

## GILBERTSON v. SOUTH AUSTRALIA—THE CASE FOR S.51 (xxxviii)?

Until 1975 the boundaries of the electoral districts for the South Australian House of Assembly were fixed by legislative act. When a review of those boundaries was felt to be necessary, an *ad hoc* committee was appointed to make recommendations to the Parliament and new boundaries were fixed by the legislature. In 1975 the Parliament passed the Constitution Act Amendment Act (No. 5),<sup>1</sup> implementing Australian Labor Party policy and radically changing this system. A new Part V was enacted whereby a permanent Electoral Districts Boundaries Commission was created,<sup>2</sup> with the function of determining the boundaries of House of Assembly electoral districts. The Commission was instructed to commence its duties within three months after the commencement of the Act.<sup>3</sup> After its first redistribution, it was to undertake revisions of electoral boundaries at intervals of between five and eight years.<sup>4</sup> An electoral redistribution is made by an order of the Commission<sup>5</sup> which is to be published in the Gazette.<sup>6</sup> Several provisions<sup>7</sup> instruct the Commission how it is to perform its duties, and s.86(2) provides for an appeal to the Full Court of the Supreme Court against an order of the Commission, on the ground that the order has not been duly made in accordance with the Act.

As the Commission is instructed to divide the State into electoral districts with an equal number of electors in each district (subject to a tolerance of plus or minus 10%),<sup>8</sup> whereas prior to the Act metropolitan districts had about 50% more electors than did rural districts, the first redistribution inevitably involved substantial alterations of boundaries. When the order was published on 5th August, 1976,<sup>9</sup> several appeals were lodged against it. The action which concerns us here however was not an appeal against the order as such, but a challenge to the validity of s.86(2) to (9) and thus, since it was argued that these sub-sections could not be severed from the new Part V, to the validity of the whole Part.

It was argued for the plaintiff that the determination of appeals against an order of the Commission would involve an exercise by the Full Court of legislative or executive power, and that in purporting to confer such a power on the Full Court the 1975 Amendment Act was void and inoperative by virtue of s.2 of the Colonial Laws Validity Act, 1865.<sup>10</sup> That section provides that:

“Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of [the Imperial] Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to

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1. No. 122 of 1975.
  2. New s.78, enacted by No. 122 of 1975, s.7. References made to sections in this note will be references to new sections of the Constitution Act, 1934-1975 (S.A.) as enacted by No. 122 of 1975, s.7, unless otherwise stated.
  3. S.82(2) (a).
  4. S.82(2) (c).
  5. S.82(4).
  6. S.86(1).
  7. Ss.77, 82, 83 and 85.
  8. S.77.
  9. *South Australian Government Gazette*, No. 33, 5th August, 1976, 339, 351.
  10. 28 and 29 Vict. c.63 (1865).

such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

The Supreme Court as presently constituted is a continuation of the Court of Judicature called the Supreme Court of the Province of South Australia, established under South Australian Ordinance No. 5 of 1837. That Ordinance, the plaintiff argued, was an order or regulation made under the authority of the Imperial Act 4 & 5 Wm. IV c.95 (1834), and its validity was confirmed by another Imperial Act, 5 & 6 Vict. c.61 (1842). Hence under s.2 of the Colonial Laws Validity Act any South Australian law repugnant to that Ordinance was, to the extent of the repugnancy, void and inoperative. Any attempt to alter the Supreme Court's character as a court of judicature was repugnant to the 1837 Ordinance and such an attempt was made by the 1975 legislation. S.5 of the Colonial Laws Validity Act confers upon colonial legislatures the power "to establish courts of judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein." The plaintiff further argued that the South Australian Parliament's power with respect to courts of judicature was limited by this section to the powers enumerated and that therefore it did not extend to a power to alter the nature of the Supreme Court. In the words of Bray C.J. "the South Australian Parliament can abolish it, but not turn it into something other than a court of judicature. It can kill it, but not violate its judicial virginity."<sup>11</sup> The plaintiff contended that by s.86 the South Australian Parliament had done just that. S.86 (7) provides that on the hearing of an appeal against an order of the Commission, the Full Court may:

- "(a) quash the order and direct the Commission to make a fresh electoral redistribution;
- (b) vary the order; or
- (c) dismiss the appeal."

Both s.86(7)(a) and (b), it was said, required or might require the Full Court to exercise a non-judicial power, since the Full Court was thereby empowered to redistribute electoral boundaries.

Although this "astounding argument"<sup>12</sup> was rejected by a majority of the Full Court (Bray C.J., Walters and Jacobs JJ.) and unanimously by the Privy Council,<sup>13</sup> the grounds on which it was accepted by Wells and Zelling JJ. merit at least brief consideration. Wells J. held that the 1837 Ordinance had the constitutional status of an Act of the Imperial Parliament, a conclusion which he reached by the following process. S.2 of the Act of 1834 authorised William IV to empower certain persons resident in the colony to exercise four distinct heads of power: to make laws for the colony, to constitute courts, to make certain appointments for the established Churches, and to impose and levy rates, duties and taxes. In 1836 the King exercised this authority by an Order in Council which empowered the Governor, the Judge and three others resident in the colony to exercise the powers which had been recited in s.2 of the Act of 1834. In Wells J.'s view, that Order in Council was not

11. *Gilbertson v. The State of S.A. and the Attorney-General for the State of South Australia* (1977) 72 *Law Society Judgment Scheme* (L.S.J.S.) 213, 225.

12. *Id.*, 224.

