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# The Invalidity of Queensland's First Parliament Lutwyche J. and the Legislature 1860-1861

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## THE JUDICIARY AT SEPARATION

Separation of Queensland from New South Wales brought together the two most important and powerful men in the new colony. One was Sir George Bowen, "Captain-General and Governor-in-Chief of our said colony", whose proclamation at Brisbane on December 10, 1859 of the Letters Patent of June 6, 1859, marked the starting point of Queensland's existence.[1] The other was Alfred James Peter Lutwyche, Judge of the Supreme Court at Moreton Bay, who "robed and in an awful wig" as Nehemiah Bartley observed him,[2] administered the oaths of office and allegiance to the Governor of Queen Victoria's most recent and remote colony. They were soon to share their powers with the legislature to be established in 1860 by elections for a Legislative Assembly.

Mr Justice Lutwyche was not merely the only judge in Queensland; he was a Judge of a Supreme Court. As such his powers were extensive and his hold on his judicial office virtually impregnable. The Governor was appointed and removable upon the advice of the Imperial Government, to whom he reported and was responsible.

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In Queensland he acted upon the advice of his Executive Council. The Judge, who had been appointed by the Government of New South Wales, could be removed by Her Majesty upon address by both houses of the legislature. Neither house had yet been constituted in Queensland. The only other means of removing a colonial judge was by "amotion" under the *Colonial Leave of Absence Act* 1782 for misconduct in office; but this procedure, which was subject to appeal to the Privy Council, was available only after definite charges had been laid against the judge and he had been heard in his defence. When in 1862 Governor Bowen had thoughts of invoking the Act against Lutwyche, he was advised by the Law Officers to the Crown in London that it was available only in the case of "legal and official misbehaviour and breach of duty", and not "any mere error of judgment or wrongheadness consistent with the *bona fide* discharge of that duty".[3]

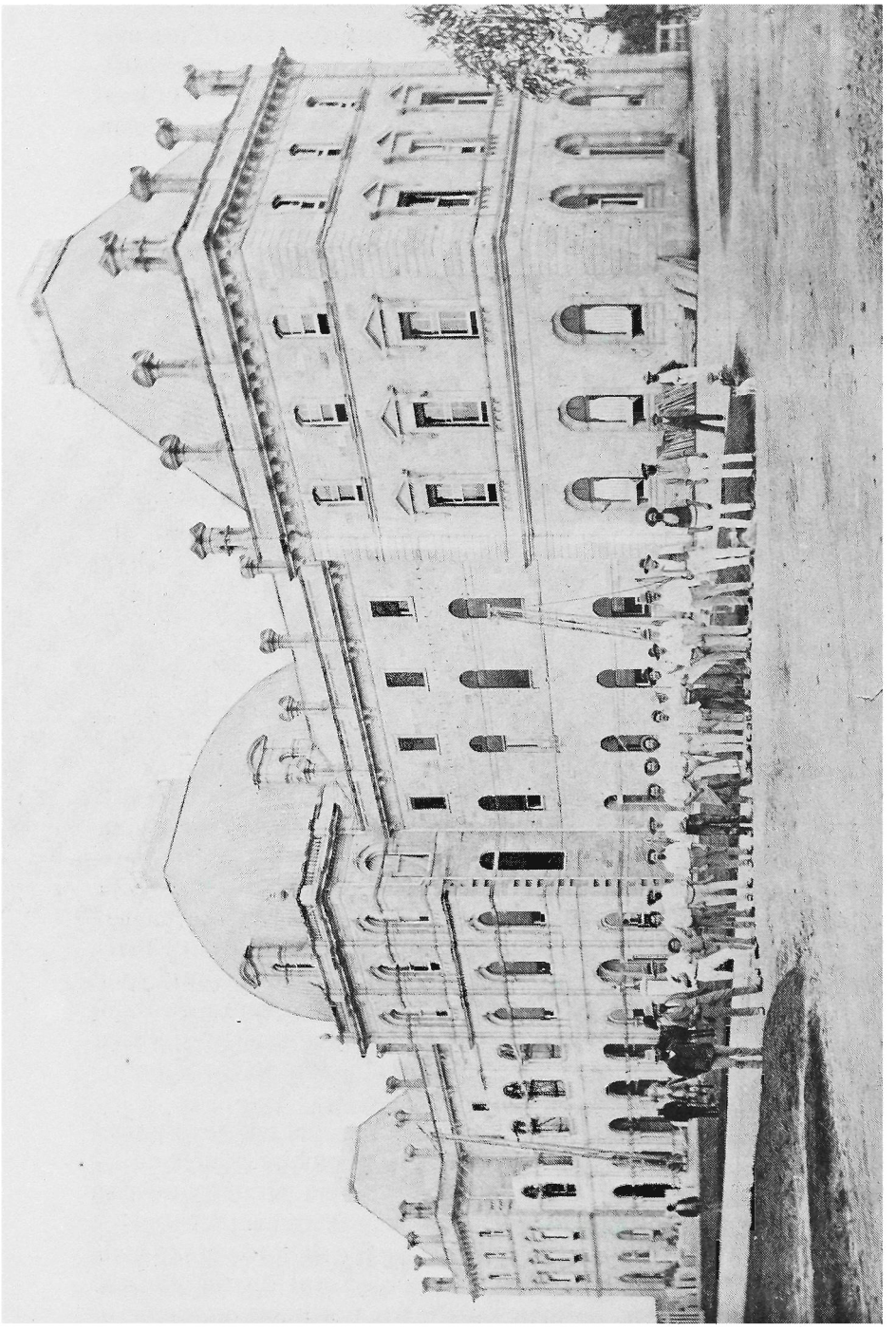
As Supreme Court judge the powers exercisable by Lutwyche J. were considerable. Under the *Australian Courts Act* 1828, he possessed all the judicial powers of the Lord Chancellor of England, as well as the entire range of jurisdiction, civil and criminal, vested in the superior courts of common law at Westminster. Both he and the Governor were equally subject to and bound by the law; but it was the Judge and not the Governor who decided what the law was. Although controlled by statute, by precedent, and by his professional training, Lutwyche, as the only judge, enjoyed a measure of independence never since enjoyed by any judge in Queensland. His decisions were, of course, subject to appeal, although at that time appeals were practically confined to matters of law. Before Separation, appeal lay to the Supreme Court of New South Wales in Sydney. The very fact of Separation changed all that, as decisions of Lutwyche J., of the Supreme Court of New South Wales, and of the Privy Council, confirmed in 1860.[4] Thereafter a litigant aggreived by a decision of Lutwyche J. could appeal only to the Supreme Court of Queensland, where he would find himself once more confronted by Lutwyche now sitting as the Supreme Court in *Banc*. His Honor was, as at his death Lilley C. J. acknowledged, readier than most men "willingly and cheerfully" to admit to error;[5] but it was Lilley who in 1860 had condemned this procedure as amounting to an appeal "from His Honor downstairs to His Honor upstairs." Beyond it there was always the Privy Council in London; but even after that right of appeal was fully established by Order in Council of June 30, 1860,[6] it required some patience, much determination, and a deep purse, to carry an appeal to London. It was not until 1876 that an appeal from the Supreme Court of Queensland first reached the Judicial Committee.[7] Significantly, it involved a dispute over mining claims on the Gympie goldfield.

