APPEALS TO THE PRIVY COUNCIL— NEW ZEALAND

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New Zealand has shared, tardily and sometimes reluctantly, in the gradual but inexorable transition of what used to be called the White Dominions of the Commonwealth from colonies to sovereign nations. By 1940 this country can fairly be said to have achieved full executive independence from the United Kingdom.[1] After a prim and maidenly rejection in 1931, and a false start in 1944,[2] the enactment of the Statute of Westminster Adoption Act in 1947 marked the attainment of legislative independence.

It is useful to pause here at the threshold to refer to the Parliamentary discussions on the Statute of Westminster in 1931 and 1947, since the attitudes and the habits of thought there illustrated are not irrelevant to the theme of this article. In 1931 we find the Prime Minister (Forbes) stating—

> The New Zealand representatives at the 1926 Imperial Conference were more concerned to consolidate the unity of the British Commonwealth than to lay down any principle of status or freedom for this Dominion.[3]

In the Legislative Council the elder statesman Sir Francis Bell was more outspoken—

> Every part of this statute is against the view that I have held during all my life . . . I venture to express the hope that the Parliament of New Zealand will never seek to come under the charter which this statute affords.[4]

In contrast a small minority spoke with the voice of the future. Mr H. G. R. Mason said—

> I am sorry that in this country we should take pride in our insufficiency. In New Zealand we are always liable to have our laws called in question on the ground that our authority is limited authority. That is a position inconsistent with the self-respect of this Parliament and Dominion.[5]

Even in 1947, after a depression and a world war, there were reservations. The views of members ranged from strong support to outright opposition, with several of the participants pointedly lukewarm. Fraser as Prime Minister summarised the view taken by Government Members—

> Though we would be sorry to admit it, the New Zealand Parliament still exists as subordinate in some way to the British Parliament.[6]

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1 The final mark of formal independence was perhaps the appointment of a United Kingdom High Commissioner and the dropping of the Governor-General as a channel of communication between the British and New Zealand Governments following the outbreak of war in 1939.

2 The intention to adopt the Statute of Westminster was announced in February 1944. Legislation was deferred in the belief that it might embarrass Great Britain and provide an opening for enemy propaganda: 279 *New Zealand Parliamentary Debates* 531.

3 228 *New Zealand Parliamentary Debates* 548.

4 *Ibid.*, 636.

5 *Ibid.*, 621.

Some were still most unhappy at the thought of New Zealand having full powers. One Legislative Councillor (Sir William Perry) objected to the Statute of Westminister partly on the ground that it could open the way to the destruction of the appeal to the Privy Council—

> We are taking power to do it, and it might only need a case to go to the Privy Council and a decision given unacceptable to the conscience of the New Zealand people to start an agitation for the abolition of the right of appeal to the Privy Council.[7]

Today there can be few New Zealanders who do not take executive and legislative independence for granted, and 40 years after 1930 a relationship of subordination to the United Kingdom Parliament is inconceivable. Yet in the third of the traditional powers—the judicial branch—New Zealand in 1970 remains tied in a colonial relationship and there seems no early prospect of acquiring the autonomy that is there for the taking.

Why should it be possible for a legal dispute between Mr X and his neighbour in Waikikamukau to be decided by a number of eminent judges sitting in London? In most places outside New Zealand such a question would be rhetorical. In this country it is still meaningful and the desirability of maintaining the appeal to the Privy Council has until the last few years been little questioned. It is the writer's view that the continued existence of this right of appeal is an anachronism unwarranted by the needs and inappropriate to the status of New Zealand. In any event however there is need for an examination of the present law and practice and of the arguments brought forward on each side.

