Section 2 of the Act No. 1.

And clause (g) of Paragraph II of Section 2 of the Act No. 2 only purports to insert the amendments therein referred to—many if not most of which had been proclaimed under "The Statute Law Revision " Act, 1934"—into Part II of the schedule to the Act No. 1, and the operation of that Act is most explicitly confined to amendments made by certain recited proclamations under "The Statute Law Revision " Act, 1934."

What operation then can the Act No. 1 have with respect to the amendment of Section 8 of "The Statute Law Revision Act, 1935," by the insertion therein of sub-section (8)?

Without doing violence to the terms of Section 2 of the Act No. 1, and the whole purpose of that Act, the amendment in Part II of the schedule to the Act No. 2 inserting sub-section (8), cannot be read into Section 2 of the Act No. 1—particularly as Section 4 of the Act No. 2 expressly refers to Section 2 of the Act No. 1, but only applies it to the "proclamations" consolidated and embodied in the schedule in the Act No. 2 "as if they had been recited in the preamble to the" Act No. 1.

It is not a case of holding either that the Act No. 2 inserts sub-section (8) in Section 8, or that clause (g) of Paragraph II of Section 2 of that Act has no operation.

That is not the case, because there were amendments within the meaning of that clause which were made by proclamation.

I find it difficult to give the Act No. 1 any operation so far as the insertion of sub-section (8) in Section 8 of "The Statute Law Revision " Act, 1934," is concerned, but it may be that the Act No. 2 would have to be construed either as enacting that Section 8 of "The Statute Law " Revision Act, 1934," should be amended by the insertion of sub-section (8), or that such amendment should be deemed to be within the operation of Section 2 of the Act No. 1, notwithstanding that it had not been proclaimed under "The Statute Law Revision Act, 1934" (as amended by "The Statute Law Revision Act (No. 2), 1934," and "The " Statute Law Revision Act, 1935"), and I will deal with the case on that footing.

I will now consider the terms of sub-section (8) and the construction of it.

Sub-section (8) provides that "where during the year 1936 both "Houses have agreed to any Bill, the provisions of which either "House has directed shall be included in the Reprint of Statutes, "such provisions may be enacted by proclamation in the manner "provided by Section 8 with all such adjustments, additions, and con- "sequential amendments as may be found necessary for giving full "effect to the same whether or not such Bill has been formally passed "and it shall not be necessary for such Bill to be presented for assent "on behalf of His Majesty."

The sub-section, therefore, applies to any Bill which both Houses, that is to say, the Legislative Council and the House of Assembly, have agreed to, and the provisions of which either House has directed to be included in the Reprint of Statutes.

The two Houses are parts—but of course only parts—of Parliament; and the fact that the sub-section speaks of any "Bill" the provisions of which have been agreed to by both Houses, and provides that such provisions may be enacted in the manner provided by Section 8 "whether or not such Bill has been formally passed" (implying that a Bill will come within the operation of the sub-section although it has been formally passed), and the provision that "it shall not be "necessary for such Bill to be presented for assent on behalf of His "Majesty" (which implies that it may be presented for assent), clearly shows that it is as parts of Parliament that the two Houses are treated in the sub-section.

The amendment, therefore, avails itself of the existence of two of the three branches or parts of Parliament, and founds itself on a Bill agreed to by both those parts as such.

The words "any Bill," apart from a controlling context, would cover a Bill relating to any subject whatever which Parliament could deal with.

But they are in a Statute Law Revision Act, and the sub-section, in which they appear, provides for either House directing the provisions of the Bill being included in the Reprint of Statutes. Does that context limit the scope of the words "any Bill"?

These two circumstances must be considered together—each in conjunction with the other—but it will be convenient to first consider them separately.

The declared object of "The Statute Law Revision Act, 1934," is to provide for the revision of the statute law of the State, that is to say, the existing statute law of the State.

And the original sub-section (1) of Section 8 of that Act expressly confined amendments of that law by proclamation to such as did not alter the law.

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But it would appear from the amendments to the sub-section that first the Governor's advisers, and then Parliament, considered that the original sub-section (1) did not give the revisers that freedom in the revision which it was desirable they should have, and accordingly the words of the sub-section confining amendments by proclamation to verbal amendments which did not alter the law, were deleted from it.

After the amendment of the sub-section, amendments of the statute law by proclamation could be made for any of the purposes specifically mentioned in the sub-section, and also for making such "further "revision as might be required."

And such amendments could be made up to December 31, 1937 (Section 8 (5)).

The sub-section (that is to say, sub-section (1)), as so amended, certainly does not state that the amendments to be made under it may alter the law, but having regard to its history that would seem to be implicit in it. (Cf. *Attorney-General for Ontario* v. *Perry* (1934), *A.C.* 477, at pp. 485-486.) Nevertheless, it is still only "revision" which it permits to be made.

Then later on sub-section (8) was inserted. This sub-section does not speak of Bills directed to any particular purpose. It does not use the language of sub-section (1), that is to say, "amendments," "cor- "recting any . . . error," "rectifying any omissions in any amend- "ment made for the purposes of revision," "ensuring consistency "and co-ordination," or making "further revision."

And sub-section (1), as it stood when sub-section (8) was inserted, would appear to cover everything that would be possible in the way of "revision" other than repeals, and repeals are provided for by sub-sections (6) and (7) and Section 2.

These considerations would suggest that sub-section (8) was intended to have a wider scope than sub-section (1).

Then, what is the effect of the words "which either House has "directed shall be included in the Reprint of Statutes"?

I have already discussed "The Statutes Reprint Act, 1935."

It applies only to public general statutes and "amendments" thereof.

The public general statutes or "amendments" thereof to be published in the Reprint would not ordinarily include a mere repealing statute (one of the objects of the Reprint is to make available a collection of the public general statutes of the State, other than mere repealing Acts, in force at the time of its publication and of which the Court should take Judicial notice). But a repealing statute could be included in the Reprint, and there might be cases in which, during the course of the publication of the Reprint, it would become desirable that that should be done, and under sub-section (8), either House could give the necessary direction for that purpose.

A private Bill would certainly not fall within the description "public general" in "The Statutes Reprint Act, 1935."

But what according to the rules of Parliament would be the proper subject-matter of a private Bill could be dealt with as an ordinary Bill, and (unless sub-section 2 of Section 17 of "The Constitution Act, "1934," enacts otherwise—cf. *Attorney-General for New South Wales* v. *Trethowan*, 44 *C.L.R.*, 394, at pp. 429-430) "with irregularities or "departures from the usage of Parliament the Courts have nothing "to do." (*Craies*, 4th ed., p. 35, and cf. *Manigault* v. *Springs*, 199 *U.S.*, 473, at pp. 486-487.)