13. Privy Council decision, April 1977: unreported.

an act of colonial law-making but "an act of the highest executive authority by which what was contemplated and authorised by the 1834 Act (Imp.) was brought into force according to its tenor";<sup>14</sup> and the Ordinance of 1837, the act-in-law by which the Governor and his appointed colleagues exercised the power to constitute courts,

"did not amount, in the orthodox sense, to an act of law-making: rather did it settle and define . . . the scope and operation of an Imperial law that extended to the Province; in other words it refined and perfected an Imperial law, as distinct from making a new provincial law."<sup>15</sup>

His Honour agreed that the 1837 Ordinance could be regarded as a legislative act, but in his view no legal principle "denies . . . to an Instrument of Government . . . more than one operation".<sup>16</sup> The 1837 Ordinance was both an Act and a "thing done" by executive act. By this exercise of executive power the Governor and his appointed colleagues defined, delimited and perfected the operation of the relevant provisions of the 1834 Act, and His Honour could see no reason why that executive act should be held to have lost that virtue and effect because what was done by executive act was simultaneously done by a valid colonial law.<sup>17</sup> Because the 1837 Ordinance should be regarded as perfecting the operation of the 1834 Act, it had the constitutional status of an Imperial statute extending to the colony. The 1834 Act was repealed by the Act of 1842 but, by s.2, all laws and ordinances passed under authority of the 1834 Act and all things lawfully done in virtue of that Act were confirmed in their validity. "The whole legal and constitutional operation of what had been done and provided for was . . . preserved in its pristine character."<sup>18</sup>

Ordinance No. 5 of 1837 established the Supreme Court as a court of judicature and the Act of 1842 confirmed the validity of its creation as such. In his Honour's opinion, any attempt to change the character of that court must be repugnant to Imperial law by virtue of s.2 of the Colonial Laws Validity Act, for when the Governor and his appointed colleagues "conferred on the Court a particular character, [they] excluded from it all qualities and incidents that were obnoxious to that character."<sup>19</sup> And this was not affected by s.5 of the Colonial Laws Validity Act, for although that section empowers colonial legislatures "to establish courts of judicature . . .",<sup>20</sup>

"the language of the section, by necessary implication, denies to the State legislature the power to change the character of any such Court from one that appertains to a Court of Judicature to one that does not."<sup>21</sup>

Wells J. then considered the character of a court of judicature and held that such courts undertake not any kind of work "but a special sort of work—the act of judging."<sup>22</sup> A judge is positively bound to apply legal rules and principles and also negatively bound in that he is precluded from bowing to the dictates of expediency. "He is above all an interpreter of the law, and

14. (1977) 72 L.S.J.S. 213, 266.

15. *Ibid.*

16. *Ibid.*

17. *Id.*, 267-268.

18. *Id.*, 271.

19. *Id.*, 277.

20. *Supra*, text at n.11.

21. (1977) 72 L.S.J.S. 213, 274.

22. *Id.*, 275.

not a creator of legislative or administrative policy."<sup>23</sup> Although he found that s.86(7) of the 1975 Amendment Act could be read as conferring upon the Full Court a legislative or executive, and thus non-judicial, function he held that it was possible to read the Act down so that it conferred only judicial functions. He therefore held the Act to be valid.

Zelling J. also held that an Act purporting to confer non-judicial functions on the Full Court would be void for repugnancy, but his reasoning differed from that of Wells J. The true meaning of the authority to create "courts" conferred by the Act of 1834 and the 1836 Order in Council was that where the court created was a Supreme Court it should be a court of judicature. That this was the true meaning of those instruments was clear, in his Honour's view, from a study of other statutes and instruments of the time.<sup>24</sup> Thus the South Australian Parliament could not confer non-judicial functions on the Full Court as its power in this field was not plenary. As far as superior courts are concerned the South Australian Parliament had only been empowered to create courts of judicature. His Honour held the 1975 Amendment Act wholly invalid on the ground that the appeal provisions purported to confer on the Full Court functions which were legislative only and as such could not be read down. Neither could they be severed as the remainder of the Act would then operate differently. The only reasons he gave for this view were that "the appeal procedure determines the date of taking effect of the order",<sup>25</sup> and that "quite apart" from that, he had "no doubt . . . that the appeal procedure was an important factor in the whole of the newly enacted legislation."<sup>26</sup> With respect, the Act makes two provisions for determining the date when an order takes effect, one when an appeal has been lodged and the other when there has been no appeal.<sup>27</sup> Thus severance of the appeal procedure would not prevent an order of the Commission taking effect. Moreover, both the Colonial Laws Validity Act and the Acts Interpretation Act, 1915-1975 (S.A.), create a presumption in favour of severance.<sup>28</sup> And although the appeal procedure is undoubtedly important, it is quite possible that the legislation stripped of that procedure would have been acceptable to the Parliament since . . .

"it is clear that even in the absence of any statutory remedy for obtaining the annulment of an order of the Commission the legality of the manner in which it had exercised those functions . . . would, at common law, have been open to review by the Supreme Court by means of the prerogative writs."<sup>29</sup>

The reasons given by Wells and Zelling JJ. for their decisions were rejected by three of the Justices in the Full Court and by the Privy Council. Bray C. J. had no doubt that the 1837 Ordinance constituted colonial legislation and could therefore be freely repealed or amended. But even if the 1837 Ordinance were to be regarded as "a thing done . . . by executive act and not by

23. *Id.*, 276.

24. *Id.*, 250.

25. *Id.*, 256.

26. *Ibid.*

27. Constitution Act, 1936-1975 (S.A.), s.32(3) and (5).

28. S.2 of the Colonial Laws Validity Act, 1865, provides that Colonial laws shall be rendered invalid "to the extent of such repugnancy, but not otherwise". S.22a(2) of the Acts Interpretation Act, 1915-1975 (S.A.) reads:

"(2) Any Act or provision of an Act which, but for this section, would exceed the power of the State, shall nevertheless be a valid enactment to the extent to which it does not exceed that power."

29. *Gilbertson v. South Australia*, Privy Council decision (transcript), 7.

legislation", there would have been no repugnancy for two reasons.<sup>30</sup> First, the argument that to alter the character of a court established as a court of judicature by executive act would be repugnant to the Imperial statute authorising that act confused validity with perpetuity. Undoubtedly, the Supreme Court was validly created<sup>31</sup> but the 1837 Ordinance "only creates the court. It does not guarantee immutability, either in its existence or in any of its attributes."<sup>32</sup> And, secondly,

"a law is not . . . repugnant to another law enacting or directing that a court should be a court of judicature if, while taking nothing away from the court, it gives it an additional attribute not appropriate to a court of judicature."<sup>33</sup>

His Honour therefore held that the plaintiff's case had not been made out and that it was not necessary for him to consider at any length the nature of the jurisdiction conferred on the Full Court. He took the view that, with due regard for "the considerations dwelt on with such force and earnestness by Wells J.",<sup>34</sup> the legislature's powers in this respect are plenary and there is nothing to stop it conferring legislative or executive powers on the Supreme Court. However, he did not concede that it had done so in this instance.<sup>35</sup>

In the Privy Council the appellant's argument met with short shrift. Their Lordships . . .