## MR JUSTICE LUTWYCHE

Compared to the Governor, the position and powers of the single Supreme Court judge at Separation were therefore, relatively speaking, unassailable. The personality, background and outlook of Lutwyche J. consequently assume a certain importance in the events that followed. In an earlier period of English history there had been another judge who bore the surname Lutwyche. Appointed to the Court of Common Pleas in 1686, Sir Edward Lutwyche was turned out of office for his Jacobite sympathies after the abdication of James II in 1688.[8] Thereafter he contented himself with completing, in Latin and law French, two volumes of reports of cases decided in the Common Pleas between 1684 and 1704.[9] It seems likely that the Queensland judge claimed descent from his earlier namesake. The Supreme Court Library at Brisbane includes in its collection of rare books an original edition of Sir Edward's reports presented by the executrix of Alfred Lutwyche after his death in 1880.

If Alfred Lutwyche felt some pride in his judicial ancestry, he certainly did not inherit his political views. Born into a well-to-do family of London merchants,[10] Lutwyche J. of Queensland typified the nineteenth century English liberal — one who, in the Orwellian vision, "is always fighting against something, but who fights in the open and is never frightened". In writing that, George Orwell had in mind Charles Dickens; and Dickens and Lutwyche are said to have been life-long friends, a circumstance dating from their days as Parliamentary reporters for the liberal *Morning Chronicle*. After admission to the Bar, Lutwyche maintained an interest in politics and the franchise by editing a series of reports devoted to decisions on registration of voters under the provisions of the Great Reform Act of 1832.[11] Ill-health forced him to emigrate, and, after surviving a shipwreck on remote Amsterdam Island, of which he published accounts in both French and English,[12] he reached Sydney late in 1853. Abandoning a commission as Sydney reporter for the *Chronicle*, he was admitted to the colonial Bar, and soon became active in local politics, becoming in 1856 Solicitor-General, and in 1858 Attorney-General in the two Cowper ministries of that period. It was to this that he owed his appointment to the Supreme Court at Moreton Bay in February, 1859.

New South Wales attained representative internal self-government under the *Constitution Act* of 1855. The franchise conferred by that Act was subject to a not insubstantial property-owning qualification. However, in 1858 the Cowper government secured the passing of the *Electoral Act* 1858 extending the right to vote to male persons who had been resident in the electoral district for the preceding six months, or who satisfied a negligible property or income-earning test. Later, when the crisis erupted in Queensland,



*Parliament House as it was built in 1868, nearing completion. The building housing parliament in earlier years was in Queen Street.*

Lutwyche was credited — debited might be more accurate — by his critics with responsibility for procuring the more liberal franchise in New South Wales, and with being associated with the "ultra-democratic" portion of the press.[13] Certainly in Queensland he liked to stress his early connexion with the press, forming a close association with Theophilus Pugh, the editor of *The Courier*, reputedly a supporter of radical causes.

## ESTABLISHING A LEGISLATURE

For the present account the relevance of these matters lies in the provisions of the Letters Patent and Order in Council, both dated June 6, 1859, by which Queensland was constituted and its government provided for, which were published by Governor Bowen on or shortly after his arrival. The procedure for constituting the Legislature, consisting of an elected Assembly and a nominated Council, was laid down by the Order in Council, which also took effect on December 10, 1859. Arranging for elections to the Assembly was a task entrusted to the Governor of New South Wales, then Sir William Denison. Article 6 of the Order in Council required him to fix by proclamation the number of members of the Assembly; to divide the colony into convenient electoral districts; and to arrange —

> for the compilation and revision of lists of all persons qualified to vote, according, as nearly as may be, to the laws which now or shall be at the date of the Proclamation, in force in the Colony of New South Wales, at the elections to be holden within the several districts of the said colony [of Queensland].

