THE PRIVY COUNCIL AND CONSTITUTIONAL APPEALS

An Historical Retrospect.

Prior to 1900 it was a firmly established rule of English constitutional law of universal application that the royal prerogative could be exercised so as to permit appeals to the Crown in Council from the courts of all of the colonies. It is true that by various statutes the United Kingdom parliament had defined and restricted the subject's *right* to such an appeal, but no limitation was placed upon the prerogative of the Crown to allow it *as of grace*. It is also true that the prerogative itself may have been exercised only on special grounds, but the restrictions placed upon it came from within the Privy Council and not from without.

With the Commonwealth of Australia Constitution Act 1900, to the chagrin of many imperialists, came the first break in the perfection of the principle, and for the first time the freedom of the Privy Council to allow appeals to itself was constrained by statute. Section 74 of the schedule to that Act, so far as I intend to deal with it, reads:—"No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council." Though we may not agree with Sir Edward Braddon when he said at the 1897 Convention, "I think we ought to remember that this is possibly one of the most important provisions in the whole Constitution Bill,"[1] it is certainly a section of no minor importance and is capable of having a great bearing on the future development of Australian constitutional law and hence on Australian national and economic life.

Early in the federation movement in Australia no mention was made of constituting a final court of appeal in order to dispense with the necessity of going to the Privy Council. And this was only to be expected from a country whose economy and sense of national independence were as yet at an embryonic stage. The desire was to create a federal union—at times merely a customs union—under the more or less direct control of the Colonial Office. Hence in Earl

[1] *Convention Debates* (Adelaide 1897), 968.

Grey's abortive Bill of 1850 to federate the colonies no mention was made of restricting appeals. But as responsible government and an expanding economy gave strength and form to the nationalism of the Australian group of colonies, and as political leaders began to look for more independence from the mother country, they raised their heads proudly and queried the validity of the assumption that their courts were inferior to that in Downing Street.

At the first conference of colonial Premiers at Melbourne in 1889 no mention was made of the question of judicial appeals to England. As the result of this meeting the Australasian Federation Conference was summoned in 1890 for the purpose of considering whether the time was ripe for federation. Consideration of this question involved of necessity an extensive examination of the institutions of government in a federal polity, and assertions of faith in this or that type of federal structure; and though the debates were confined largely to principle and did not deal with detail, the judicial system that would have to be established came under review. While the subject of the judiciary was being discussed the only topic that aroused any feeling was that of allowing appeals to the Privy Council.

The majority of the delegates favoured the creation of a federal court of appeal whose decisions would be final. Deakin of Victoria spoke of "the creation of a court of appeal in Australasia, which should avoid the necessity of appealing to the Privy Council in London."[2] Not only was it expected that it would be unnecessary to appeal, but it was firmly intended that appeals should not be allowed. Playford of South Australia said bluntly, "If we have a court of appeal in these colonies that court of appeal must be final."[3] Passing statements to the same effect came from Parkes[4] and McMillan[5] of New South Wales and from Macrossan[6] of Queensland, though the latter doubted whether it would be possible to prevent appeals. Only one member spoke strongly against the restriction of appeals,[7] and he (Sir John Hall) was one of the representatives of the strongest pillar of Empire, New Zealand. The predominant opinion of the Conference was that the right of appeal to the Privy Council should be completely abolished.

It is interesting and rather perplexing to observe that not one of the British newspapers, most of which were closely reporting the progress of the debates, commented on this unprecedented display of colonial independence.