And in this State, it has not been uncommon for Parliament to put into a public Act provisions which could properly have been made the subject of a private Act, and indeed the purpose sought to be attained by the amendment purported to be made to "The Licensing Act, 1932," by the proclamation of December 7, 1936, and which is therein directed to become sub-section (4) of Section 56, would not have been out of place if it had been made the subject of a private Bill.

In view of these considerations it is not clear that the circumstances that sub-section (8) is a part of a Statute Law Revision Act and that it refers to "The Statutes Reprint Act," would limit its operation to enactments made for the purpose of revising the public general statutes of the State.

But even if the context does impose some limit on the subject matter of the Bills which fall within the scope of the sub-section, it is clear, I think, that the sub-section includes any Bill dealing with any existing public general statute in the way of amending or reframing the law on the subject dealt with in such statute.

The sub-section next provides that the provisions of such a Bill (that is to say, a Bill agreed to by both Houses and directed by either of the Houses to be included in the Reprint) "may be enacted" by proclamation "in the manner provided by" Section 8 "with such adjust-"ments, additions, and consequential amendments as may be found "necessary" (apparently by the Governor's advisers) "for giving "full effect to the same" (that is to say, to the provisions of the Bill as agreed to by both Houses).

And finally, the sub-section provides that it shall not be necessary for such Bill to be presented for assent on His Majesty's behalf—not that it shall not be presented, but that it shall not be necessary to present it.

Sub-section (1) of Section 8 provides that it shall be lawful for the Governor, on the "recommendation" of the Attorney-General, by proclamation to make in any Act such amendments as he may think necessary for any of the purposes mentioned in that sub-section.

Therefore, in order that the provisions of a Bill may be enacted under sub-section (8), it must have been agreed to by both Houses,

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and at least one House must have directed the provisions of it to be included in the Reprint, and (those conditions having been satisfied) the Attorney-General must have recommended to the Governor that the provisions of the Bill or such provisions with such adjustments, additions, and consequential amendments as should be found necessary (by the Governor's advisers) for giving full effect to such provisions, should be enacted by proclamation, and they must have been proclaimed by the Governor accordingly.

I do not think it necessary to consider whether sub-sections (3) and (4) of Section 8 apply to a proclamation made under sub-section (8).

I will now proceed to trace the descent of the amendments to "The "Licensing Act, 1932," here in question from sub-section (8) of Section 8 of "The Statute Law Revision Act, 1934" (as amended).

On (or shortly before) December 3, 1936, the Attorney-General brought into the House of Assembly a Bill of which the following is a copy:

"Be it enacted by His Excellency the Governor of Tasmania, by and "with the advice and consent of the Legislative Council and House of "Assembly, in Parliament assembled, as follows:—

"1. This Act may be cited as "The Licensing Act, 1936."

"2. The Principal Act is hereby amended as from the 1st Novem- "ber, 1936—

"I. By deleting the words be upon some question of law only and "'shall' in sub-section (1) of section fifty-six thereof: and

"II. By inserting—

"(a) In sub-section (1) of Section fifty-seven thereof the fol- "lowing new paragraph I:—

"I. Rehear the application or matter in respect of which the "appeal is lodged"—

"and renumbering paragraphs I to III (as originally enacted) "as II to IV: and

"(b) and the procedure on any such appeal may be prescribed "by Rules of Court under 'The Supreme Court Civil Procedure "'Act, 1932' (at the end of the said sub-section (1))."

"3. Notice of appeal in respect of any order, decision, or deter- "mination made or given before the passing of this Act, and to which "this Act applies, may be given at any time not later than Decem- "ber 21, 1936."

On December 3, 1936, the House of Assembly by resolution directed that the provisions of the Bill should be included in the Reprint of Statutes.

On December 4, 1936, the Bill (having gone through the usual and regular course) was passed by the House of Assembly with two amendments, and was thereupon transmitted to the Legislative Council.

On the same date (December 4, 1936), the Legislative Council passed the Bill, in accordance with its usual and regular course, with an amendment consisting of the deletion of one of the amendments made by the House of Assembly.

On the same date the Bill as so amended by the Legislative Council was returned by the Legislative Council to the House of Assembly; and on the same date the Legislative Council by resolution directed that the provisions of the Bill should be included in the Reprint of Statutes; and on the same date the House of Assembly, in accordance with its usual and regular course, agreed to the amendment to the Bill made by the Legislative Council.

In the result the only difference between the Bill as brought into the House of Assembly and the Bill as finally passed by both Houses was that in the first line of Section 3 the words "or petition" appeared between the words "appeal" and "in," that is to say, as finally passed Section 3 read as follows:—

"3. Notice of appeal or petition in respect of any order, decision "or determination made or given before the passing of this Act, "and to which this Act applies, may be given at any time not later "than the twenty-first day of December, one thousand nine hundred "and thirty-six."

On December 7, 1936, a certificate in the terms following was signed by the Attorney-General.

"I, ERIC JAMES OGILVIE, His Majesty's Attorney-General for "the State of Tasmania, do hereby certify that the amendments of "the Acts enumerated in the schedule hereto, which are set forth in "the third and fourth columns of that schedule, are in accordance "with the provisions of Section 8 of 'The Statute Law Revision Act, "'1934,' and that it is expedient that the said amendments should be "made by His Excellency the Governor as provided by the said Act.

"E. J. OGILVIE,
"Attorney-General."

The concluding words, "it is expedient that the said amendments "should be made by His Excellency the Governor as provided by the "said Act" are no doubt the "recommendation" required by sub-section (1) of Section 8 of "The Statute Law Revision Act, 1934."

On the same date (December 7, 1936), His Excellency the Governor made the proclamation of that date which is set out above (at pp. 9 and 10).

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It will be seen that the differences between the Bill as finally passed by both Houses of the Legislature and the provisions of it as "enacted" by His Excellency's proclamation are as follows:—

Section 2 of the Bill states that "The Licensing Act" is amended as stated in that section as from November 1, 1936, but the schedule to the proclamation does not mention any date as from which the amendments made by it (to "The Licensing Act, 1932") are to operate, except so far as it does so by the new sub-section (4) (of Section 56 of "The Licensing Act, 1932").

Paragraph II of Section 2 of the Bill provided for the insertion in sub-section (1) of Section 57 (of "The Licensing Act, 1932") of a new paragraph in the words following:—

"I. Re-hear the application or matter in respect of which the "appeal is lodged."

In the schedule to the proclamation, this has been "adjusted" (or added to and adjusted) into—

"I. Hear and determine afresh the application or matter."