Had art.6 of the Order in Council stood alone, no difficulty would have arisen in giving effect to its provisions. The New South Wales *Electoral Act* of 1858 had been assented to on November 17, 1858. According, therefore, to the laws in force in that colony at the date both of the Order in Council (June 6, 1859) and of Denison's Proclamation (December 31, 1859),[14] those qualified to vote were the persons specified in the *Electoral Act* of 1858. But art.6 did not stand alone. Article 8 expressly declared that the provisions of the New South Wales *Constitution Act* 1855 —

> "which relate to the constitution, functions and mode of proceeding of the . . . Legislative Assembly . . . and to the qualification and disqualification of electors and members of the Assembly, shall be of force within the said Colony of Queensland . . . and shall be deemed to be incorporated in the present Order in Council."

The question was whether art.6 or art.8 prevailed. Depending on the answer, the extended franchise of 1858 or the more limited franchise of 1855 would govern the right to vote at Queensland's first election.

## ADVICE OF STEPHEN C. J.

The inconsistency between arts.6 and 8 was not adverted to until after the Order in Council reached Sydney on December 1, 1859. The explanation later given in the House of Lords by the Duke of Newcastle, then Secretary of State for the Colonies, was that a copy of the *Electoral Act* 1858 had been received in London at the beginning of 1859 but had "escaped the attention of the Government" at the time when the Order in Council was drafted in May 1859.[15] Confronted with the inconsistency, Governor Denison sought the advice of the Chief Justice of New South Wales. The Governor seems to have entertained a hope that the extended franchise of 1858 would prevail;[16] but the opinion given by Stephen C. J., with whom his colleagues on the New South Wales Bench "substantially concurred", was that the express provisions of art.8 were too "clear and precise" to admit of any qualification and overrode the apparently contradictory provisions of art.6.[17] The extended franchise in force in New South Wales was therefore not applied in the first election for the Legislative Assembly in Queensland held in April, 1860. The incongruity of that state of affairs becomes more apparent when it is realised that in the last elections conducted shortly before Separation the voters of Moreton Bay had participated on the basis of the New South Wales electoral qualification of 1858. Now as Queenslanders some of them were disenfranchised in their own colony.

These events raise a series of questions of historical and legal interest. One is whether Stephen C. J. was correct in his advice to Sir William Denison; and, if he was not, what consequences in law followed from his being wrong. As to the first question, the advice relied, as we have seen, primarily upon the specific form of art.8 of the Order in Council. In his opinion Stephen C. J. acknowledged that, as a matter of grammatical form, art.6 required lists of voters to be compiled and revised of persons qualified to vote according, as nearly as may be, to the laws in force in New South Wales at the date of the Proclamation. He concluded, however, that this was a "clerical blunder" occasioned by the insertion of the words "according as nearly as may be to the laws", etc. in the wrong place in art.6. His view was that they should have appeared directly under the phrase "compilation and revision of lists", and that they were intended to apply only to the creation of the machinery for the elections, not to the qualification for voting. "Is it not absurd", he asked —

> to suppose, moreover, that persons may be qualified as nearly as may be according to law? What kind of qualification would this give; and who could ever decide what degree of proximity to the established qualifications, short of the defined ones, would entitle a man to vote?[18]

Stephen's point may be shortly disposed of by reference to the provisions of the 1858 *Electoral Act* itself. By s.9 of the Act, the entitlement to vote was confined to the electoral district for which the voter was "qualified", either by residence, or by the possession or occupation of property in that district. Only in "such district" was a person entitled to vote, the districts being identified by name in s.4 of the Act. Clearly a voting qualification expressed in that form in New South Wales could not be literally transposed to Queensland without some such modification as was both envisaged and authorised by the phrase "as nearly as may be". In other respects the defined qualification could, without resort to degree or proximity, quite readily be applied to the conditions of Queensland.

In considering the question placed before him, Sir Alfred Stephen had confined his attention to the provisions of the Order in Council. On that limited basis, his opinion was, as Lutwyche himself acknowledged, supportable and very probably correct. The Chief Justice failed, however, to consider the provisions of the New South Wales *Constitution Act* 1855 which had authorised the Letters Patent and Order in Council. In providing for the erection of a separate colony in the north, s.7 of that Act empowered Her Majesty by those instruments —

> to make provision for the government of any such colony and for the establishment of a legislature therein *in manner as nearly resembling the form of government and legislature which shall be at such time established in New South Wales as the circumstances of the colony will allow* . . . [Italics supplied].

The Order in Council by which a legislature for Queensland was to be established at Separation was a form of delegated or subordinate legislation. As such it was subject to a well settled legal rule which confined its operation to the limits imposed by the Act conferring the power to make it. Section 7 of the *Constitution Act* spoke of the "establishment" of a legislature in manner resembling the legislature of New South Wales. In that colony one of the Houses of the Legislature was an Assembly made up of elected representatives of the districts identified in s.4 of the *Electoral Act* 1858. There could be no "establishment" of a Legislative Assembly in Queensland without an election. When, therefore, s.7 of the *Constitution Act* required that, as part of the legislature, the Assembly be established "in manner as nearly resembling the form of" the New South Wales Assembly at the time of Separation, it necessarily envisaged a process of election of members of the Assembly. It was only by such an election that this component of the legislature of Queensland could be established.

Section 7 was, it is true, not happily worded; but it is difficult to resist the conclusion that the "manner" of establishing the

Queensland Legislative Assembly in the New South Wales form directly incorporated the criteria for determining who was entitled to vote at the elections held to establish it. To the extent that art.8 of the Order in Council diverged from the authority conferred by s.7, it was *ultra vires* the New South Wales *Constitution Act* and accordingly of no legal effect or validity.