The immediate result of the 1890 Conference was the passing of the resolution, for the consideration of which it had been called

[2] 1890 *Conference Debates*, 89.
[3] *ibid.*, 72.
[4] *ibid.*, 197.
[5] *ibid.*, 148.
[6] *ibid.*, 197.
[7] *ibid.*, 180.

together, in substantially the form in which it was presented. As this resolution merely expressed the opinion of the Conference of the advisability of early union of the colonies, under the Crown, no decision was required to be reached regarding the question of judicial appeals. But the effect of the Conference is to be seen in the Resolutions presented by Sir Henry Parkes as a basis for discussion at the National Australasian Convention which met in Sydney in 1891 for the purpose of framing a Constitution Bill. "This Convention approves of the framing of a federal constitution, which shall establish . . . (2) A judiciary, consisting of a federal supreme court, which shall constitute a high court of appeal for Australia, under the direct authority of the Sovereign, whose decisions, as such, shall be final." Parkes referred to this proposed court as "an appellate court from which there shall be no appeal to the Queen in Privy Council . . . I think we shall make a great mistake if we allow any appeal to be made outside the shores of the new Australia."[8] Of the thirty-six delegates present, only fourteen expressed opinions on the subject of the resolution. Jennings of New South Wales, Rutledge of Queensland, and Kingston of South Australia were the only speakers to support the proposal as put by the leader of the Convention. Deakin considered[10] that in questions involving imperial interests the right to allow appeals should be retained. In this view he was supported by Barton[11] of New South Wales, Downer[12] of South Australia, and Inglis Clark[13] of Tasmania. Munro of Victoria was not prepared to go even as far as this but thought that there might be some cases in which it would be advantageous to have the federal court's decision made final. Lee Steere of Western Australia, Dibbs of New South Wales, Brown of Tasmania, and Wrixon and Cuthbert of Victoria expressed their opposition to the proposal with varying degrees of feeling.[14] The arguments that spurred these latter members were the stereotyped assertions that by breaking away from the system of judicial appeals to the Privy Council they would be disrupting a vital link of Empire, that the Privy Council provides an authoritative uniform law for immediate application by courts of inferior jurisdiction, and that no British subject should be deprived of his constitutional right to seek redress at the feet of the sovereign, the fountain of all justice. On the other side, it was said that the creation of a final court in Australia would give speedy justice, would not favour the rich as against the poor litigant, would add to the prestige of our local judiciary and increase our self-sufficiency, would create an Australian jurisprudence, would dispense with recourse to aged judges unskilled in the law of a written constitution for the settlement of intricate problems requiring a know-

[8] 1891 *Convention Debates*, 26.
[9] *ibid.*, 126-7, 152, 163-4.
[10] *ibid.*, 83.
[11] *ibid.*, 97.
[12] *ibid.*, 103.
[13] *ibid.*, 253.
[14] *ibid.*, 194, 209, 216, 294-5.

ledge of its workings in practice, would loosen a chafing bond of Empire, and would not detract from the court's justice being the Crown's justice.

Kingston must have caught a neat glimpse of the future when he said that the peculiar province of the federal court ought to be "to decide *all constitutional questions arising between the federal dominion and the states* which constitute it." He added, "A court of appeal without that power would be shorn of its chief attribute, and of a function most largely utilised and most wisely availed of in the American States."[15] He was thus nearer to the eventual truth than any of his fellow delegates.

Wrixon, the only legal member who did not support the restriction of appeals, moved an amendment omitting the restrictive clause and reserving the question for the closer examination of the Judiciary Committee; this amendment was carried. The Chairman of this Committee, Inglis Clark, was responsible for the substance of the clauses submitted by it to the Committee on Constitutional Machinery and reported in a slightly altered form by the Chairman of the latter (Sir Samuel Griffith) to the Convention. Clause 4 of Chapter III of the Draft Bill concluded:—" . . . and the judgment of the Supreme Court of Australia in all such cases shall be final and conclusive." Clause 6 read:—"Notwithstanding the provisions of the two last preceding sections, or any law made by the Parliament of the Commonwealth in pursuance thereof, the Queen may in any case in which the public interests of the Commonwealth, or of any State, or of any other part of the Queen's dominions are concerned grant leave to appeal to herself in Council against any judgment of the Supreme Court of Australia." Thus there was to be no appeal to the Privy Council from the federal supreme court in any case of whatever nature, either constitutional or common law, unless the "public interests" of some part of the Empire were involved. As was explained to the members of the Convention by Griffith, these clauses would embody in the Constitution practically the same limitations as were then applied in the exercise of the royal prerogative of allowing appeals from Canada. Clark added that it was better that this should be so by specific inclusion in the Constitution than by reliance on an indefinite rule of practice of the Privy Council. Wrixon made a last effort to amend the clause and retain the appeal *simpliciter*, but by a vote of 19 to 17 the clause as introduced was passed.