And Section 3 of the Bill provides that "Notice of appeal or petition "in respect of any order, decision, or determination made or given "before the passing of this Act and to which this Act applies, may "be given at any time not later than December 21, 1936."

In the schedule to the proclamation this has been "adjusted," etc., into—

"(4). Notice of appeal in respect of any order, decision, or deter-"mination made or given after October 31, 1936, and before Decem-"ber 9, in that year, may be given at any time not later than Decem-"ber 21, 1936."

The said certificate and proclamation were published in the *Gazette* on December 8, 1936.

As previously observed, the proclamation does not state whether it was made under sub-section (1) of Section 8 of "The Statute "Law Revision Act, 1934," exclusively, or under sub-section (8) of Section 8 which incorporates the provisions of sub-section (1) as to the manner in which the enacting proclamation is to be made. It recited that "by Section 8 of 'The Statute Law Revision Act, 1934,' it "is provided that the Governor on the certificate of the Attorney-"General may amend any Act in certain cases," and that it was expedient that "the enactments set forth in the schedule" thereto "should be amended in the manner and to the extent set forth in the "schedule"; and it purported to be made "in exercise of the powers "and authorities vested" in His Excellency "by 'The Statute Law "'Revision Act, 1934'"; and the part of Section 8 of "The Statute "Law Revision Act, 1934," which provides that "the Governor on "the certificate (recommendation)" of the Attorney-General may amend any Act "in certain cases" is sub-section (1) thereof.

This might seem to point to the fact that the proclamation was made exclusively under sub-section (1).

But, in view of the fact that the Bill to amend "The Licensing Act, "1932," had been passed by the two Houses of the Legislature, and that they had given the direction that the provisions of the Bill should be included in the Reprint, this could hardly have been the case, and a letter dated December 24, 1936, from His Excellency to the President of the Legislative Council and a subsequent proclamation of His Excellency make it perfectly clear that the amendments were proclaimed under the provisions of sub-section (8).

In the printed record (No. 19) of the "Votes and Proceedings of "the Legislative Council" in the Session 1936, the following note is appended to the proclamation next to be referred to:—"Note—The "Bills enumerated in the Schedule to the above Proclamation were "presented to the Governor for Royal Assent on December 23, 1936, "and, in a letter dated December 24, 1936, His Excellency notified "the President of the Legislative Council that he could not assent to "the Bills as he was advised that they were unnecessary, their pro-"visions having been already enacted by Proclamations on the 8th, "15th and 23rd December, 1936, in pursuance of sub-section (8) of "Section 8 of 'The Statute Law Revision Act, 1934'"—in pursuance of sub-section (8).

The proclamation referred to is dated January 29, 1937, and was published in the *Gazette* on February 2, 1937.

It was as follows:—

"Whereas by Section 8 of 'The Statute Law Revision Act, 1934,' "it is provided that where either House of Parliament has directed "that the provisions of any Bill agreed to by both Houses in the "year 1936 should be included in the 'Reprint of Statutes,' such "provisions may be enacted by proclamation, under and in accord-"ance with the said section of the said Act: And whereas both "Houses of Parliament directed that the provisions of the several "Bills enumerated in the schedule hereto which were agreed to by "both Houses should be enacted by proclamation as aforesaid: And "whereas the said provisions of the said Bills have been enacted by "proclamation accordingly and now have the force of law by virtue "of the said recited section of the said Act, and it is unnecessary "that the said Bills should be assented to on behalf of His Majesty: "Now therefore I, Sir ERNEST CLARK, Knight Commander of the "Most Honourable Order of the Bath, Commander of the Most "Excellent Order of the British Empire, Governor in and over the "State of Tasmania and its Dependencies, in the Commonwealth of "Australia, do hereby notify and proclaim that, in pursuance and "by virtue of the powers in that behalf vested in me, and for reasons "above set forth, I have withheld assent to the said Bills.

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"Given under my hand, at Hobart, in Tasmania, this 29th day of "January, 1937.

"E. CLARK, Governor."

The schedule included the Bill to amend "The Licensing Act, 1932," part of the provisions of which are in question.

It will be observed that the proclamation recites the provisions of sub-section (8) and that both Houses had directed that the provisions of several Bills should be enacted by proclamation, and that "the "said provisions of the said Bills have been enacted by proclamation" accordingly.

This leaves no doubt that the amendments to "The Licensing Act, "1932," were enacted by proclamation under sub-section (8).

So the provisions of the Bill to amend "The Licensing Act, 1932" (according to the Proclamation of January 29, 1937), having become law on December 7, 1936, by being "enacted" by the Governor as the Executive, the Bill was then (on December 23, 1936) presented to His Excellency for "His Majesty's Assent" (Section 31 of "The Aus- "tralian Constitutions Act, 1842," Section 31, and "The Constitution "Act, 1934," Section 17 (1)), and His Excellency, acting on the advice of his Constitutional advisers, withheld His Majesty's assent to it, on the ground that he had been advised that the provisions of the Bill had already become law by reason of having been enacted by him as the Executive under sub-section (8) of Section 8.

The position, therefore, which we have now reached, is that His Excellency as the Executive "enacted" the provisions of the Bill, and then as the representative of the Crown in Parliament (and in consequence of the advice he had received) vetoed the Bill.

This brings the narrative and incidental discussion to a close, and I will now proceed to consider the result in point of law.

It was not contended, that although in fact the amendments to "The Licensing Act, 1932," here in question were enacted under sub-section (8) of Section 8 of "The Statute Law Revision Act, 1934" (as amended), they could be supported as amendments made under the power conferred by sub-section (1) of that Section, but as I do not think that the amendments can be supported by virtue of sub-section (8), I have had to consider whether, having regard to the fact that the proclamation of December 7, 1936, purports to be made under Section 8, without specifying any particular sub-section of it, they can be supported as amendments made under sub-section (1) exclusively.

This question of course involves the question whether the amendments in question or any of them are within the scope of sub-section (1). But I think it also raises the question, whether, even if it would

have been competent for His Excellency to enact the amendments under sub-section (1) if the two Houses of the Legislature had not passed the Bill which they did pass, it was still competent for him to do so, after the two Houses of the Legislature had passed the Bill.

I think this question is answered in the negative by what is stated later in the discussion as to whether it was competent for Parliament to confer on the Governor by sub-section (8) the power to enact as law the provisions of a Bill passed by the two Houses and directed to be included in the Reprint, without such Bill being presented for His Majesty's assent.