## THE OPINION OF LUTWYCHE J.

It is unfortunate that the apparently informal instructions given to Stephen C. J. failed to canvass this point. It was not long before the penetrating gaze of Lutwyche J. brought it to light. As early as January 9, 1860, he wrote[19] to Governor Bowen advising his "dissent from the views taken by Sir Alfred [Stephen] and his colleagues". The question, he said, went much deeper than the construction of the Order in Council, and was whether art.8 "pursued" the authority given by the *Constitution Act* which it recited. Concluding that it did not, Lutwyche added that, if no election had been held in Moreton Bay under the *Electoral Act* of 1858, "there might have been some room for argument founded on a difference of circumstances in the two colonies"; but, as the constituencies had been actually voted under the extended franchise, art.8 of the Order in Council was null and void. Accordingly, by art.20, which continued until repealed all New South Wales statutes applying in Queensland at Separation, the provisions of the *Electoral Act* were maintained in force in Queensland.[20]

The logic of the Judge's reasoning is difficult to refute. Its consequences might be less certain. In quantitative terms, Bowen's initial estimate in his despatch to the Colonial Office of February 3, 1860[21] was that a third of Queensland's voters had been disenfranchised as a result of adopting the 1855 electoral qualification. By the end of 1860 his estimate had been revised downward to a mere 1.5%, a figure that appears — in language which is unmistakably that of Bowen — in a prefatory Report to the Queensland Blue Book of 1860.[22] If the result of adopting the more limited franchise of 1855 was — as is surely must have been — to exclude at least some voters from the roll in every constituency at Queensland's first election, then it follows that no members at all were validly returned to the Legislative Assembly of the first Parliament in 1860. On that footing, the Assembly, and consequently Parliament itself, as well as any subsequent Parliaments elected in the same manner, would never have been validly constituted or established. The acts of such a body could have no more validity or effect as legislation or binding law in Queensland than those of any collection of individuals who, without authority in law, might attempt to usurp the title and powers of the Parliament of Queensland. The Court would have been bound to deny effect to such an unauthorised attempt at law making. Even

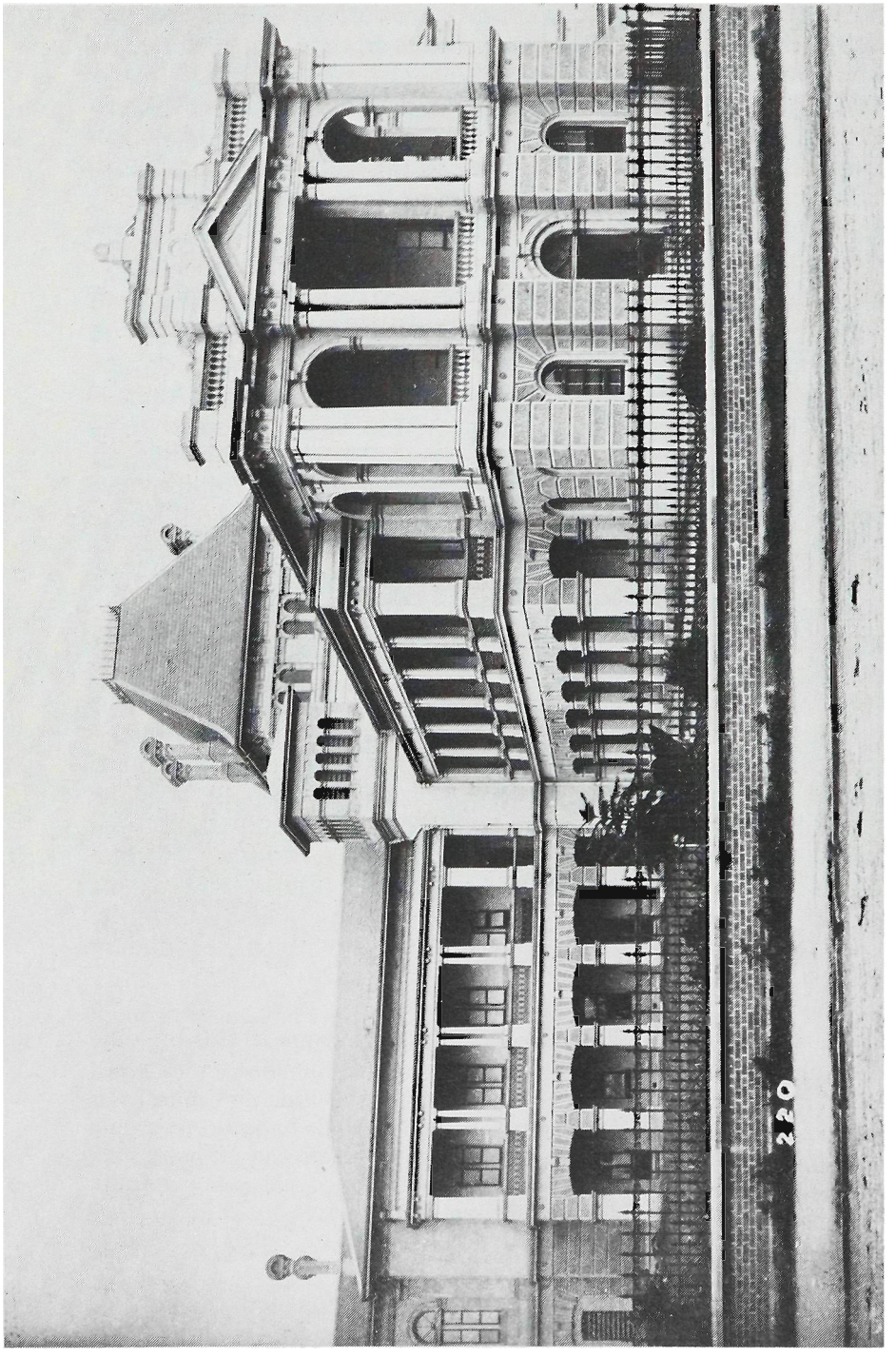
under the Parliamentary "despotism", as Professor A. H. Dicey has described it, prevailing in England, the courts are bound to regard only what is enacted by Parliament. That was settled in 1839 by the decision in *Stockdale v. Hansard*,[23] when the Court of Queen's Bench rejected a claim to legislate by simple resolution of the House of Commons. In the United Kingdom, so the Court held, an Act of Parliament required the concurrence of all three "legislative estates" of which the British Parliament is constituted. In Queensland one of the three components had not been validly constituted.