The Draft Bill of 1891 laid the foundations for the Bill of 1900. In the intervening federal Conventions there were definite improvements effected and important changes made, notably the increase in the list of federal powers and the reduction of the authority of the Senate; but the federal structure remained substantially the same as it was after being hammered out by the committees of the 1891 Convention.

[15] *ibid.*, 475.

At the National Australasian Convention which opened in Adelaide in 1897 Barton, its chosen leader, decided that the better plan would be to start the new Constitution Bill from fresh thought and debate rather than to take the 1891 Bill as a point from which to recommence. He expressed himself to be in complete accord with Parkes's resolutions of 1891, but those he presented to the Convention did not in regard to the federal court appear to go quite so far as those of Parkes. Barton's resolutions concluded:—" . . . this Convention approves of the framing of a Federal Constitution which shall establish . . . (c) a Supreme Federal Court, which shall also be the High Court of Appeal for each colony in the Federation."[16] However, the committee of the Convention arrived at the same result as did the committee in 1891, and clause 73 was proposed in this form:—"No appeal shall be allowed to the Queen in Council from any court of any State or from the High Court or any other federal court, except that the Queen may, in any matter in which the public interests of the Commonwealth, or of any State, or of any other part of her dominions are concerned, grant leave to appeal to the Queen in Council from the High Court."[17] It will be noticed that this clause would have restricted the prerogative of allowing appeals from *all* courts and not merely from the High Court, and that as in 1891 the prerogative could only be exercised in respect of cases involving the public interests of some part of the Empire where such cases had come before the High Court.

The clause as it then stood was far from Kingston's prediction in 1891, of reserving for the High Court's final determination all cases involving the constitutional limits between the federal and State powers. It was a concession, by those who favoured the complete abolition of appeals to the Privy Council, to those who considered that in all questions involving imperial interests the appeal should be retained. There were of course others who wished to go further and to retain the full appeal, and an amendment to this effect was moved but was lost; the clause as originally put was adopted. Higgins pointed out to the Convention, as had Griffith in 1891, that the clause merely embodied the practice in regard to Canadian appeals. As passed, the clause became clause 75 of the Draft Bill.

The Convention adjourned while the Premiers attended the Queen's Jubilee in London, and re-assembled in Sydney in September of the same year; but clause 75 did not come up for reconsideration until the third session, held in Melbourne in the early part of 1898. At this session the clause took on more of its final shape. Abbott of New South Wales moved an amendment so as to make the latter part of it read—"except that the Queen may, in any matter . . . , grant leave to appeal to the Queen in Council from the High Court." Thus were all restricting words intended to be omitted. Symon, however, moved a further amendment to insert, in place of Abbott's

[16] *Convention Debates* (Adelaide, 1897), 17.
[17] *ibid.*, 968.

clause, these words—"not involving the interpretation of the Constitution of the Commonwealth or of a State." We now have for the first time a proposal to prohibit appeals on constitutional questions alone. But this was not sufficient for Barton, who realised that it was possible for a question affecting imperial interests to involve also a question of the interpretation of the Constitution, and hence by Symon's amendment to be unappealable to the Privy Council. He therefore proposed the addition of the words, "or in any matter involving the interests of any other part of Her Majesty's dominions." These words, it will be noted, did not cover as wide a field as those used in the 1891 Draft Bill, as they exclude cases in which the public interests of the Australian Commonwealth or States were concerned. As amended the clause was agreed to; compared with that of 1891 its effect was briefly as follows. Instead of generally prohibiting all appeals, it prohibited only constitutional appeals; and instead of excepting all cases of imperial interests from the prohibition, it excepted cases of imperial interests other than Australian. But the minds of many lay members, and particularly that of Forrest of Western Australia, were unable to appreciate this simple result of the much amended clause, and on reconsideration it was completely redrafted. It finished up in the Bill as clause 74 and in the following form:—"No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved . . . "

During the 1897-98 Convention the arguments used by the parties to both sides of the controversy were not substantially different from those heard in 1891, and need no further comment.