All I need say here is, that if it was not competent for Parliament to enact by a provision in sub-section (8) that the provisions of a Bill passed by both Houses and directed to be included in the Reprint, could be enacted by the Governor without the Bill being presented for His Majesty's assent, Parliament was not competent to enact by any other provision that the Governor could enact by proclamation amendments to the statute law, notwithstanding that the two Houses of the Legislature had passed a Bill providing for the same amendments, and which had not been presented for His Majesty's assent at the time the Governor's proclamation was made.

And if it could not have lawfully enacted that, it could not lawfully confer the same power by an enactment which only implied, but did not express, the *non-obstante* provision.

If sub-section (1) had contained the *non-obstante* clause I have mentioned, I am of opinion that it would have been invalid so far as it purported to confer the power mentioned in it in a case within the *non-obstante* clause.

And the fact that the *non-obstante* clause is absent, cannot operate to confer a power which could not have been validly conferred if it had been expressed.

But, even apart from this ground, I think that the sub-section (1) did not confer power to make the purported amendment to "The Licen-" sing Act, 1932," which was to become sub-section (4) of Section 56 thereof. (I do not think it necessary to express any opinion as to the other amendments to "The Licensing Act, 1932," here in question.)

I have said that I think sub-section (1), as it stood on December 7, 1936, did not confine the revision which it authorised to such as did not alter the law.

But I do not think it authorised any and every alteration of the existing statutory law.

The sub-section first specified certain kinds of amendments which might be made under it. All these were of a very restricted nature, that is to say, correcting typographical, grammatical, or patent

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errors, "rectifying any omission in any amendment made for pur- "poses of revision," and "ensuring consistency and co-ordination in "the amendments" made to any Act.

None of the amendments to "The Licensing Act, 1932," could be sustained under these provisions.

Then it conferred power to make amendments "making such further "revision as may be required."

This confines what can be done under it to "revision," and I do not think that that word can be given a meaning so extensive as to authorise such an amendment as that which purports to insert in Section 56 of "The Licensing Act, 1932," the new sub-section (4) set out in the proclamation of December 7, 1936—an amendment the purpose of which is not merely to extend the time during which an existing right of appeal (on questions of law only) could be exercised, but to confer on a class, so limited as to consist of but a few individuals, a new right of appeal from the decision of a Licensing Court given anterior to the date of the proclamation—and which might have become unchallengeable.

The provision made by sub-section (4) was not one which was going to operate indefinitely, that is to say, until amended by some future legislation, but was confined to conferring a right of appeal from a decision of a Court given after October 31, 1936, and before December 9, 1936, provided that notice of appeal was given not later than December 21, 1936. The right purported to be conferred was one which was to become exhausted within 14 days after the proclamation purporting to create it was "enacted."

It was no doubt for this reason that those responsible for the preparation of the Reprint omitted sub-section (4) from it.

The alteration of a right of appeal on questions of law only to one on both law and facts (and as to the facts an appeal in the widest sense), would carry "revision" to its extremity if not beyond it, but to do what the new sub-section (4) of Section 56 would do, appears to me to go quite beyond anything permissible in performance of that function.

Surely it is no part of the function of a revision of statute law, even a revision in the exercise of which it is permissible to alter the law, to so far go back into the past as to confer on a party to a curial proceeding for a fortnight, a new right to challenge an adjudication in the proceeding made prior to the alteration of the law—and indeed to so alter the law as to confer a right of appeal against an adjudication which had become unchallengeable before the making of the proclamation.

The contention which was put to me was that sub-section (8) of Section 8 was a delegation of legislative power, or of power which, if

not subordinate, would be essentially legislative, to the Governor as the Executive, and that it was competent for Parliament to make such a delegation.

If the first proposition were correct, it would be necessary, I think, to consider whether, having regard to the nature of power purported to be conferred (a power which would include the power not merely to make laws inconsistent with statutes but to repeal and amend statutes), it was within the competence of Parliament to confer it. But even if it were competent for Parliament to confer such a power as to provisions not included in a Bill which had been passed by both Houses of the Legislature but not yet assented to, I do not think (for reasons I will state later) it could do so as to the proposed enactments in such a Bill.

But I do not think the purported enactment (Section 8 (8)) (I will refer to it as "the enactment") was a delegation by Parliament (that is to say, His Excellency the Governor by and with the advice and consent of the Legislative Council and the House of Assembly, in Parliament assembled—I will throughout use the term "Parliament" in this sense) of the legislative power it purported to confer.

The true effect of it, I think, was that, while leaving Parliament intact with all its powers, it purported to set up a legislative authority which, if not unlimited as to the subjects it could deal with, was at least to have power to deal with all subjects covered by existing legislation of a public general nature including power to repeal, partially repeal, and amend existing statutes.

I will first consider the question without regard to the fact that the enactment confers on the Governor power to make adjustments, additions, and consequential amendments.

The enactment did not confer on the Governor any presently exercisable powers.

The result of it was not that the Governor became clothed with the power to make laws either generally, or on any class or classes of subjects, or on any specific subject.

The power it conferred was but a contingent or potential power until the two Houses had agreed upon a Bill, and at least one House had directed it to be included in the Reprint of Statutes.

The subject matter of the power had to be provided by the two Houses in the form of a "Bill" agreed to by both Houses and directed by either House to be included in the Reprint.

And if both Houses should agree to a Bill, and give the necessary direction, and the Bill was not assented to by the Crown, then although it would become a proper subject matter for the exercise of the power conferred upon the Governor by the enactment, the subject matter would not be one conferred by Parliament (as distinguished from the Legislature).

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No doubt when the subject matter was provided, the power conferred on the Governor would become a power with respect to the particular subject matter.

But from whence would the subject matter come?

Not from Parliament, but from the Legislative Council and the House of Assembly acting (as I think I have shown) as such.

And the enactment did not purport to confer on the Legislative Council and the House of Assembly power to originate or agree to Bills. It would have been otiose to do so. It recognised the fact that that was a function of the two Houses, possessed by them as part of Parliament. Therefore the enactment did not purport to make any delegation of power to either of the Houses.

The position then, so far, is that the enactment (sub-section (8) of Section 8) does not delegate any power to the Legislative Council and the House of Assembly, but it requires the subject matter of every exercise of the power conferred by it on the Governor to enact a law under it, to be provided by the two Houses in the form of a "Bill," agreed to by both Houses, and which either House has directed to be included in the Reprint of Statutes.

Apart from such a Bill, the Governor could do nothing under the enactment; and thus, if the enactment was one which Parliament was competent to enact, the requisite action on the part of the two Houses (the authority to take which was not delegated to them by Parliament) would be a constituent part of the law-making process under it.

But, on the other hand, the requisite action on the part of the two Houses was not to amount to the making of law.

