

Chapter 4

Trethowan's Case

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Introduction

Trethowan's case is among the most important and influential constitutional cases decided in any jurisdiction of the British Commonwealth. It was the first major case to deal with a problem common to many of these jurisdictions, including Britain itself: namely, whether, and to what extent, a Parliament can control or even restrict the future exercise of its own legislative power. The problem includes, for example, whether a Parliament can make the future enactment of legislation conditional on its being passed by super-majorities in Parliament, or by a majority of electors in a referendum. Moreover, the ingenious arguments put forward in the case, and adopted in various judgments, proposed novel solutions to the problem that have greatly influenced constitutional thought, throughout the Commonwealth, ever since. They are generally acknowledged to have inspired new theories of parliamentary sovereignty, which are more amenable to Parliaments being able to bind themselves in these ways. But, however beneficial its consequences may have been, the decision in the case was almost certainly wrong as a matter of law. It is an example of creative judicial statecraft surmounting legal obstacles in the interests of good government.

Background

In the early part of the 20th century, members of Upper Houses in State Parliaments were either elected on a restricted property franchise, or (in New South Wales and Queensland) appointed for life by the Governor. Consequently, they “were more patrician than democratic in character,

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