## SUPREME COURT CONSTITUTION AMENDMENT BILL 1860

It was some months before Lutwyche carried his reasoning to its final conclusion. What prompted him to do so was the progress through the Legislature of the Supreme Court Constitution Amendment Bill. The principal purpose of the Bill was to reconstitute as the Supreme Court of Queensland what was, at least nominally, still the Supreme Court at Moreton Bay established by New South Wales legislation of 1857; but it also contained a provision cancelling the Judge's existing New South Wales judicial commission and substituting a local version, at a salary reduced from £2000 p.a. to £1200 p.a. For reasons at once both constitutional and personal, judges are extremely sensitive about attempts to tamper with their salaries. Lutwyche advised the Governor on July 20, 1860[24] that he would not accept a new commission under the proposed enactment for fear that he would lose his existing New South Wales commission carrying the higher salary and retiring allowance. He would, he said, take every preliminary step to prevent the passing of the Bill including "memorialising" the Queen to disallow it "*on the ground that the Legislature itself is not legally constituted*"[25] for the reason that the Order in Council had failed to follow, in respect of the qualification of electors, the conditions prescribed by s.7 of the *Constitution Act* 1855. In an evident reference to his letter of January 7, 1860, Lutwyche went on[26] —

> I am glad that I pointed out this blot before any question about my salary arose. The Colonial Office probably set little store by the opinion of a Colonial Judge, but the opinion of the Crown Law Officer in England, issued before the Order in Council was made, was to the same effect, and unless some Imperial Act should be passed, legalising the Acts of this Legislative in the meantime, the Judicial Committee of the Privy Council will, some fine day, set Queensland aghast. I believe that the Acts of this Legislature will not be worth the paper they are printed on, unless the Imperial Parliament interposes.

That Lutwyche was fully conscious of the seriousness of the view he was propounding is shown by his assurance to the Governor that, "as the mere hint of such a doctrine would be sure to produce in-



*The Supreme Court in George Street, photographed in 1889. It too, was built after the events discussed in this paper.*

finite confusion", he would take care to keep it to himself and would transcribe the memorial to the Queen in his own hand, rather than have it written out by his clerk-associate.

In due course the petition to Queen Victoria was prepared by Lutwyche and transmitted by Governor Bowen to the Colonial Office. In it, he submitted, as he had said he would, that the Legislative Assembly of Queensland was "illegally constituted, and consequently cannot, according to law, take part in the making of the laws." The petition accompanied the Governor's Despatch dated October 4, 1860[27] enclosing a copy of the Supreme Court Bill, which had been reserved by the Governor for signification of Her Majesty's pleasure. After that, there was little to be done but wait for the Colonial Office response. The Judge found employment during the interval in an acrimonious correspondence with the Government.

The long-awaited despatch from the Secretary of State for the Colonies[28] reached Queensland in April, 1861. While not questioning the legal competency of the Legislature to reduce the Judge's salary, the Secretary of State found himself unable to recommend for the sanction of Her Majesty the Supreme Court Constitution Amendment Bill, which appeared to him "open to much objection". In his despatch to Governor Bowen, the Duke of Newcastle expressed the hope that the Legislature would be led to a conclusion "more favourable to the claims of the present Judge".

The arrival of the despatch in Queensland was marked by expressions of widespread popular support for the Judge. Public meetings were held in the major towns followed by presentation to the Legislature of petitions signed by hundreds of citizens of Brisbane, Ipswich, and Toowoomba declaring their confidence in Mr Justice Lutwyche and urging his retention in office.[29] To this, the Judge responded in characteristic vein, announcing his determination not to swerve from "the broad and plain path of duty, but to stand between the people and the Crown, and do justice to both."

## R. v. Pugh

For a Legislature, now condemned to the humilation of having to re-enact the Supreme Court Amendment Bill shorn of its offending reduction in judicial salary, this was altogether too much to swallow. Among its members there were those who believed that the public meetings in support of Lutwyche had consisted of "personal friends and political partizans", and had been "secretly organised and arranged by Mr Justice Lutwyche himself".[30] Re-submission of the Bill presented an opportunity for the Legislative Council to record their condemnation of the conduct of the Judge for, as they claimed, "practically evincing a political partizanship calculated seriously to impair confidence in the administration of justice in the colony" and for "impugning the legality of the Constitution and Acts of the

Parliament of Queensland''.[31] *The Courier*, whose editor T. P. Pugh remained a close friend and admirer of the Judge, retaliated in its issue of July 30, 1861 with an editorial attacking the Legislative Council for, among other failings, being ''destitute of the gentlemanly feelings''; lacking ''common Christian charity''; evincing ''utter disregard for the truth''; and having a ''most crass ignorance on all matters''. For the Legislative Council, this was the last straw, and Attorney-General Ratcliffe Pring was prevailed upon to institute criminal proceedings for seditious libel against both Pugh, the editor, and Stevens, the proprietor, of *The Courier*.