Proclamation of the provisions of the Bill by the Governor was necessary to do that. So the Governor is also a part of the law-making authority. But, as the Executive, and not as the representative of the Crown in Parliament.

Thus, although the power which the enactment conferred on the Crown was conferred on the Crown as the Executive and not as the Crown in Parliament, the enactment was of a very different nature from the Statute of Proclamations. The two Houses of the Legislature are joined with the Executive as constituent parts of the new law-making authority.

Then, would the existence of the power purported to be conferred on the Governor to make "such adjustment, additions, and conse- "quential amendments as may be found necessary for giving full "effect to the same" (i.e., the provisions of a Bill agreed to by both Houses and directed by either House to be included in the Reprint of Statutes) so alter the position as to vest the law-making power in the Governor alone.

For reasons which I will state later I do not think it was competent for Parliament to confer such a power. But assuming it was, I do not think the existence of the power would amount to vesting the law-making power in the Governor alone.

The power, purported to be conferred on the Governor to make adjustments, etc., was also an empty power until the two Houses had provided a subject matter for it, and when they had provided a subject matter, the power was but a subsidiary one expressed to be conferred for the purpose of giving full effect to the provisions of a Bill agreed to by both Houses and directed by either House to be included in the Reprint of Statutes.

The action of the Legislative Council and the House of Assembly in agreeing to a Bill, and a direction by either House that the Bill should be included in the Reprint of Statutes, was still a constituent part of the law-making process.

For these reasons I am of opinion that the enactment did not delegate to the Governor the power to enact laws (e.g., the amendments to "The Licensing Act, 1932," here in question), but that it created a new legislative authority consisting of the Legislative Council, the House of Assembly, and His Excellency the Governor as the Executive (perhaps the Attorney-General should be included), and conferred upon them as a composite body exercising separate functions, the very extensive (if not general) authority to repeal statutes and make laws which I have stated above.

Then was it competent for Parliament to create such a legislative authority?

This seems to me to involve two questions. First, whether a legislative authority consisting of such constituent parts and endowed with such powers, was in substance a subordinate law-making authority, or an alternative to Parliament. And, if an alternative to Parliament, whether the Crown as the Executive could be substituted for the Crown in Parliament.

As to the first question. I doubt whether the fact that the powers exercisable under sub-section (8) of Section 8 of "The Statute Law "Revision Act, 1934," were (or might have been) limited to those which I have mentioned, would necessarily mean that the law-making authority by which they were to be exercised was a subordinate one.

Parliament can so mould its own constitution as to make Parliament consist of different elements for the purpose of legislation upon different subjects (*Attorney-General for New South Wales* v. *Trethowan* (1932), *A.C.* 56, and 44 *C.L.R.*, 394, particularly at pp. 419-420), and, that being so, it may be that if the new law-making authority I have mentioned would otherwise have been a law-making authority alternative to Parliament, the mere fact that it could only legislate on a part of the subjects within the competence of Parliament, would not make it a subordinate authority.

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And, as the existence of the new law-making authority could not be destroyed without the concurrence of two of its constituent parts (the two Houses of the Legislature), and the power conferred by sub-section (4) of Section 8 of "The Statute Law Revision Act, 1934" (if it applies to a proclamation made under sub-section (8)), is only a power reserved to the two Houses of the Legislature themselves, there would seem to be at least some ground for the view that it is not a subordinate law-making authority, but a law-making authority alternative to Parliament.

But I do not think it necessary to express any opinion on this question, because I think the appeal fails on another ground.

And, as I am not determining the first question, it is not necessary to consider the second question in the connection in which it has just been raised. But as I think that question is involved in another which must be determined for the purpose of disposing of the appeal, it will be convenient to deal with the other question at this stage.

This is the question whether it is within the competence of Parliament to eliminate the Crown as a constituent part of it.

Section 7 of "The Australian Constitutions Act, 1850," authorised the Legislatures of Van Diemen's Land and South Australia to establish Legislative Councils within those Colonies respectively.

And Section 14 of the same statute enacted that "The Governors "of the said Colonies of Victoria, Van Diemen's Land, South Aus- "tralia and Western Australia respectively, with the advice and con- "sent of the Legislative Councils to be established in the said Colonies "under this Act, shall have authority to make laws for the peace, "order, and good government of the said Colonies respectively . . . ."

Section 32 of the same statute enacted that "Notwithstanding any- "thing hereinbefore contained, it shall be lawful for the Governors "and Legislative Councils of the said Colonies of Van Diemen's "Land, South Australia . . . . respectively from time to time by any "Act or Acts to alter the provisions or laws for the time being in "force under this Act or otherwise concerning the election of . . . . "to establish in the said Colonies respectively, instead of the Legis- "lative Council, a Council and a House of Representatives or other "separate legislative houses, to consist respectively of such members "to be appointed or elected respectively by such persons and in such "manner as by such Act or Acts shall be determined and to vest in such "Council and House of Representatives or other separate legislative "houses the powers and functions of the Legislative Council for which "the same may be substituted . . . . "

Reading Sections 14 and 32 together, in the light of the fact that the two legislative houses were established in Tasmania under the authority conferred by Section 32, the result is that "The Australian "Constitutions Act, 1850," provides that the Governor of Tasmania

with the advice and consent of the Legislative Council and House of Assembly shall have authority to make laws for the peace, order, and good government of the State.

Therefore the Governor, as representing the Crown, is constituted by Imperial legislation part of the Parliament of the State—Parliament is the Crown in Parliament, and this position has been recognised and enacted in "The Constitutions Act, 1934" (Section 10).

The same result was brought about in the other States either under the Imperial legislation above referred to or by other Imperial legislation or Imperial Orders in Council.

Section 5 of "The Colonial Laws Validity Act, 1865," provides (*inter alia*) that "every *representative legislature* shall, in respect to the "Colony under its jurisdiction, have, and be deemed at all times to "have had, full power to make laws respecting the constitution, power, "and procedure of *such legislature;* provided that such laws shall "have been passed in such manner and form as may from time to time "be required by any Act of Parliament, letters patent, order in Coun-"cil or colonial law for the time being in force in the said Colony."

I would here observe that, apart from the use of it for the purpose of defining it, this is the only occasion on which the expression "representative legislature" is used in the statute, and thus if the definition of it does not apply to the use of it in Section 5, Parliament defined it to no purpose.

Section 1 of the statute enacts (*inter alia*) that "the terms 'legis-"lature' and 'Colonial Legislature' shall severally signify the authority "other than the Imperial Parliament or Her Majesty in Council com-"petent to make laws for any Colony": that the term "Representative "Legislature" shall signify "any colonial legislature which shall com-"prise a Legislative body of which one half are elected by the "inhabitants of the Colony."