"entertain[ed] no doubt that the 1837 Ordinance is a "colonial law" within the meaning of the Colonial Laws Validity Act, 1865. It is not an Act of the Imperial Parliament nor an order or regulation made under the authority of such an Act. Those persons who made the 1837 Ordinance derived their competence to make the laws for the colony of South Australia not from the Act of 1834 itself, but from the Order in Council of 23rd February 1836. This was itself a colonial law within the definition of section 1 of the Colonial Laws Validity Act 1865."<sup>36</sup>

Their Lordships went on to say that:

"The Parliament of South Australia would have plenary power to confer upon the Supreme Court . . . whatever jurisdiction Parliament thought fit, notwithstanding that such jurisdiction might involve the exercise of powers which do not fall within the concept of judicial power as it has been applied to constitutions based upon the separation of powers—which the State Constitution of South Australia is not."<sup>37</sup>

But, approving the judgments of Bray C.J., Walters and Jacobs JJ., they held that the only issue that can be raised under s.86(2) is one of law, since it confines the right of appeal to the ground that the order has not been duly made in accordance with the Act.<sup>38</sup> They rejected the argument that the power to vary an order of the Commission conferred by s.86(7)(b) would enable the Full Court to substitute its redistribution for that of the Commission,

30. (1977) 72 L.S.J.S. 213, 227.

31. The Imperial Act of 1842 confirms this.

32. (1977) 72 L.S.J.S. 213, 227.

33. *Ibid.*

34. *Id.*, 228.

35. *Ibid.*

36. P.C. transcript, 5.

37. *Ibid.*

38. *Id.*, 8.

and confined the power of the Full Court to a power "to correct errors [of a kind] which would not involve the Full Court in giving effect to a redistribution different from that which the Commission itself had intended to make."<sup>39</sup>

The plaintiff's appeal, having been dismissed by a four to one majority of the Full Court, was thus unanimously rejected by the Privy Council. The Constitution Act Amendment Act (No. 5), 1975 was held valid in its entirety. Other pending appeals were then withdrawn,<sup>40</sup> and the Commission's order came into effect towards the end of August, 1977.

Although the plaintiff's argument was resoundingly rejected the case does raise issues which, in 1977, are rather disquieting. It reveals the absurdity of a situation where, although the Australian States have united "in one indissoluble Federal Commonwealth"<sup>41</sup> which apparently is now fully independent,<sup>42</sup> those States appear to be legally subordinate to the United Kingdom Parliament. What then, in 1977, is the legal status of the six States? By the very nature of the federal system of government, the individual States do not possess the full legislative competence and executive authority of an independent "nation state"<sup>43</sup> and the Federal Constitution expressly delimits the powers of the State Parliaments by various means. But the States are not simply autonomous units of a federal system subject only to limitations under the Federal Constitution. They remain subject to the provisions of the Colonial Laws Validity Act 1865, which was expressly repealed in so far as it applied to the Commonwealth Parliament by the Statute of Westminster, and under which legislation passed by the State Parliaments can be struck down.

It has been suggested<sup>44</sup> that there is no legal continuity between the Australian States and the colonies as they existed before federation, the States as such owing their existence to ss.106 and 107 of the Commonwealth Constitution. Since the States remain subject to the Colonial Laws Validity Act, this seems unlikely: any deliberate break in the legal continuity of these entities would presumably have been accompanied by the re-enactment of that Act, or at least by some express statement to the effect that it was to continue to apply to the new States. And such a fundamental break in continuity could hardly have been accomplished unawares or by indirection. Nonetheless, various factors point to the conclusion that in 1977 the States cannot be viewed in the same way as were the colonies. The British Empire no longer exists. Australia is no longer a loose collection of colonies, but a federation and a

39. *Id.*, 9.

40. Formally withdrawn, 23rd May, 1977: *The Advertiser*, 24th May, 1977, 9.

41. Commonwealth of Australia Constitution Act, 1900-1977, preamble.

42. There seems no doubt that the average Australian would regard this country as a fully independent nation. However, legalists may challenge this view. (See e.g., Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976), 82-83.) Certainly, until the enactment of the Statute of Westminster, 1931 the United Kingdom Parliament had the legal power to enact legislation binding on Australia without the request and consent of any Australian Parliament. It is possible to regard this nation as having become fully independent, in British law at least, in 1931. However, the Commonwealth Parliament did not adopt the Statute of Westminster until 1942, retrospectively to 3rd September, 1939, and it is possible that in Australian law full independence was not acquired until that adoption. There is, however, a third possible view, that Australia is still not fully independent, as the States are not parties to the Statute of Westminster.

43. *Per Barwick C.J., N.S.W. v. Commonwealth (Seas and Submerged Lands Act Case)* (1975) 8 A.L.R. 1, 6. See also *per Isaacs, Rich & Starke JJ., Commonwealth of Australia v. State of N.S.W.* (1923) 32 C.L.R. 200, 210.

44. *Per Barwick C.J., N.S.W. v. Commonwealth* (1975) 8 A.L.R. 1, 15; *per Murphy J., Bisticic v. Rokov* (1976) 11 A.L.R. 129, 139; but *cf.* Covering Clause 6 of the Commonwealth Constitution, and see Stephen J., (1975) 8 A.L.R. 1, 73.

party to the Statute of Westminster. Changes in economic and political circumstances have drawn Australia to other parts of the world in matters such as political alignment and trade. Furthermore, the United Kingdom seems to have severed many of the remaining ties with its former colonies and dominions by its recent entry into the European Economic Community. Yet to this day, all State Parliaments in Australia are subject to the Colonial Laws Validity Act, and the effect of s.2 of that Act, as we have seen, is that Imperial legislation which purports to extend to the States is overriding and unpealable by the State Parliaments.