On its foundation as a European colony in 1840[8] New Zealand acquired the law and the legal institutions of England, so far as they were applicable to the circumstances of the colony at that date. British sovereignty carried with it as a fundamental corrollary the right of recourse to Her Majesty in Council. At this time the hearing of appeals from colonial Courts by a proper judicial tribunal was a recent innovation. Up till the 1830s they had been dealt with by a Privy Council committee of three which might and often did include laymen. The Judicial Committee Act 1833[9] provided that all such appeals should be heard by a special committee of that name, the members of which included the holders of high judicial office, and although it seems still to have been possible for laymen to sit[10] the committee became established as a prestigious and respected judicial body whose quality fully satisfied 19th century standards of justice.

While an appeal to the Judicial Committee by virtue of the prerogative power lay from the New Zealand Supreme Court from the time of its establishment in 1841[11] the first specific provision for such appeals was made by an Imperial Order in Council in 1860. This recited doubts

6 279 *New Zealand Parliamentary Debates* 531.
7 *Ibid.*, 873.
8 14 January 1840 is the operative date for the reception of English law (English Laws Act 1908, s. 2) but it is not the date of acquisition of sovereignty over New Zealand. See B. J. Cameron, "The History of Law Reform in New Zealand" (1956) 32 N.Z.L.J. 88.
9 3 and 4 William 4, ch. 41.
10 The membership included (inter alia) the President and former Presidents of the Privy Council and any two other members of that body appointed to the Committee.
11 Supreme Court Ordinance 1841.

as to whether an appeal then lay direct from the Supreme Court, there being a paper Court of Appeal in New Zealand consisting of the members of the Executive Council other than the Attorney-General.[12] In 1871 regular provision was made for appeals from the Court of Appeal[13] but the provision for appeals direct from the Supreme Court was for some reason retained. The rights of appeal defined by these Orders in Council of a century or more ago, including the monetary limits, have remained substantially unaltered to the present day, and a provision thought appropriate for the needs of a young colony of about 250,000 people governs an advanced and independent nation of today.

Appeals from New Zealand Courts to the Privy Council are now regulated by Orders in Council made in the United Kingdom in 1910 and 1957. Briefly an appeal may lie either by leave of the court appealed from or by special leave of the Privy Council itself. Leave is granted as of right from any final judgment of the Court of Appeal where the matter in dispute amounts to or is of the value of $1,000 or more,[14] or involves directly or indirectly some claim or question to or respecting property or some civil right of or exceeding that value. Leave may be granted at the discretion of the Court of Appeal from any judgment, whether final or interlocutory, if the court considers it proper to do so because of the great general or public importance of the appeal or otherwise. Leave may also be given to appeal direct to the Privy Council from a final judgment of the Supreme Court if that court considers the question is one that should be considered by the Privy Council by reason of its great general or public importance or the magnitude of the interests affected or for any other reason.

There are a few reported cases of leave having been given to appeal direct from the Supreme Court. In *Re Midland Railway Co. Ltd., Ex Parte Coates*[15] the Court declined to sidestep the Court of Appeal at least unless both parties consented. However in 1916 leave to appeal was granted in *Gillies v. The Gane Milking Machine Co. Ltd.*[16] on the curious ground that if the case went to the Court of Appeal there might be a further appeal to the Privy Council. In 1918 leave was again granted, although on onerous terms.[17] Since then the direct appeal seems to have fallen into disuse and nothing has been heard of it for many years. With the present predilection of the New Zealand legal profession for a double right of appeal it may perhaps be pronounced dead.

So far we have been concerned with civil appeals only. A little needs to be said about appeals in criminal cases. There is no legislative provision for such appeals but for a century the Privy Council has regarded itself as entitled under the prerogative power to grant special leave to appeal in criminal cases. The Council has stressed that it is not a court of criminal appeal and will interfere broadly speaking only if there has been an infringement of the essential principles of justice.[18] This state-