After a strenuous popular campaign, and the adoption of only five miscellaneous amendments at the instance of the colonial Premiers, the 1898 Constitution Bill was finally ratified by all the colonies except Western Australia, and was sent to the imperial Parliament. It was closely followed by a small band of delegates representing each colony whose "task was defined with most unequivocal plainness. They were to secure the passage of the Bill without amendment of any kind."[18] It was perhaps natural that the paternal pride of the "fathers of the Constitution" should lead them to abhor any disfiguring alterations to the product of their labours, but the amazement which the delegates expressed when confronted with the announcement by the ministerial head of the Colonial Office as to the probability of amendment cannot be justified.

There had been no attempt at the time of the passing of the British North America Act 1867 to restrict appeals to the Privy Council, for the drafting was done in London on the basis of resolutions agreed to in the colonies and was not completed by the colonial

[18] Alfred Deakin, *The Federal Story*, 104.

governments or at colonial conventions as was the case in Australia. The Dominion Parliament, however, was not long in seeking such a restriction; in 1875, on the creation of the Supreme Court, a provision was originally inserted in the Bill to prevent appeals beyond that Court, but on advice that the imperial government would not assent to such a clause in the Bill (which was reserved), it was withdrawn. Ten years later a reserved Bill restricting appeals in criminal cases was accorded royal assent, but was later found to be inconsistent with the Judicial Committee Act 1844. Thus in 1900 there was no statutory restriction on the prerogative of allowing Canadian appeals.

Many times during the federal Conventions delegates were reminded of this fact, as a few quotations will show. In 1890 Macrossan had said, "I would be quite as anxious as Mr. Playford to prevent any appeal going beyond the bounds of Australasia if it could be done, but the limitation does not exist in Canada."[19] In 1891 Barton repeated this warning to the Convention.[20] Cuthbert remarked, "It is useless for us to entertain the idea that as long as we are a dependency . . . the Queen will ever concede to these Australian colonies a request which was made by the North American colonies and refused. . . . it would be unwise for us to ask for a thing which we know must be refused."[21] Downer was equally diffident; " . . . the proposed court of appeal should be made as final as we can possibly make it—as final as we can induce the Imperial Government to allow it to be made."[22] And that was the essence of the position.

Joseph Chamberlain, furthermore, was not the man to derogate from imperial unity where it could be avoided by careful diplomacy and keen argument. A staunch imperialist, his ever present ideal was an Empire Federation; how could he agree to an innovation which in his opinion tended towards Empire disunity! In introducing the Bill in the Commons he presented a set of carefully prepared arguments against clause 74, practically the only provision of the Bill to which the government seriously objected. However, apart from his plea for Empire unity, every one of his arguments was without foundation and reveals his sole purpose to be that of aiding the programme of "imperial government" entrusted to the department of which he was the head. He was shocked at the thought of there being a country in which Englishmen would be denied the right to seek justice at the foot of the throne. Had he reflected for a moment he would have realised that, apart from ecclesiastical cases —and prize cases in time of war—not one Englishman in the United Kingdom has that right; Englishmen must be content with their cause resting with the House of Lords, a judicial body completely unconnected with the royal prerogative. He further objected that no

[19] 1890 *Conference Debates,* 197.
[20] 1891 *Convention Debates,* 97.
[21] *ibid.,* 294.
[22] *ibid.,* 475.