There is no reason, other than the existence of a constitutional convention, why the United Kingdom Parliament, by expressing an intention to bind the States, could not pass legislation which directly affected their existing rights and duties. *Halsbury* states the position as follows:

"The competence of the Parliament of the United Kingdom to legislate for the overseas dependencies of the Crown has not been in serious doubt since the seventeenth century. From the middle of the nineteenth century however, there was a convention against Parliament legislating for the self-governing colonies and colonies with responsible government without their consent. *But this convention does not restrict the legal powers of Parliament, and may in any event be inoperative in some circumstances.*"<sup>45</sup>

The learned commentator refers here to *Madzimbamuto v. Lardner-Burke*,<sup>46</sup> a case concerning the validity of legislation of the Southern Rhodesian authorities after the unilateral declaration of independence in 1965. Immediately upon that declaration the United Kingdom Parliament passed the Southern Rhodesia Act which asserted that Southern Rhodesia continued to be part of Her Majesty's dominions. Pursuant to the Act the Southern Rhodesia (Constitution) Order of 18th November, 1965 declared "any instrument made or other act done in purported promulgation of any constitution for Southern Rhodesia except as authorized by act of Parliament" to be "void and of no effect". Madzimbamuto was detained under emergency regulations enacted subsequent to the passage of the 1965 Act and Order in Council. The Privy Council held the regulations invalid; and, by implication, the Southern Rhodesia Act 1965 valid, despite the fact that it was applied to Southern Rhodesia without that Parliament's request or consent. In the words of Lord Reid:

"It may be that it would have been thought, before 1965, that it would be unconstitutional to disregard this convention. But it may also be that the unilateral Declaration of Independence released the United Kingdom from any obligation to observe the convention. Their Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament."<sup>47</sup>

It is conceded that it is highly unlikely that a situation would arise where the United Kingdom Parliament would legislate for one or more of the

45. *Halsbury's Laws of England*, (4th ed. 1974), VI, para. 1027 (emphasis added).

46. [1969] 1 A.C. 645.

47. *Id.*, 723. Note, however, that the position of Rhodesia in 1965 was different from that of the Australian States. The convention of non-interference in Southern Rhodesia was only formalised in 1961; and there was some support for the United Kingdom government's view that the convention applied only in the absence of a fundamental change of circumstances. See Palley, *The Constitutional History and Law of Southern Rhodesia 1888-1965* (1966), 230-234, 703-711. Thus it is arguable that there was no breach of convention in this situation.

Australian States without their request and consent. In two recent cases,<sup>48</sup> where it has been argued that such legislation<sup>49</sup> applied, by implication, to the States, both the High Court and the Victorian Supreme Court rejected these arguments: it was held in both cases that on the construction of the respective Acts neither was intended to apply to the States.<sup>50</sup> But the point to be emphasised is that in both cases there appeared to be grounds for arguing that the Acts applied to the States, so that the question had to be judicially determined.<sup>51</sup>

These possibilities, it is submitted, show that the time for fundamental change to the legal positions of the State parliaments is overdue. Traditionalists could perhaps argue that to free the States from the bondage of the repugnancy sections of the Colonial Laws Validity Act would endanger ties with the British Commonwealth. However, the Commonwealth of Nations ought, by definition, to be concerned with Australia as a whole, as the only "nation" existing within the geographical limits of the Australian Commonwealth. Canada is a member of the Commonwealth of Nations, yet its provinces became subject to the Statute of Westminster. Indeed, there is no Canadian appeal to the Privy Council, either from Federal or Provincial courts, yet it could scarcely be contended that Canada is "less" a member of the Commonwealth than Australia. Nor can it be argued that releasing the States from their subordination to the United Kingdom would make them more vulnerable to Federal power. Such a move would no more increase the Commonwealth government's power *vis-à-vis* the States than did the acceptance by the Commonwealth of the Statute of Westminster, an acceptance which was opposed by some of the States because of just such a fear.<sup>52</sup>

Assuming, then, that there is no justification for the continued application of the Act to the Australian States, nonetheless its repeal could raise legal problems.<sup>53</sup> The most difficult of these concerns the proviso to s.5 of the Colonial Laws Validity Act which requires that colonial legislation with respect

48. *Bisticic v. Rokov* (1976) 11 A.L.R. 129; *Ukley v. Ukley* [1977] V.R. 121.

49. Respectively, Merchant Shipping (Liability of Shipowners and Others) Act, 1958 (U.K.), amending the Merchant Shipping Act, 1894 (U.K.); Evidence (Proceedings in Other Jurisdictions) Act, 1975 (U.K.), amending the Foreign Tribunals Evidence Act, 1856 (U.K.).

50. See esp. *per* Mason J., (1976) 11 A.L.R. 129, 131-133; and the Full Court, [1977] V.R. 121, 129-130. But in one case it seems to have been assumed that Imperial legislation did apply to the States without their request or consent: Nettheim, *Sydney Morning Herald*, 11th July, 1968, p.2, referring (*semble*) to the Collision Regulations (Ships and Seaplanes on the Water) and Signals of Distress (Ships) Order 1965 (S.I. 1965 No. 1525). *Sed quaere*.

51. Note, however, the view of Murphy J. in *Bisticic v. Rokov* (1976) 11 A.L.R. 129, 138-141. His Honour, without considering whether the Act on its construction applied to N.S.W., stated categorically that the relationship which formerly was imperial-colonial is now international and that hence the United Kingdom "has no legislative or executive authority over Australia (or any part of it)": *id.*, 139.

52. It was to allay such fears that s.9 was included in the Statute of Westminster. For a modern argument that the States do require the protection of the United Kingdom against encroachment on their powers by the Commonwealth see O'Connell, "The royal prerogative", *Times Literary Supplement*, 9th April, 1976. See also his "Monarchy or Republic?", in Dutton, ed., *Republican Australia?* (1977), 23-43.

53. S. 5 of the Colonial Laws Validity Act conferred on colonial legislatures power to legislate with respect to such legislatures and with respect to courts of judicature. It might perhaps be argued that should the Act be repealed such powers would be lost, but we regard such an argument as untenable. The plenary power to pass laws for the peace, order and good government of the States conferred on their Parliaments by their respective constitutions must surely be sufficient to empower them to legislate with respect to courts of judicature and the legislature.



to the constitution, powers and procedure of the legislature must be passed "in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony". It has been argued that it is only because of this proviso that special manner and form provisions are binding on State legislatures and that if the act were repealed, State legislatures would be unable to bind their successors, and would be able to amend entrenched clauses in their Constitutions by legislation passed, not in accordance with the special manner and form required but by ordinary manner and form. This is the position taken by the N.S.W. Law Reform Commission in its *Working Paper on Legislative Powers*,<sup>54</sup> where it is suggested that if the United Kingdom Parliament is requested to enact "Statute of Westminster" type legislation for New South Wales it should be requested to re-enact the substance of s.5 in order to preserve entrenchment. With respect, we believe that this is unnecessary and possibly even undesirable.