12 Supreme Court Amendment Ordinance 1846.
13 Constituted by the Court of Appeal Act 1862.
14 An amount first fixed in 1860. It was then the standard amount for colonial appeals as of right: Roberts-Wray, *Commonwealth and Colonial Law* (1966) 436.
15 (1899) 17 N.Z.L.R. 596.
16 (1916) 17 G.L.R. 313.
17 *Boyd* v. *Colby* [1918] G.L.R. 333.
18 *Muhammad Nawaz* v. *R.* (1941) L.R. 68 I.A. 126 per Lord Simon L.C.

ment seems a little too narrow, as leave has also been granted to settle an important question of law, for example in *Nazir Ahmed* v. *The King-Emperor*.[18a]

Oddly enough there was statutory provision in New Zealand from 1946 to 1957 for an appeal to the Privy Council in criminal cases originating in the Magistrates' Courts.[19] The sidenote to this provision and its language indicate that it was based on ss. 64 and 65 of the Judicature Act 1908 which were concerned with civil appeals. It seems that those who prepared the 1946 Act failed to appreciate the practice of the Privy Council in criminal cases and the absence of provision for criminal appeals by leave of the superior courts in New Zealand. This statutory appeal disappeared with the passing of the Summary Proceedings Act 1957, but not before it had prompted one of New Zealand's few constitutional cases, *Woolworths Limited* v. *Wynne*.[20] It is symbolic of New Zealand attitudes that this decision should have involved the power of the New Zealand Parliament to confer a right of appeal, not to abolish or restrict it.

In some cases Parliament has used a formula which on its face prevents any appeal beyond the Court of Appeal. Section 144 of the Summary Proceedings Act is an example, and there are others in the Electoral Act 1956 and in some of the recent family law statutes.[21] The effect of such a provision at the present day is uncertain. Clearly it is effective to deny the Court of Appeal the power to grant leave, but the question is whether without express words it curtails the prerogative and precludes the Privy Council itself from granting special leave. A number of cases have held that it does not, among them *Re the Will of Wi Matua*[22] which decided that leave to appeal could be granted from the Native Appellate Court.

These cases are however all pre-Statute of Westminster. It is submitted that the profound constitutional changes of the last 50 years have made the reasoning in cases such as *Wi Matua* obsolete and that when a New Zealand statute makes the decision of the Court of Appeal "final" that word means what it says. When *Wi Matua* was decided the New Zealand Parliament had no power to abolish prerogative appeals. It now has this power, and a narrow construction seems neither necessary nor appropriate. The question has not fallen for decision in New Zealand but at least one member of the present Court of Appeal has expressly left open the question whether political and constitutional changes have not affected the old cases.[23]

During New Zealand's colonial period, when the local courts were not firmly established or their independence axiomatic, and a large part of the European population had personal memories of Great Britain, the abolition of appeals to the Privy Council would have been as politically unthinkable as it was constitutionally impossible. Nonetheless dissatisfaction with the judgments of the Privy Council was not unknown in Victorian New Zealand and it culminated in the well-known remonstrance of the Judges against the animadversions cast by the Judicial Committee on the competence and independence of the Bench in *Wallis*

18a [1936] W.N. 27.
19 Justices of the Peace Amendment Act 1946, ss. 4, 5.
20 [1952] N.Z.L.R. 496.
21 e.g. Guardianship Act 1968, s. 31 (4).
22 [1908] A.C. 448.
23 McCarthy J. in *Nunns* v. *Licensing Control Commission* [1968] N.Z.L.R. 57.

v. *Solicitor-General*.[24] This remonstrance was abundantly justified. Not only had the Privy Council criticised the New Zealand Courts and the Solicitor-General in almost unparallelled terms, but it had betrayed a woeful ignorance of New Zealand law and conditions, exemplified by the egregious error of treating the Treaty of Waitangi as part of municipal law. The decision and others that had preceded it caused intense feeling among the Judges and the legal profession, but the tenor and temper of the protests may nonetheless startle the New Zealand lawyer of today. At the end of a detailed analysis of the decision the Chief Justice, Sir Robert Stout, said—

> At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, our conveyancing terms, or our history. What the remedy may be . . . is not at present within my province to suggest.