The trial of *R. v. Pugh* on August 21, 1861[32] raised a number of points of legal and constitutional interest. Among them was the circumstance that the prosecution had its origin in criticisms of the Judge who tried it. There were even those who believed that Lutwyche himself had written the editorial in *The Courier*. He was said to have been seen at the office of the newspaper on the day preceding publication.[33] As the only Supreme Court judge in Queensland, he alone possessed authority in the colony to conduct the trial. Describing his position as ''very invidious'', Lutwyche nevertheless declared that he would endeavour to fulfil his duty ''in such manner as to leave as little occasion as possible for unfavourable comment''.[34] At the outset, the defendant, represented by Mr Gore Jones of counsel, until recently the Supreme Court Registrar, entered a plea to the jurisdiction, submitting that Lutwyche J. had accepted, and was acting under, a commission issued pursuant to the recently enacted *Supreme Court Constitution Amendment Act* 1861.[35] Both the Act and the commission were, counsel submitted, invalid as having been passed by a Parliament that was illegally constituted, consisting as it did in part of a Legislative Assembly elected by persons qualified in accordance with the New South Wales franchise of 1855 rather than that of 1858.[36]

Counsel's submission repeated what Lutwyche had been saying ever since January 1860. He had originally endeavoured to confine knowledge of it to the Governor. Inevitably it had become public, apparently at some time earlier in 1861, and certainly well before August 7, when Sir George Bowen advised Parliament of his assent to the revised Supreme Court Bill. In his message to the Assembly on that occasion,[37] the Governor noted that, while agreeing to accept a commission under the new Act, Lutwyche had nevertheless intimated his intention of again petitioning the Queen on the ground that the Legislature was illegally constituted. After receiving his commission on August 13, Lutwyche had taken the oath of office on the following day.[38] A day later he received the congratulations of the Bar at a ceremony in Court at which the Attorney-General expressed delight at seeing him still in office and greeted him as ''the first Judge

of Queensland''.[39] His conduct in accepting the Queensland commission while continuing to impugn its validity was thought by his critics to expose the Judge to charges of inconsistency. As always, he had a ready rejoinder. The *Supreme Court Constitution Amendment Act* 1861 did, it was true, affect to cancel his New South Wales commission and to issue a new Queensland commission in its place; and, if it was invalid, so was the Queensland commission. But, if that Act was invalid, it necessarily also failed in its other purpose of cancelling his earlier New South Wales commission, which, by remaining in force, enabled him to preside as judge at the trial of *R. v. Pugh*. With that difficulty out of the way,[40] the trial proceeded to a triumphant verdict of acquittal, greeted, as *The Courier* reported, by ''one loud cheer'' from a large and attentive audience in court.

## THE LEGISLATURE HELD INVALID

In *R. v. Pugh* on August 21, 1861, Lutwyche avoided deciding whether the Legislature was invalidly constituted. It is possible he refrained from doing so because of his involvement in the matter that had brought the case to court; but, because of his conclusion about the validity of his commission, the occasion was not one on which he was bound to decide the question. He may have preferred to postpone it until he sat formally as the Supreme Court, rather than simply as a Judge presiding at a criminal trial, so that there would be a right of appeal to the Privy Council. The moment arrived three days later on August 24, 1861, when the Judge constituted the Supreme Court in Banc at the opening of the third law term of the year. The Attorney-General applied to fix the amount of security to be given by the Official Assignee ''under the Supreme Court Bill lately passed.'' The fate of the application appears from the report in *The Courier* of August 24, 1861,[41] which is as follows —

> The Judge said, in the opinion of the Law Officers of the Crown, and in his own opinion, the Supreme Court Bill was illegal, as having been passed by a legislature improperly constituted. The Attorney-General had admitted this himself, by demurring to Mr. Jones' plea in the case of the Queen against Pugh, and until the Bill passed by the Imperial Parliament, legalising the proceedings of the Queensland legislature, was in the colony, he could not hold any other opinion than he did.

The Attorney-General's response was that the Bill legalising the proceedings retrospectively had been passed a third time in the House of Commons on 20th of June last, to which he added an expression of hope that ''the Queen would *(sic)* assent to it early enough in July to enable us to have it by the next mail.''

The Official Assignee's security was a requirement of the *Supreme Court Constitution Amendment Act* of 1861. The Court's refusal,

for the reason stated, to fix it under that Act therefore amounted to a direct decision by Lutwyche J. that the Queensland Parliament was not validly constituted. A necessary incident of the decision was that the Supreme Court Act and, by implication, all other Acts of the Queensland Legislature were invalid.

## AUSTRALIAN COLONIES ACT 1861

At the time the Judge gave his decision it had, without his being aware of it, already been overtaken by events in England. The advice he had given in his letter of July 20, 1860 had with commendable speed been acted upon in the *Australian Colonies Act* 1861,[42] which became law upon receiving Royal assent on July 22, 1861. Its effect — although no one in Queensland knew of it at that time — was to validate the Legislature and all its Acts, thus technically depriving Queensland of the distinction of being the first and, so far as can be gathered, the only colony of Empire to have its Parliament nullified by the decision of its own Supreme Court.