The proposition that only subordinate legislative bodies can be bound by special manner and form requirements and that a sovereign Parliament cannot bind its successors appears to be based on the assumption that the government of an independent, sovereign nation must have plenary power to govern its own affairs. But this does not require that the plenary power to legislate must reside in one body alone. It may be divided between several bodies, as it is in a federation, without in any way reducing the overall plenitude of power. The plenary power to legislate may for the most part reside in one body constituted in a particular way, but with respect to certain subject matters it may reside in a differently constituted body. In such a case and with respect to those subject matters the legislative body has been redefined, but the nation's power to govern its own affairs has not been reduced in any way. This was the view taken by the Appellate Division of the Supreme Court of South Africa in *Harris v. The Minister of the Interior*.<sup>55</sup> There the Court was considering the validity of legislation passed by ordinary manner and form when the South Africa Act required legislation on that subject matter to be passed by a two-thirds majority of the two Houses of Parliament sitting together. Centlivres C.J., with whom the rest of the Court concurred, said:

"A State can be unquestionably sovereign although it has no legislature which is completely sovereign . . . [L]egal sovereignty may be divided between two authorities. In the case of the Union, legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted under s.63 and the proviso to s.152. Such a division of legislative powers is no derogation from the sovereignty of the Union . . ."<sup>56</sup>

Later in his judgment he pointed out that . . .

"it would be surprising to a constitutional lawyer to be told that . . . the United States of America is not a sovereign independent country simply because its Congress cannot pass any legislation which it pleases."<sup>57</sup>

54. N.S.W. Law Reform Commission, *Working Paper on Legislative Powers* (1972), 67-69, esp. 69.

55. 1952 (2) S.A. 428 (A.D.), sub nom. *Harris v. Dönges*.

56. *Id.*, 464.

57. *Id.*, 468.

Dixon J. (as he then was) suggested in *Trethowan's Case* that a special manner and form requirement could be binding on the United Kingdom Parliament:

"An Act of the British Parliament which contained a provision that no Bill repealing any part of the Act including the part so restraining its own repeal should be presented for the royal assent unless the Bill were first approved by the electors, would have the force of law until the Sovereign actually did assent to a Bill for its repeal. In strictness it would be an unlawful proceeding to present such a Bill for the royal assent before it had been approved by the electors. If, before the Bill received the assent of the Crown, it was found possible . . . to raise for judicial decision the question whether it was lawful to present the Bill for that assent, the Courts would be bound to pronounce it unlawful to do so. Moreover, if it happened that, notwithstanding the statutory inhibition, the Bill did receive the royal assent although it was not submitted to the electors, the Courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside."<sup>58</sup>

Dixon J., and the other members of the High Court who formed the majority in that case, held that the New South Wales legislature was bound by the special manner and form laid down in s.7A of the Constitution Act, 1902-1930 (N.S.W.), because of s.5 of the Colonial Laws Validity Act, but it seems most likely that s.5 is not essential in this regard. A Parliament with unlimited power to legislate can presumably vest a part of that legislative power in a different body. This is so simply because the Parliament's power is unlimited.

Thus if the Colonial Laws Validity Act were repealed the special manner and form requirements of the States' Constitutions would remain binding on their respective legislatures, and it would be unnecessary to request the United Kingdom Parliament to re-enact the substance of s.5. Such a re-enactment may well put to rest any doubts as to the continued binding effect of special manner and form requirements. However, the N.S.W. Law Reform Commission appears to be of the opinion that only subordinate legislatures can be thus bound, and that it is preferable to remain subordinate than to achieve independence at the expense of destroying entrenchment. Thus in its draft Bill the re-enactment of s.5 was to be rendered unrepealable by the New South Wales Parliament.<sup>59</sup> Such a step would, we contend, be undesirable and we would oppose any proposal that South Australia should request such an enactment. A re-enactment of s.5 which was not rendered unrepealable by the State Parliament, while strictly speaking unnecessary, would allay doubts without maintaining the State in a subordinate situation.

Let us assume then, that South Australia (and possibly all or some of the other States) decides that it would like to have the Colonial Laws Validity Act repealed in so far as it applies to that State. There is no doubt that a State legislature has no power itself to repeal the Act. However, this does not

<sup>58</sup>. *Attorney-General for N.S.W. v. Trethowan* (1931) 44 C.L.R. 394, 426.

<sup>59</sup>. Draft ss.4 and 6; *op. cit.*, 112-113 and *infra.*, pp.146-147. S.6, to which s.4 is subject, would render the Act, were the draft Bill enacted, unrepealable by the New South Wales Parliament. Moreover, s.5, by which the New South Wales Parliament was to be empowered to repeal Imperial legislation extending to the State, is also expressed to be subject to s.6.

mean that such a repeal is impossible. There are available to the States three alternative methods of bringing about repeal: (i) a possible constitutional "revolution"; (ii) legislation by the United Kingdom parliament; (iii) legislation by the Commonwealth, at the request or concurrence of the State(s), under s.51 (xxxviii) of the Commonwealth Constitution. These will be discussed in turn.

(i) It may be arguable that economic, political and historical factors have, to all intents and purposes, brought about some sort of revolution in the Australian States. It could follow from this contention that the constitutional situation has changed so radically that any notion of dependence on the former Imperial parliament is outmoded and untenable in 1977.<sup>60</sup> (This proposition is by no means trivial, but a thorough examination of the area of "constitutional revolution" and its implications is beyond the scope of this note.)

(ii) The N.S.W. Law Reform Commission's *Working Paper on Legislative Powers* has already been referred to.<sup>61</sup> At this stage, it is perhaps worth noting the manner in which the Commission approached this topic. In 1966, the Commission was given a number of references concerning statute law revision and it was in the course of examining the limitations of the State Parliament in that area that the questions of repugnancy and the possibility of repeal of the Colonial Laws Validity Act arose. The Working Paper referred to . . .

"a number of fundamental questions as to the legislative relationships between the Australian States and, respectively, the Commonwealth and the Parliament of the United Kingdom. Those questions must be taken into account in order to achieve the object contemplated in the existing reference of securing general statute law revision. In theory and, to some extent, in practice the State Parliament is not, for historical reasons, the exclusive master of its own statute book. Until it becomes so, statute law revision in an ycomplete sense must be, at best, imperfect."<sup>62</sup>

The result of the Commission's work was the drafting of a suggested Bill to be called the New South Wales Act, 1972.<sup>63</sup> The provisions in this draft "Bill" were similar to those of the Statute of Westminster, with one notable exception. Draft s.4 provided:

- "(1) The Legislature shall have full power to make laws respecting its constitution, powers and procedure:  
Provided that such laws must be passed in such manner and form as may from time to time be required by any law for the time being in force in the State.
- (2) This section has effect subject to s.6 below."