Reading together the definitions of "Legislature," "Colonial Legis-"lature," and "Representative Legislature," the full definition of the expression "Representative Legislature" is "any authority, "other than the Imperial Parliament or Her Majesty in Council, com-"petent to make laws for any Colony, and which shall comprise a "legislative body of which one half are elected by the inhabitants of "the Colony."

So a "legislature" and a "representative legislature" must be a body competent to make "laws" for the Colony.

And the words "such legislature" in Section 5 refer to the preceding expression "representative legislature."

From this, it would seem that there is something to be said for the view that the word "legislature" in the expression "such legislature" means an authority, other than the Imperial Parliament or Her Majesty in Council, competent to make *laws* for a Colony and com-

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prising a legislative body of which one half are elected by the inhabitants of the Colony: and that therefore as (to take the case of Tasmania) the Legislative Council and the House of Assembly cannot make "laws" without the assent of the Crown, the word "legislature" in the expression "such legislature" in Section 5 includes the Crown.

And if the words "constitution . . . . of such legislature" in Section 5 include the Crown, the fact that the Governor as representing His Majesty is made a part of the constitution of Parliament by an Imperial statute extending to the State (and not merely by virtue of an enactment in the State "Constitution Act"—see Section 3 of the repealed 18 Victoria, No. 17, and Section 10 of "The Constitution Act, "1934"), would not exclude the application of Section 5.

Section 5 would prevail over Section 2.

In *Attorney-General for New South Wales* v. *Trethowan* ((1932), *A.C.* 526), LORD SANKEY, L.C., delivering the judgment of the *Privy Council* said (at p. 535): "From this date" (1855) "therefore the "Parliament of New South Wales consisted of two chambers—a Legis- "lative Council and a Legislative Assembly—and within the colony "Her Majesty had power by and with the advice and consent of the "said Council and Assembly to make laws." Here the Parliament of New South Wales is spoken of as consisting of a Legislative Council and a Legislative Assembly.

And then after quoting the definition of "representative legislature" in "The Colonial Laws Validity Act, 1865," HIS LORDSHIP said (at p. 535): "The Legislature of New South Wales has always been "representative legislature within this definition."

But in a later part of the judgment HIS LORDSHIP said (at p. 540): "In their Lordships' opinion the legislature of New South Wales "has power under Section 5 of the Act of 1865 *to enact* 'The Con- "'stitution (Legislative Council) Amendment *Act*, 1929' *and thereby* "*to introduce Section 7a into 'The Constitution Act*, 1902.' In other "words *the Legislature* had power *to alter the constitution* of New "South Wales by *enacting* that Bills relating to specified kind or "kinds of legislation (e.g., abolishing the Legislative Council or alter- "ing its constitution or powers or repealing or amending that enact- "ment) should not be presented for the Royal assent until approved "by the electors in a prescribed manner. There is here no question "of repugnancy. The enactment of the *Act* of 1929 was simply an "exercise by *the Legislature of New South Wales* of its power (adopt- "ing the words of Section 5 of the Act of 1865) to make *laws* respect- "ing the constitution powers and procedure of the authority com- "petent to make *laws* for New South Wales."

And THEIR LORDSHIPS (at p. 541) adopted the view expressed by RICH, J., in the *High Court of Australia* as follows:—"I take the word "'passed' to be equivalent to 'enacted' . . . In my opinion the proviso "to Section 5 relates to the entire process of turning a proposed law

"into a legislative enactment and was intended to enjoin fulfilment "of every condition and compliance with every requirement which "existing legislation imposed upon the process of law-making." This, of course, definitely negatived the view that the word "passed" in the proviso to Section 5 is used in the same sense as it is in Section 6 (of "The Colonial Laws Validity Act") and Section 14 of "The Australian "Constitutions Act, 1850."

The whole of these last three passages could, no doubt, be read as implying that the legislature referred to in Section 5 includes the Crown (cf. judgment of DIXON, J., in the same case when before the *High Court*, 44 *C.L.R.*, at p. 432, and SIR HARRISON MOORE—*The Powers of Colonial Legislatures* in the Journal of Society of Comparative Legislation (1922), Vol. IV., at p. 19.)

But the passages in the judgment of the *Privy Council* which have been quoted were not directed to the question here under consideration, and cannot, I think, be regarded as a pronouncement on it.

In *Taylor* v. *Attorney-General for Queensland* (23 *C.L.R.*, 457) ISAACS, J. (as he then was), said (at p. 473):—"It" (a contention of Counsel for the plaintiff) "was supported by urging that since "'legislature' included the Crown, the Attorney-General's view would "authorise the total elimination of the Crown as part of the legis-"lature.

"I do not agree with this contention. To begin with, the word "'legislature' in this connection is not intended to include the Crown. "That word is undoubtedly sometimes used to include the Crown, "which is the first branch of it. But it is also frequently used even "by Parliament itself to denote the law-making authority other than "the Crown. In sec. 7 of the same Statute, referring to the 'Legis-"lature of South Australia,' the expression 'legislature' in the phrase "'persons or bodies of persons for the time being acting as such Legis-"lature' is manifestly exclusive to the Crown, both from its form and "from the fact that the 'assent' of the Queen or the Governor is re-"garded as an additional factor. This limited use of the term is "common. For instance, in *Anson's Law and Custom of the Con-"stitution* (Vol. II., part 2, at p. 68), in dealing with the self-govern-"ing colonies, the learned author observes: 'The legislature consists "'of two chambers, except in certain provinces of the Dominion of "'Canada.' The context must always be looked at to see which is "meant. The Imperial Act so called 'The Australian States Con-"'stitution Act, 1907' (7 Edw. VII., c. 7) is a good illustration. Sec. "1 contains examples of both senses. 'Every Bill passed by the Legis-"'lature of any State' which 'shall be reserved for the signification of "'His Majesty's pleasure thereon' necessarily, as to the expression "'legislature,' refers to the Houses only. But 'any Act of the "'Legislature of the State' in the same section must include the Crown.

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"Other examples are found in the same Act. When power is given to "a colonial legislature to alter the constitution of the legislature, that "must be read subject to the fundamental conception that, consis- "tently with the very nature of our constitution as an Empire, the "Crown is not included in the ambit of such a power.

"I read the words 'constitution of such legislature' as including the "change from a unicameral to a bicameral system, or the reverse. "Probably the 'representative' character of the Legislature is a basic "condition of the power relied on, and is preserved by the word 'such,' "but, ..."