possibility should be allowed to arise of different laws applying within the Empire; but we may assume that the common law has no greater relative importance than statute law, and note that there were then more than twenty competent legislatures in the Empire of 1900 each of which was necessarily enacting for its differing people laws of vastly differing content. Even in the field of domestic law Chamberlain must have known that the House of Lords applies one law for England and a very different law for Scotland. (Every student of the law of torts knows the discrepancy that existed for years between the Court of Appeal's views on the remedy for negligence resulting in nervous shock and the ruling of the Privy Council in *Victorian Railways Commissioners v. Coultas*.[23])

Chamberlain also relied on the eminence of the Privy Council, saying that it was "the highest judicial authority, composed of men of the greatest legal capacity existing in the metropolis." This argument is based on the assumption that all law is a coherent system of knowledge in which a man may become expert as does a mathematician in his branch of science, and that its application is a matter of precise reasoning quite unrelated to the particular society in which it is to be implemented. With all fields of law, and especially with the type of law under discussion—constitutional law—this assumption is as ill-founded as it is dangerous.

Appeasement was Chamberlain's second method of attack. He promised the abandonment of the use of the Judicial Committee of the Privy Council and the establishment of an Empire Court of Appeal consisting partly of judges selected from the colonies. Neither was the proposal acceptable to the delegates nor has it since been implemented. With argument and appeasement failing him the Colonial Secretary was in a difficult position, for to crown with success the movement for Australian federation during his term of office had always been his cherished hope; was he now to see it slip through his fingers? Worse results might follow if he gave way, as was indicated by the warning of the Chief Justice of Cape Colony that if Australia's demands were granted, other colonies could not be expected to rest content with less. Chamberlain's position was made even more difficult by imperial gratitude for Australia's help in the Boer War.

At this stage, however, disagreement both in Australia and among the delegates in London gave him the opportunity to divide and conquer. He was able to appear as the champion of Empire interests and at the same time to have the support of three of the Australasian colonies when, on introducing the Bill, he deleted clause 74 entirely. Both Chamberlain and the delegates had shown their hands; compromise was the only solution.[24] The compromise was

[23] (1888) L.R. 13 A.C. 222.

[24] For the struggle in London and the approach to compromise, see Deakin, *op. cit.*, 132-157, and J. Reynolds, *Edmund Barton*, 154-162.

section 74 as it now appears in the Constitution, with the exception that the certificate was not at first to be obtained from the High Court but from the Executive Governments concerned; the alteration, when made, brought immediate accord from all the colonies. Instead of the Privy Council's having jurisdiction only in the case of "the public interests of other parts of the Empire" being affected, the High Court was to have final jurisdiction only in cases of *inter se* constitutional questions. One might have thought that the delegates would have been sadly disappointed to lose so much finality in the jurisdiction of their federal court, but their actions did not reveal any such disappointment. "When the door closed upon them" (after receiving Chamberlain's suggested compromise) "and they found themselves alone, they seized each other's hands and danced, in a ring, around the room."[25] They considered that they had got all they had ever wanted, and they were not alone in their opinion. In the House of Lords it was believed by some[26] that Chamberlain had completely surrendered. The Dictionary of National Biography reports that "the conclusion finally reached was in fact a confession of failure";[27] congratulations on their success came to the delegates from Australia and elsewhere. Had Chamberlain in fact lost everything? He himself said, "They have got what they wanted and I have got what I wanted."[28] It would even seem that the compromise was not so equally favourable as he suggested, that in fact he gained more of what he desired than did the delegates. That this is so, or at least that the delegates were misled in believing their triumph to be so complete, is supported by this contemporary report from London:—"He (Chamberlain) declared that, speaking generally, the original Bill might be said to restrict appeals in nine cases out of ten, and the first compromise five cases out of ten (i.e., with Executive certificate), while the latest agreement restricted appeals only in one out of every ten cases."[29] The original clause would have rendered the High Court the final court of appeal for Australia in cases involving all types of question—common law and statute, racial and religious, and above all constitutional, unless in any such case imperial interests of a limited nature were involved. The delegates in London had always striven for this result. Barton in 1891 had said, "I trust that this Convention and the parliaments to whom its conclusions are to be presented will use their utmost efforts to secure the abolition of the jurisdiction of the Privy Council and the transfer of supreme authority to the colonial judiciary."[30] The new clause gave the High Court final jurisdiction only in questions as to the constitutional powers of the States and the Commonwealth *inter se*. The original clause had been whittled down until the High Court's