It will be seen that s.4 was a virtual re-statement of s.5 of the Colonial Laws Validity Act, *i.e.*, the manner and form section. S. 6 stated:

- "(1) For the purposes of this section, each of the following, but no other law, is a dominant law—
- (a) the Commonwealth of Australia Constitution Act;
- (b) the Constitution of the Commonwealth of Australia;

60. See, in this context, the judgments of Murphy J. in *Bisticic v. Rokov* (1976) 11 A.L.R. 129, 138 *et seq.*; and in *Commonwealth v. Queensland* (1976) 50 A.L.J.R. 189, 200 *et seq.*

61. N.S.W. Law Reform Commission, *Working Paper on Legislative Powers* (1972) (*supra*, p.144).

62. *Id.*, 17.

63. *Id.*, 111-115.

- (c) the Statute of Westminster 1931;
- (d) this Act.

- (2) Where a law made by the Legislature is inconsistent with a dominant law, the latter shall prevail, and the former shall to the extent of the inconsistency, be invalid."

S.5 expressly provided that no subsequently enacted law should "be void or inoperative on the ground that it is repugnant to the law of England". Thus, s.6 afforded a definitive, and exclusive enumeration of state legislative subordination to dominant laws. It is submitted that the substance of such an Act (excluding s.4)<sup>64</sup> would be suitable as the kind of "emancipating" legislation needed for the States.

The Commission was apparently of the opinion that the only law-making body competent to pass such legislation is the United Kingdom Parliament. Doubtless, such legislation is within the legislative competence of that Parliament—but whether this power would ever be exercised is highly questionable. Convention has it that the United Kingdom would legislate for the Australian States only at their direct request and consent.<sup>65</sup> Furthermore, except for such highly explosive situations as that in Southern Rhodesia, it seems clear that the United Kingdom Parliament will not enter into any political or legal controversy involving one of the self-governing colonies or dominions. It may be then that the United Kingdom Parliament might only be persuaded to pass legislation of this kind if there were a unanimous approach by all the States, and possibly the Commonwealth as well, requesting a "Statute of Westminster" for the States. It remains doubtful whether the New South Wales Parliament could successfully have requested the legislature at Westminster to pass the New South Wales Act, 1972 in the absence of a similar request from the other States, and it is probable that such a request would not have been forthcoming from all the other States.<sup>66</sup>

(iii) It is submitted, however, that the United Kingdom Parliament is not the only legislature competent to pass such legislation. Another such power exists, indeed that power is enumerated in one of the "dominant laws" set out in s.6 of the New South Wales draft Bill. This is s.51 (xxxviii) of the Commonwealth Constitution, which provides:

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: . . . (xxxviii) the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia."

There is no case law, and little academic discussion of the ambit of s.51 (xxxviii). The placitum mentions powers which could "at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia".<sup>67</sup> Quick and Garran point out that:

64. See *supra*, text at n.63.

65. *Supra*, p.142, but note the possible *caveat* evidenced by *Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645; *supra*, nn. 47, 50.

66. The N.S.W. Law Reform Commission's Working Paper was never formalised as a report: no action has since been taken on it.

67. It seems clear that all powers exercisable by the Federal Council of Australasia have been expressly given to the Commonwealth Parliament by the Constitution.

“. . . the Parliament of each colony had general powers to make laws for the peace, order and good government of the colony, subject only (1) to the general exception expressed in the Colonial Laws Validity Act—that such laws must not be repugnant to any Imperial Law expressly extending to the colony; (2) to certain particular exceptions expressed in the Constitution Act of each colony; and (3) to the limitation that such laws could not operate extra-territorially, except where express authority to that effect had been given by the Imperial Parliament . . . It would seem, therefore, that the only powers to make laws for the peace, order and government of a colony which at the establishment of the Commonwealth [were] ‘only exercisable’ by the Imperial Parliament are powers which come within one of those three classes of exceptions or limitations.”<sup>68</sup>

Other commentators on the subject agree that these three categories constitute the powers mentioned in s.51 (xxxviii).<sup>69</sup> Nonetheless Quick and Garran find it “difficult to see what power can be conferred on the Federal Parliament by these words”.<sup>70</sup> They assume that the Colonial Laws Validity Act was applicable to the Commonwealth in 1900 and that it follows that the Commonwealth then had no power to pass laws repugnant to Imperial legislation extending to the colonies. This limitation affects categories (1) and (2) and the words “within the Commonwealth” preclude the enactment of legislation having extra-territorial effect. Lumb and Ryan,<sup>71</sup> writing in 1977, claim that since it was understood that the Colonial Laws Validity Act was binding on the Commonwealth Parliament in 1900,<sup>72</sup> there is no power in the placitum to pass legislation repugnant to that of the Imperial Parliament. They agree with the limitation on extra-territorial legislation based on the words “within the Commonwealth”, and conclude that

“the interpretation to be given to this head of power is that it is restricted to . . . that small class of matters excepted from State control or subject to manner and form requirements by force of Imperial legislation.”<sup>73</sup>

Professor Nettheim<sup>74</sup> has suggested that the placitum could be invoked for the purpose of abolishing appeals to the Privy Council. (This has since become a hypothetical question in so far as appeals from the High Court are concerned;<sup>75</sup> however it may still be relevant with regard to appeals from State Courts.) He posits two alternative views of the placitum.

“(1) It could be taken to cover powers which could not otherwise be exercised by the States or the Commonwealth. Such powers would comprise (a) power to pass laws on matters beyond competence under the respective constitutions; (b) power to pass laws repugnant to United Kingdom laws extending to Australia by paramount force; (c) power to pass laws having extra-territorial effect.”<sup>76</sup>

68. Quick and Garran, *Commentaries on the Constitution* (1901), 650.

69. See Lumb and Ryan, *Annotated Constitution* (2nd ed., 1977), 190; Nettheim, “The Power to Abolish Appeals to the Privy Council”, (1965-1966) 39 *A.L.J.* 39, 45.