The Imperial legislation averted that consequence and it did so retrospectively; but it does not dispose of the question whether, before the *Australian Colonies Act* was assented to on July 22, 1861, the Parliament of Queensland was improperly constituted and invalid. Lutwyche's reasons for thinking that it was have already been considered. It is known that the legal advisers to the Colonial Office agreed with his views. In his memorandum dated July 20, 1860[43] Lutwyche had referred to an opinion of the Crown Law Officers in England given even before the Order in Council of June 6, 1859 was made. No early opinion to the effect has so far been located. If it existed, one would expect that, as Attorney-General, Ratcliffe Pring would have known about it. When on August 24, 1861, Lutwyche referred to "the opinion of the Law Officers of the Crown" as being at one with his own he was, however, almost certainly referring to an opinion given by them some time after his petition to disallow the Supreme Court Act had reached England either late in 1860 or early in 1861. In the course of the second reading debate in the House of Lords of the Bill that became the *Australian Colonies Act* 1861, the Duke of Newcastle referred to the opinion of "the principal Judge of Queensland" that "the powers and acts of the Legislative Council *(sic)* of Queensland were invalid".[44] He added that the Judge's opinion "was confirmed by the Law Officers of the Crown in this country". The date of this statement was March 21, 1861, which would have allowed ample time for Hansard or newspaper reports of the debate to reach Queensland by August 24, 1861. By that date both Lutwyche J. and Pring A.-G. were aware that the Bill initiated in the Lords had passed its third reading in the Commons. It is surprising that the Attorney-General should not

have been aware of the Crown Law Officers' Opinion when he instituted the proceedings in *R. v. Pugh*; but when he applied to fix the Official Assignee's security on that date in August 1861 he claimed not to have heard of it.[45] Lutwyche himself apparently had become acquainted with it only at some time between August 7 and August 24.

The views held by Lutwyche J. are also supported by the form of the Imperial legislation. Section 4 of the *Australian Colonies Act* repealed so much of s.7 of the New South Wales *Constitution Act* 1855 as required that the Legislature of the new colony in the north be established "in manner as nearly resembling the form" of the New South Wales legislature, which is the italicized portion of s.7 quoted earlier. It was this provision that, according to Lutwyche, art.8 of the Separation Order in Council had failed to follow. In addition, s.3 of the Imperial Act deemed all the provisions of the Letters Patent and Order in Council to have been "valid and effectual for all purposes whatsoever", thus disposing of the argument that, as delegated legislation, the limits of the power conferred by s.7 had been exceeded. Finally, the same section of the Imperial Act attributed to all the acts and proceedings of government and legislature the same force and effect as if the Order in Council had "in all respects been valid and free from doubt".

## COMPARISONS AND CONCLUSIONS

These events vindicate the Judge's consistent opinion that art.8 of the Order in Council, and the electoral franchise adopted at the first election in 1860, were neither authorised nor valid. It is not to the point that at the time, according to Governor Bowen, all others held a different opinion of the implications of those defects with respect to the validity of the Queensland Parliament and the statues it enacted. It has always been difficult for lawyers, particularly those versed only in British constitutional law and history, to come to grips with the conception of a Parliamentary enactment being invalid. The constitutional position in the United States is quite different and was well known to lawyers in Australia in the mid-nineteenth century. Barely a month before Lutwyche J. was confronted with the problem in Queensland, the *Sydney Morning Herald*[46] had carried a report of the decision of the Supreme Court of New South Wales in *Rusdon v. Weekes*,[47] in which three judges of that Court were unanimous in concluding that there was power to hold a colonial enactment invalid if it exceeded the constitutional authority conferred upon it by Imperial enactment. In doing so, two of their Honours found it useful to invoke the analogy of the United States constitution.

The question that arose in Queensland in 1861 was a more fundamental and far-reaching one. It was whether a court could and would declare invalid not merely a single Act of the legislature but

the entire law-making body itself. The notion that Parliament itself might be defectively constituted and legally inoperative is breath-taking in its implications; but it was not unheard of in that period of Australia's history. At about the same time in South Australia Mr Justice Boothby was arriving at a similar conclusion, although extra-judicially, concerning the legislature in that colony. There the problem stemmed from the omission to reserve the South Australian *Constitution Act* 1855-1856 for signification of Her Majesty's pleasure as required by Imperial statute.[48] The Law Officers supported Boothby's opinion, but he was condemned for it then, and, despite persuasive efforts by Mr P. A. Howell,[49] he continues to be condemned for it in orthodox Australian histories.[50]

There are, indeed, some striking parallels between events of the time in Queensland and South Australia. In both colonies it was the opinion of a Supreme Court Judge that the local legislature was invalidly constituted. In both cases the judge's opinion was upheld by a quite independent source, in the form of advice from the Law Officers to the Crown in London. In both colonies, the problem was capable of being solved, and was solved, only by the overriding force of Imperial Legislation. In both the judge's opinion provoked hostile reaction from government and legislature. In Queensland Lutwyche J. was condemned by resolution of the Legislative Council, and the newspaper editor who supported him was prosecuted for sedition. Procedures for removing him from office were investigated, and in 1863 he was denied appointment to the newly created position of Chief Justice, an office which had been the object both of his ambition and his reasonable expectations when in 1859 he accepted appointment to what his predecessor Samuel Milford described as a "torrid Siberia".[51] In the case of Boothby, the consequences were, in the end, far more serious. Early attempts to remove him from office by Parliamentary address were unsuccessful because, as the Law Officers pointed out, such an address was required to emanate from a lawfully constituted Parliament,[52] and the validity of the South Australian legislature was itself open to question. Boothby was eventually "amoved" from office by the Governor acting under the *Colonial Leave of Absence Act* 1782. He died before his appeal could be heard by the Privy Council.

In Queensland the success of Lutwyche against the combined forces of the legislature and executive was exceedingly short-lived. It ended with the enactment, in accordance with his advice, of the *Australian Colonies Act* 1861, which settled the franchise question in favour of the more restricted qualification, which thereafter continued to prevail in Queensland until 1872. The decision 60 years later in *McCawley v. The King*[53] adopting the British conception of

Parliamentary supremacy spelt an end to the possibility that legislation might be held invalid on grounds of inconsistency with the State constitution. An improperly constituted Parliament perhaps remains a theoretical possibility;[54] but it is extremely improbable that any judge in Queensland will ever again be called upon to declare Parliament to be invalid on that ground. Unlike Lutwyche J., no Queensland judge now has a New South Wales commission to fall back on to give him the jurisdiction necessary to decide the question. All State Supreme Court judges now hold office under the authority of the Queensland Parliament. The decision of Lutwyche J. in 1861 was therefore not merely the first but almost certainly the last and only instance of its kind in the history of the law.