His Honour did not refer to the definitions in the statute of "Legis- "lature," "Colonial Legislature," and "Representative Legislature," but the opinion expressed by His Honour is clearly based upon the fundamental conception he spoke of.

In *re Initiative and Referendum Act* ((1919), *A.C.* 935, at p. 943), LORD HALDANE delivering the judgment of the *Privy Council* said that it requires clear and unmistakable language to abrogate any power which the Crown possesses through the person who represents it, and it is but an application or corollary of that principle to say that a statute will not be construed as conferring power on a Colonial Legislature to abrogate any power which the Crown possesses through the person who represents it unless that power appears to be conferred by clear and unmistakable language.

It cannot be said that Section 5 of "The Colonial Laws Validity Act, "1865," clearly and unmistakably confers on a representative colonial legislature the power to alter its constitution by eliminating the Crown from it. The judgments of ISAACS, J., and DIXON, J., to which I have referred, are sufficient to demonstrate that proposition.

And I think that later Imperial legislation shows that the Imperial Parliament has treated Section 5 as not conferring such a power.

Section 31 of "The Australian Constitutions Act, 1842," enacted that "Every Bill which has been passed by the said Council . . . . shall "be presented for Her Majesty's assent to the Governor of the said "Colony and the Governor shall declare according to his discretion "but subject nevertheless to the provisions contained in this Act and "to such instructions as may from time to time be given in that be- "half by Her Majesty that he assents to such Bill in Her Majesty's "name or that he withholds Her Majesty's assent or that he reserves "such Bill for signification of Her Majesty's pleasure thereon."

This enactment (which originally applied to the Colony of New South Wales only) was extended to Victoria, Tasmania, South Australia, and Western Australia by Section 12 of "The Australian Constitutions "Act, 1850," and after the establishment of bicameral legislatures in those States it applied to Bills passed by the two Houses of the Legis- lature.

Section 33 of the same statute ("The Australian Constitutions Act, "1842") enacted that "No Bill which shall be so reserved for the "signification of Her Majesty's pleasure thereon shall have any force "or authority within the Colony of New South Wales until the "Governor of the said Colony shall signify either by speech or mes- "sage to the Legislative Council of the said Colony or by proclamation "as aforesaid that such Bill has been laid before Her Majesty in "Council and that Her Majesty has been pleased to assent to the "same; and an entry shall be made in the Journals of the said "Legislative Council . . . . ; and no Bill which shall be so reserved "as aforesaid shall have any force or authority in the said "Colony unless Her Majesty's assent thereto shall have been so "signed as aforesaid within the space of two years from the day on "which such Bill shall have been presented for Her Majesty's assent "to the Governor as aforesaid."

This section also was applied to Victoria, Tasmania, South Australia, and Western Australia by Section 12 of "The Australian Con- "stitutions Act, 1850"; and sub-section (3) of Section 1 of "The "Australian States Constitution Act, 1907," enacts that this section (33 of "The Australian Constitutions Act, 1842") "shall apply to "Bills reserved under" "The Australian States Constitution Act, "1907," "in like manner as it applies to Bills reserved under" "The "Australian Constitutions Act, 1850," "with the substitution of re- "ferences to a State forming part of the Commonwealth of Australia "for references to the Colony of New South Wales and of references "to both Houses of the Legislature of the State for references to the "Legislative Council."

And sub-sections (1) and (2) of Section 1 of "The Australian States "Constitution Act, 1907," are as follows:—

"(1). There shall be reserved for the signification of His Majesty's "pleasure thereon, every Bill passed by the Legislature of any State "forming part of the Commonwealth of Australia which—

"(a) Alters the constitution of the Legislature of the State or of "either House thereof: or

"(b) Affects the salary of the Governor of the State: or

"(c) Is, under any Act of the Legislature of the State passed after "the passing of this Act, or under any provision contained "in the Bill itself, required to be reserved:

"but, save as aforesaid, it shall not be necessary to so reserve any "Bill passed by any such Legislature:

"Provided that—

"(a) Nothing in this Act shall affect the reservation of Bills in "accordance with any instructions given to the Governor of "the State by His Majesty: and

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"(b) It shall not be necessary to reserve a Bill for a temporary "law which the Governor expressly declares necessary to be "assented to forthwith by reason of some public and pressing "emergency; and

"(c) It shall not be necessary to reserve any Bill if the Governor "declares that he withholds His Majesty's assent, or if he has "previously received instructions from His Majesty to assent "and does assent accordingly to the Bill.

"(2) For the purposes of this section a Bill shall not be treated "as a Bill altering the constitution of the Legislature of a State or "of either House thereof by reason only that the Bill—

"(a) Creates, alters, or affects any province, district, or town, or "division of a province, district, or town, which returns one "or more Members to either House of the Legislature: or

"(b) Fixes or alters the number of Members to be elected for any "such province, district, or town, or division of a province, "district, or town: or

"(c) Increases or decreases the total number of elective Members "of either House of the Legislature: or

"(d) Concerns the election of the elective Members of the Legis- "lature or either House thereof, or the qualifications of electors "or elective Members."

I think it is manifest from the provisions of this Act that Section 5 of "The Colonial Laws Validity Act, 1865," was not intended to permit, and cannot be construed as permitting, the elimination of the Crown as part of the Legislature.

Bills passed by the two Houses (or House) of the Legislature are assented to, vetoed, or reserved by the Governor as a part of Parliament—as representing the Crown in Parliament. (I will refer to this subject again presently.)

And Section 1 makes it obligatory that certain Bills should be reserved, and it is therefore necessary for the continued operation of Section 1 that the Governor should remain as part of Parliament.

And although sub-section (1) of Section 1 of "The Australian "States Constitution Act, 1907," requires Bills passed by the Legislature of a State which alters the constitution of the Legislature of the State or of either House thereof, to be reserved, it does not specify as one of the cases in which a Bill must be reserved a Bill eliminating the Crown as a part of the Parliament of a State.

If it were competent for the Legislature of a State to pass a Bill for that purpose, it is highly improbable that the Imperial Parliament in enacting "The Australian States Constitution Act, 1907," would have made the requirement of reservation a matter of statutory enactment in the case of a Bill to amend the constitution

of either of (or both) the Houses of the Legislature and not have done so in the case of a Bill to eliminate the Crown as a part of Parliament—so highly improbable, I think, that this statute can fairly be construed as a declaration by the Imperial Parliament that a Colonial representative legislature does not possess the power to enact such a law.

The statute does not require a Bill to eliminate the Crown from a State Parliament to be reserved because it is not competent for a State Legislature to pass such a Bill, and the inclusion of such a Bill in sub-section (1) of Section 1 would have been a statutory recognition of the competence of the Legislature to pass such a Bill and submit it to the Governor for the Crown's assent.