70. Quick and Garran, *op. cit.*, 651.

71. Lumb and Ryan, *op. cit.*, 190.

72. Here the writers refer to Quick and Garran, *op. cit.*, 351-2.

73. Lumb and Ryan, *op. cit.*, 190.

74. Nettheim, *loc. cit.*, 45.

75. These were abolished by the Privy Council (Appeals from the High Court) Act 1975, assented to 30th April, 1975.

76. Nettheim, *loc. cit.*, 45.

This is, as he points out, a wide view of the placitum and to accept it would be to support the view that:

"the Commonwealth and States Parliaments can, in co-operation, do what none of them could do individually, including passing laws beyond their respective constitutional competence, or laws repugnant to imperial laws extending to them by paramount force, or laws having extra-territorial effect."<sup>77</sup>

His alternative suggestion is:

"... to read the words 'any power which can *at the establishment of this Constitution* be exercised only by the Parliament of the United Kingdom' as referring to powers which did not belong to the parliaments of the colonies before they became States, and as excluding any reference to powers conferred on the Commonwealth *on the establishment of the Constitution*. On this interpretation the effect of pl. (xxxviii) would be to supplement the powers conferred on the Commonwealth Parliament by the Constitution with a power, in co-operation with the States, to legislate on matters beyond the competence of the Commonwealth itself."<sup>78</sup>

Such an interpretation, in his view, would reduce the content of the power *originally* conferred by s.51 (xxxviii) "almost to zero";<sup>79</sup> but the adoption by the Australian Parliament of the Statute of Westminster in 1942 radically changed this situation, and has given potential to a once dormant power.

Each of these commentators, then, accepts the proposition that until at least the passage of the Statute of Westminster, the Colonial Laws Validity Act was binding on the Commonwealth Parliament, and was an Act overriding the Constitution Act in its entirety. Doubtless, this was the intention of the framers of the Constitution;<sup>80</sup> however, it is an established rule of statutory construction that debates in Parliament prior to the passage of legislation cannot be used by the courts as evidence in interpreting disputed sections, and this is so in relation to interpretation of the Constitution. Reference cannot be made by the Courts to either the Convention debates, or the debates of the Imperial Parliament.<sup>81</sup> It remains then to determine the natural meaning of the placitum from the express words used. *Prima facie*,

77. *Ibid.*

78. *Ibid.* (emphasis his).

79. *Ibid.*

80. Quick and Garran, *op. cit.*, 347-352, deal with the question of the effect of the Constitution Act on the Colonial Laws Validity Act. They point out (at 351) that there was some "doubt expressed by the Imperial Law Officers of the Crown as to the application of the Colonial Laws Validity Act to Acts passed by the Federal Parliament." They continue: "It was therefore proposed to remove doubts by adding a paragraph to Clause 6 [of the Bill] declaring that 'the laws of the Commonwealth shall be Colonial laws within the meaning of the Colonial Laws Validity Act, 1865'." Apparently, the Australian delegates maintained that such express provision was unnecessary. They conclude: "The amendment declaring that 'the laws of the Commonwealth shall be Colonial laws within the meaning of the Colonial Laws Validity Act 1865' appeared in Clause 6 of the Bill introduced into the House of Commons. As a result of subsequent negotiations, however, the Imperial Government decided to omit these words, and also to omit the definition of 'colony' and in Committee this was done. It may be assumed therefore, that the Colonial Laws Validity Act is applicable to the Constitution as it stands." (*Id.*, 352.)

81. *Municipal Council of Sydney v. The Commonwealth* (1904) 1 C.L.R. 208, 213; and see Griffith C.J. in *State of Tasmania v. The Commonwealth and State of Victoria* (1904) 1 C.L.R. 329, 333.

Professor Nettheim's first view is the correct one; s.51 (xxxviii) appears to empower the Commonwealth and State Parliaments, in co-operation, to do what neither of them can do individually. This is indeed a wide view of the placitum, and he apparently finds it difficult to accept because of his assumption as to the overriding nature of the Colonial Laws Validity Act. It is, however, contended that placitum (xxxviii) effects an implied repeal of the Colonial Laws Validity Act, though only so far as the two provisions are inconsistent. For present purposes the inconsistency lies in the fact that the Constitution seemingly empowers the Commonwealth Parliament, with the request or concurrence of one or more of the State Parliaments, to repeal or amend Imperial legislation applying to the States by paramount force, since until 1900 the Colonial Laws Validity Act reserved this power to the United Kingdom Parliament.

Both the Acts in question are Acts of the Imperial Parliament, the Constitution Act being the later in time. Griffith C.J. stated the position regarding implied repeal as follows:

"Where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication . . . Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."<sup>82</sup>

In *McIlwraith McEacharn Ltd. v. Shell Co. of Australia*, Dixon J. (as he then was) stated . . .

"The Constitution is, like the Colonial Courts of Admiralty Act 1890, an Imperial statute, but later in point of date, and the solution of [a] conflict must be found in the principles of interpretation."<sup>83</sup>

The High Court was in this case dealing with two Imperial statutes, the later of the two being the Constitution Act. Because the case was decided on other grounds, this statement is *obiter*, but the case could have been decided on the question of the temporal relationship between Imperial Acts.

It would appear then that unless there is express provision to the contrary, the ordinary rules of construction apply when dealing with two Acts passed by the same legislature at different times, even when those Acts are Imperial Acts applying by paramount force and one of them is a constitution. Although it was apparently intended by the Imperial Parliament that the Colonial Laws Validity Act should override the Constitution in its entirety,<sup>84</sup> nowhere in the Constitution itself, nor in the Covering Clauses, is reference made to the 1865 Act. If the Imperial Parliament had intended that the Colonial Laws Validity Act should override the Constitution Act, including s.51 (xxxviii), an express intention ought to have been incorporated into the 1900 Act. Without such an express intention, the power conferred by placitum (xxxviii) must

82. *Goodwin v. Phillips* (1908) 7 C.L.R. 1, 7; cited by Pearce, *Statutory Interpretation in Australia* (1974), 94; *Craies on Statute Law* (6th ed., by S.G.G. Edgar, 1963), 365.

83. (1945) 70 C.L.R. 175, 206.

84. *Supra*, n.80.

be interpreted as including a power to pass such laws as the placitum permits even although those laws would otherwise be void for repugnancy.