## FOOTNOTES

1. For accounts of the ceremony, see *Sydney Morning Herald* Dec. 14, 1859; *Moreton Bay Courier* Dec. 15, 1859.
2. N. Bartley: *Opals and Agates*, at 231. Brisbane 1892.
3. Law Officers' Opinion Nov. 19, 1862. C.O. 234/7 11421 Qld. The opinion is printed in Victoria: *Votes & Proceedings* (Legislative Assembly), at 381.
4. *R. v. King, ex p. King* (1860) 1 Q.S.C.R. 1; *Bank of Australasia v. Harris* (1861) 15 Moo. P.C. 96, 106-107; 15 E.R. 429, 433-434.
5. *Brisbane Courier* July 13, 1880.
6. 2 Pring's Statutes, at 1127.
7. *Hollyman v. Noonan* (1876) 1 App.Cas. 595.
8. *Dictionary of National Biography*, vol. 34, at 302.
9. Lord Campbell: *Lives of the Chief Justices* vol. 2, at 93, described him as an "ignorant and incompetent judge"; but Campbell was a dedicated Whig, whose writings have in turn been condemned as "monuments to prejudice".
10. For details of his origins and life, see *Australian Dictionary of Biography*, vol. 5, at 109: P.A. Howell.
11. A. J. Lutwyche: *Registration Cases*, 2 vols. 1843-1853.
12. *A Narrative of the Wreck of the Meridian* Sydney 1854. Waugh & Sons.
13. Letter Aug. 8, 1861 from Colonial Secretary Herbert to Governor Bowen, forming sub-encl. No. 1 to Gov. Desp. No. 53, Sept. 9, 1861, to Colonial Office; Q.S.A. Gov. 22, vol. 2, at 52.
14. See 1 *Qld. Govt. Gaz.* at 16.
15. Hansard Parl. Debates (House of Lords) Mar. 21, 1861, at 154.
16. See Despatch of Dec. 20, 1859, from Denison to Bowen, in 1 *Qld. Gov. Gaz.* at 20.
17. Opinion Dec. 11, 1859, Stephen to Denison, in 1 *Qld. Gov. Gaz.* at 20-21.
18. 1 *Qld. Gov. Gaz.* at 21.
19. See 1861 *Votes and Proceedings* (V. & P.) at 359 — the date of the letter is erroneously printed as Jan. 9, 1861, instead of 1860.
20. Ibid.

21. Gov. Desp., No. 17, vol. 1, at 62, Q.S.A. Gov. 22; printed in Br. Parl. Papers 1860, at 11.
22. Qld. Blue Book 1860, at p.viii, where a comparison is made with New South Wales, there described as possessing "the doubtful advantage of manhood suffrage".
23. (1839) 9 Ad. & E.1; 112 E.R. 1112.
24. 1860 V. & P., at 362-363.
25. Ibid., at 363. Italics in original.
26. Ibid.
27. Gov. Desp. No. 82; Oct. 4, 1860, in vol. 1, at 354; Q.S.A. Gov. 22.
28. C.O. Desp. No. 5, Feb. 26, 1861; Duke of Newcastle to Bowen; 1861 V. & P., at 323.
29. 1861 V. & P., at 329-333.
30. Letter Aug. 25, 1861: Colonial Secretary Herbert to Governor Bowen, forming sub-encl. No. 1 to Gov. Desp. No. 53, Sept. 9, 1861, to Colonial Office, in Gov. Desp., vol. 2, at 12.
31. 1861 V. & P. 205, at 206.
32. *The Courier* Aug. 24, 1861. See also 1 *Queensland Supreme Court Reports* 63, which incorrectly reports the year of the trial as 1862.
33. Colonial Secretary Herbert to Governor Bowen, in sub-encl. no. 1, no. 30 above.
34. 1 Q.S.C.R. 63, at 64.
35. 25 Vic. No. 13.
36. See *The Courier* Aug. 24, 1861, for a report of these submissions in the case.
37. 1861 V. & P. at 232.
38. Letter Aug. 13, 1861: Lutwyche to Manning (Governor's Secretary) in Judge's Letterbook QSA/SC1.
39. *The Courier*, Aug. 15, 1861.
40. *R. v. Pugh*, as reported in *The Courier*, Aug. 24, 1861.
41. Published on the same day as the report of *R. v. Pugh*.
42. 24 & 25 Vic. c. 22.
43. See text to n. 26.
44. Hansard Parl. Debates (House of Lords) Mar. 21, 1861, at 154.
45. *The Courier* Aug. 24, 1861.
46. *S.M.H.* July 29, 1861.
47. (1861) 2 Legge 1406.
48. See Law Officers' Opinion no. 108, March 25, 1862, printed in D.P. O'Connell & A. Riordan: *Opinions on Imperial Constitutional Law*, at 32.
49. *The Boothby Case*. Unpubd. Hons. thesis. University of Tasmania 1968, particularly at pp.109ff.
50. See, for example, A.C. Castles: *An Australian Legal History*, at 407. Law Book Co. Sydney 1982.
51. *Sydney Morning Herald* Feb.18, 1859.
52. Opinion no.110, April 12. 1862. O'Connell & Riordan, *op.cit.*, 60, at 65.
53. [1920] A.C. 691.
54. Cf. the decision of the Supreme Court of the Cook Islands in *Re Te-Au-O-Tonga Election Petition* [1979] 1 N.Z.L.R. supp.26.