I am therefore of opinion that Section 5 of "The Colonial Laws "Validity Act, 1865," does not confer authority on a Colonial Legislature to eliminate the Crown as a part of its Parliament, and that the definitions of "Legislature" and "Colonial Legislature" in that statute are to be read as "the authority other than the Imperial "Parliament or Her Majesty in Council competent, *with the assent* "*of the Crown*, to make laws for any Colony"; and the words "full "power to make laws" in Section 5 must be read as meaning "full "power *with the assent of the Crown* to make laws."

I have said that in assenting to, vetoing, or reserving a Bill passed by the Legislature, the Governor acts as a branch or part of Parliament.

The question has been raised whether this is so (*Clark*: *Constitutional Law*, 2nd ed., pp. 317-320).

So far as the powers of assent and veto are concerned, I think it is clear that the Imperial Parliament in enacting "The Australian "Constitutions Act, 1850," applied the analogy of the Imperial Parliament (cf. *In re The Initiative and Referendum Act* (1919), *A.C.*, 935, at p. 943), and in the case of that Parliament it is clear that in assenting to a Bill, and also in vetoing a Bill, if he should exercise that power, the Sovereign acts as a branch of Parliament (*Blackstone*: *Commentaries* (*Kerr*), vol. 1, p. 139; *Chitty* on *The Prerogatives of the Crown*, p. 2; *Anson*: *The Law and Custom of the Constitution*, 5th ed., pp. 4 and 263; *Hearn*: *The Government of England*, pp. 51 and 60; and *Lowell*: *The Government of England*, new edition, vol. 1, p. 19); and it seems impossible to dissociate the obligation or power (as the case may be) to reserve a Bill for the signification of the pleasure of the Sovereign from the powers of assent and veto.

The Governor as a branch of Parliament represents the Sovereign —it is His Majesty's assent which he gives when he assents to a Bill ("The Australian Constitutions Act, 1842," Section 31, "Con- "stitution Act, 1934," Section 17; and *In re Initiative and Referendum Act* (*supra*)), and when the Governor reserves a Bill he but

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remits to the Sovereign the exercise of the power committed to him as the representative of the Sovereign. The Royal Veto is still a live power in the case of Bills passed by Colonial Legislatures.

If the views I have expressed are correct then Section 31 of "The "Australian Constitutions Act, 1842," stands unqualified by "The "Colonial Laws Validity Act, 1865," and it is an Imperial statutory enactment which by another enactment of the Imperial Parliament (Section 12 of "The Australian Constitutions Act, 1850") is expressly extended to this State; and when by virtue of the power conferred by Section 32 of "The Australian Constitutions Act, 1850," a bi-cameral Legislature for the State was "substituted" for the single chamber legislature established under Sections 7 and 14 of the same statute, the provisions of Section 31 of "The Australian Constitutions "Act, 1842," became applicable to the new Legislature; and that being so any State law which is "in any respect repugnant to" it, is "absolutely void and inoperative" (Section 2 of "The Colonial Laws "Validity Act, 1865").

Section 31 of the Act of 1842 enacts that "Every Bill which has "been passed by" the Legislature of the State "shall be presented "for Her Majesty's assent to the Governor . . . . and the Governor "shall declare . . . . that he assents to such Bill in Her Majesty's "name or that he withholds her assent or that he reserves such Bill "for signification of Her Majesty's pleasure thereon . . . . "

And I think it is clear that this means that until a Bill passed by both Houses of the Legislature has been presented to the Governor and has been assented to either by him on behalf of His Majesty, or by the Sovereign, the Bill shall not become law.

Sub-section (8) of Section 8 of "The Statute Law Revision Act, "1934" (as amended), speaks of a Bill being "agreed to by both "Houses" and provides that the provisions of it can be enacted by proclamation whether or not the Bill "has been formally passed."

The Bill to amend "The Licensing Act, 1932," which is here in question was in fact duly and regularly "passed" by both Houses, and it is therefore unnecessary to express any opinion on the question whether Section 31 of "The Australian Constitutions Act, 1842," would apply to a Bill which had been agreed to by both Houses of the Legislature but not passed in the usual way.

I think, however, it is unlikely that in enacting that section the Imperial Parliament concerned itself with the distinction which had been made by the Tasmanian Legislature between the two Houses passing a Bill and the two Houses agreeing to a Bill without formally passing it.

If the views I have expressed are correct, then it was beyond the competence of the State Legislature to enact that a Bill passed by both Houses need not be presented to the Governor to be dealt with

by him in accordance with the provisions of Section 31 of "The Aus- " tralian Constitutions Act, 1842." To that extent sub-section (8) of Section 8 of "The Statute Law Revision Act, 1934," was *ultra vires.*

The Bill to amend "The Licensing Act, 1932," the provisions of which His Excellency purported to enact under sub-section (8) of Section 8 of "The Statute Law Revision Act, 1934" (as amended), was passed by both Houses.

And that being so, it became obligatory (by virtue of an Imperial statute expressly extended to the State) that it should be presented to the Governor for His Majesty's assent.

That in fact was done, but even if it had not been, it is clear that the Bill could not have become law.

Presentation for assent under Section 31 of "The. Australian " Constitutions Act, 1842," and assent under that enactment are conditions precedent (imposed by Imperial legislation expressly extended to the State) to a Bill becoming law, and any Colonial law which is in any respect repugnant to that enactment is void and inoperative; and a Colonial law which provides that the provisions of a Bill, passed by both Houses of the Legislature, but which has not been presented to the Governor for His Majesty's assent, may nevertheless be enacted as law is repugnant to that enactment.

If, as was the case, the Bill was presented to His Excellency and he withheld (as he did) His Majesty's assent then the refusal of assent meant that the provisions of the Bill did not become law.

Here again any Colonial law which purported to enact the contrary would be "void and inoperative."

Imperial legislation expressly extended to the State does not permit law to be made by the Executive under a statute which authorises the diversion of a Bill passed by both Houses of the Legislature from the course prescribed for it by Section 31 of the Act of 1842 to the Executive, for the purpose of the Executive enacting the provisions of it as law.

For these reasons I am of opinion that the alleged amendments here in question, which were purported to have been made to "The " Licensing Act, 1932," by the proclamation of December 7, 1936, are not, and never were, law, and I therefore hold the appeal is incompetent. The appeal will be struck out.

Solicitors for the appellants: *Ritchie & Parker, Alfred Green & Co., T. W. Maloney.*

Solicitor for the Crown: *A. Banks-Smith,* Crown Solicitor.