It may be that s.51 (xxxviii) sets up a manner and form procedure: a new legislature is created, *viz.* the Commonwealth, with the request or with the concurrence of all the States directly concerned. Alternatively, the placitum creates a condition precedent to legislation of the Commonwealth Parliament itself.<sup>85</sup> Whichever is the correct view, the Commonwealth has the power to pass legislation repugnant to Imperial laws within the meaning of s.2 of the Colonial Laws Validity Act, provided that it acts at the request or with the concurrence of some or all of the States. We would contend that the Commonwealth has had this power since 1901, but there is no doubt that the power exists now, since the adoption by the Commonwealth of the Statute of Westminster removed the repugnancy doctrine as it applied to the Federal Parliament. It follows that the Commonwealth acting in accordance with placitum (xxxviii) would be empowered, *inter alia*, to repeal the Colonial Laws Validity Act as it applied to the States.<sup>86</sup>

There are four possible limitations which could be inferred from the words of s.51 (xxxviii):

(1) The first of these is the phrase "subject to this Constitution". This does not limit the position with reference to a partial repeal, by implication, of the Colonial Laws Validity Act. What it arguably does is to prevent amendment of this particular Imperial Act, that is, the Constitution Act, since it seems likely that s.128 would override a section expressed to be subject to this Constitution. In other words, the placitum by itself does not authorise amendment of the Constitution.<sup>87</sup>

(2) The words "within the Commonwealth" would seem to preclude the enactment, under authority of the placitum, of legislation having extra-territorial effect. However, they do not preclude legislation removing restrictions upon the powers of the State Parliaments. Such legislation would have effect only within the Commonwealth, although subsequent to such legislation the States would be able to pass laws having extra-territorial operation. Similarly, although the abolition of appeals to the Privy Council

85. *Cf.* Statute of Westminster, s.4, which provides:

"4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

There are two possible interpretations of s.4. One is that it sets up a manner and form procedure for the enactment by the United Kingdom Parliament of legislation extending to a Dominion. On this view the body empowered to pass such legislation is the United Kingdom Parliament acting at the request and with the consent of the Dominion concerned. Alternatively, s.4 can be viewed as requiring a mere *declaration* of request and consent beyond which the Courts will not look. This view has two consequences. First, an Act containing such a declaration could well be held valid although the Dominion concerned did not actually request or consent to its enactment. Secondly, such a provision prescribes the content, not the manner of enactment, of legislation, and might therefore be expressly or impliedly repealed by subsequent United Kingdom legislation without compliance with its terms. Whether that subsequent legislation would apply to the Dominion as *part of its law* might then fall to be decided on other grounds. (See in this context, *British Coal Corporation v. The King* [1935] A.C. 500, 520, *per* Viscount Sankey.)

86. It could also be used, as suggested by Professor Nettheim, to abolish appeals from State Courts to the Privy Council.

87. *Cf.* also Statute of Westminster, s.8.



would probably be seen as having effect outside the Commonwealth,<sup>88</sup> legislation which removed the restriction upon State Parliaments to abolish such appeals would be legislation having effect only within the Commonwealth. Professor Nettheim also argues that since the power conferred by s.51 (xxxviii) is a power of legislation, the exercise of that power *could* only take place within the Commonwealth.<sup>89</sup>

(3) “. . . any power which *at the establishment of this Constitution* . . .” A very narrow view of this phrase would be to limit the scope of legislation to that which was only possible in 1900. It could thus be argued that amendment or repeal of any Imperial Act passed *after* the Constitution Act (*e.g.*, the Statute of Westminster) is beyond power. This possible interpretation would not, however affect legislation purporting to repeal the Colonial Laws Validity Act,<sup>90</sup> and it is to be noted that even though the Imperial Parliament, for obvious reasons, could not have amended (for example) the Statute of Westminster in 1900, it nevertheless had at that time general power to make provisions having the same effect.

(4) It remains to consider the meaning of the expression “*the Parliaments of all the States directly concerned*”. Both Lumb and Ryan and Nettheim deal with this phrase. Lumb and Ryan view the section as empowering only legislation dealing with “matters excepted from State control or subject to manner and form requirements by force of Imperial legislation”.<sup>91</sup> They conclude their discussion of the placitum with the following caveat:

“It is to be noted that s.51 (xxxviii) requires the concurrence of all the State Parliaments directly concerned. Insofar as these classes of matters would be found in more than one Constitution Act, there is some doubt as to whether a request for amendment from one State alone would justify an exercise of legislative power if requests from other States were not forthcoming. In other words, legislative action on the part of the Commonwealth under this section, may in the interests of uniformity be predicated on the consent of all the States whose constitutions contain a particular type of provision in respect of which a request for amendment has been made.”<sup>92</sup>

All the States are subject to the Colonial Laws Validity Act. Is the true position, then, that if South Australia were to request the Commonwealth to repeal that Act in relation to South Australia, any other State which did not approve of this request could claim to be “directly concerned” and refuse to concur in such action? It is conceded that any other State may be, to some extent, affected by such a repeal, since the position of the States *vis-à-vis* each other would be altered by the fact that some, but not all, were still subject to the Colonial Laws Validity Act. However, to argue that such a State would be a State “directly concerned” would negate the effect of the word

88. For an argument that the placitum does authorise such legislation see Nettheim, *loc. cit.*

89. Nettheim, *loc. cit.*, 46. This interpretation is probably wrong, as if it were correct, the words would be meaningless. It is inconceivable that the Commonwealth Parliament would travel outside the Commonwealth in order to legislate. For the purposes of this discussion however, this question is irrelevant—the repeal of the Colonial Laws Validity Act as it applies to the Australian States would undoubtedly have effect within the Commonwealth, for the reason stated in the text.

90. Or the Judicial Committee Acts, 1833 and 1834.

91. Lumb and Ryan, *op. cit.*, 191.

92. *Ibid.*

"directly". The placitum requires the concurrence of all the States which are directly concerned, and thereby excludes the need for approval of other States that are *indirectly* concerned.

Nettheim's view of these words differs markedly from that of Lumb and Ryan. He says, (in the context of the abolition of Privy Council appeals):<sup>93</sup>

"It is significant that pl. (xxxviii) refers only to those States 'directly concerned'. Presumably, if not all the States requested or concurred, the federal Parliament could still pass such laws at the request or with the concurrence of the Parliaments of the other States. Such laws would abolish Privy Council appeals only from the courts of those States and they would be the only States 'directly concerned'. Appeals to the Privy Council would remain available from the courts of the States that wished to retain them."

This seems to be the correct approach; on this view the phrase presents no impediment to the Commonwealth Parliament, at the request or with the concurrence of the South Australian Parliament, repealing the Colonial Laws Validity Act in its application to this State, and enacting in its place some agreed statement of South Australia's status within the Federation.

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93. Nettheim, *loc. cit.*, 48.\*

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