25 Deakin, *op. cit.*, 203.
26 For example, Earl Carrington.
27 *D.N.B.* (1912-21), 114.
28 See J. L. Garvin, *Life of Joseph Chamberlain*, III. 567.
29 *The West Australian*, 20th June, 1900.
30 1891 *Convention Debates*, 97.

final jurisdiction was confined to cases of Commonwealth and State constitutional law: even in this field it was restricted to questions as to the limits of the powers of the Commonwealth and the States *inter se*.

What an *inter se* question is cannot be discussed here at length, but a note may be made in passing. The present Chief Justice of the High Court was once of the opinion that "the tendency of judicial decision has been to extend the category of *inter se* questions to cover almost any constitutional question."[31] It is also apparent that most general writers on the subject are likewise mistaken, since they appear to believe that the High Court is the sole interpreter of the Constitution. The purpose expressed by Chamberlain to be behind the limitation of the restrictive clause to constitutional questions *inter se* was merely to prevent imperial interests from being included; examples of such interests being the extra-territorial operation of federal or State legislation and the application of the Colonial Laws Validity Act 1865. The obvious way to confine the clause to questions of purely Australian concern was to apply it to cases of the constitutional limits imposed on the powers of the constituent members as among themselves. In other words, the High Court was to determine finally all questions as to the distribution of legislative powers between the Commonwealth and the States. Chamberlain's compromise clause, as first drawn by the Crown Law officers, read:—"Unless by the consent of the respective governments concerned . . . no appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution or of the Constitution of a State upon the question whether as between the Commonwealth and a State or as between any two or more States any legislative or executive power is properly exercise-able by the Parliament or Government of the Commonwealth or . . . of the State." This clause was redrafted before the compromise was announced to the House of Commons, but only for the sake of brevity and clarity, not in order to change its meaning. Chamberlain knew this to be so, and said of the clause as it now stands, "a unanimous agreement had resulted, which would leave Australia absolutely free to adopt her own course in the matter of appeals where her interests alone were concerned."[32]

It seems correct to say that although the delegates, Chamberlain, and the members of both Houses of Parliament had not intended it, cases involving only the application of sec. 92 of the Constitution are appealable to the Privy Council provided that the section is treated as a command to both State and federal governments. But what was neither intended by them nor necessary to the interpretation of sec. 74, is the present doctrine of the High Court that it applies only to cases involving the limit to be placed between the

[31] J. G. Latham, *Australia and the British Commonwealth* (MacMillan & Co., London, 1929), 115.
[32] *The West Australian*, 23rd May, 1900.

exclusive powers of the States and the exclusive powers of the Commonwealth. It is said that it does not cover the case of the limit between the concurrent power of the one and the exclusive power of the other. Isaacs, J., expressed the opinion in *Ex parte Nelson (No. 2)*[33] that all of such questions came within sec. 74, and added, "The question of distributing—either concurrently or exclusively—the totality of legislative authority in Australia is naturally an Australian question appertaining to self-government."

Had the delegates in London known just how their clause was to be interpreted they would probably have been less jubilant than they were, and Chamberlain would have had more cause for satisfaction if he too had known what was to happen. What is more important is that the rules of statutory interpretation are apparently insufficient to give the enacted word the enactor's sense. Perhaps here is a field for jurisprudence to turn over and sow with the seeds of enlightenment uninhibited by the husbandry of the past.

A. B. WESTON.

[33] (1929) 42 C.L.R. 258, at 265.