And Williams J.—

> That the decisions of this Court should continue to be subject to review by a higher Court is of the utmost importance . . . Whether, however, they should be reviewed by the Judicial Committee as at present constituted is a question worthy of consideration. That Court . . . by the ignorance it has shown in this and other cases of our history, of our legislation, and of our practice . . . has displayed every characteristic of an alien tribunal.

Subsequent criticism of Privy Council decisions has been much more muted and indeed there is no reason to suppose that blunders of *Wallis* v. *Solicitor-General* proportions have subsequently been made. But it would be unfair to leave the impression that all lawyers have invariably accepted the Privy Council as the ultimate repository of legal wisdom. Thus we find Sir Hubert Ostler saying of the judgment in *Brooker* v. *Borthwick & Sons*[25] that it was not only contrary to prior decisions of the House of Lords, but utterly illogical.[26]

Already in 1895 legislation had opened the way to the appointment of a few colonial Judges to the Judicial Committee.[28] After *Wallis* the practice arose of appointing a New Zealand Judge from time to time, and judges so appointed occasionally took part in the hearing of appeals. However, it was in the nature of things only rarely that a New Zealand judge would sit on a New Zealand appeal, and appointment was in effect more an honour for a distinguished judge than an organic association of the New Zealand Bench with the work of the Privy Council. The practice seems to have died out in the 1930s. It was revived in 1962 when a principal object seems to have been to refurbish the image of the Privy Council as a Commonwealth rather than an exclusively English tribunal. The first President of the reconstituted Court of Appeal, Sir Kenneth Gresson, was appointed and served on the Judicial Committee for a few months in 1963 before his retirement. Two of the present members of the Court of Appeal have sat on the Judicial Committee during periods of sabbatical leave.

Meanwhile in the other Dominions the scope and even the existence of the appeal had been called in question. The earliest inroad was a Canadian Act of 1888[29] which purported to exclude appeals in criminal cases even by special leave. This was not surprisingly held invalid in

24 N.Z.P.C.C. 1840-1932 23, 730.
25 [1933] A.C. 699.
26 *Portrait of a Profession* (1969) 88.
27 Judicial Committee Amendment Act 1895 (U.K.).
28 Originally the total for the Empire was five.
29 51 Vict. c. 43.

1926 in *Nadan* v. *The King*[30] a decision which thereby became one of the chief precipitants of the Balfour Declaration of 1926 and of the Statute of Westminster itself. The founding fathers of the Australian Commonwealth had no great love for the institution, and sought the abolition of appeals in all constitutional cases, Federal or State, but the British Government of the day refused to allow this. The Australians were left with section 74 of the Constitution, which excluded an appeal in *inter se* cases, that is cases where the powers of the Commonwealth *vis a vis* the States were in issue, without the leave of the High Court. Since this restriction had effect by virtue of a United Kingdom statute its validity was not in question.

Canada successfully did away with appeals in criminal cases immediately after the Statute of Westminster[31] and with all appeals a few years later.[32] The Irish Free State likewise abolished appeals in the 1930s.[33] A number of other Commonwealth countries have done away with the appeal since the Second World War on attaining independence or afterwards, and by the 1960s it was fairly widely recognised that the Judicial Committee was a dying institution. In reality however its demise as a Commonwealth link had been inevitable since the passing of the Statute of Westminster in 1931 and the Canadian legislation that followed it. Canada was no more than the pacesetter in this process. The trend towards greater autonomy and indeed legal autarchy has been consistent throughout the 20th century and it was unreal at any time to suppose that the process would be checked or reversed. There has not been the slightest indication that any country having abandoned the appeal to London would reinstate it.

The Courts and most British writers had long emphasised that as an instrument of the Sovereign in Council the Judicial Committee was not truly an English institution at all but was a Commonwealth possession. Its location in London and its almost exclusively British membership were to be regarded merely as accidents, behind which the substance must be sought. This piece of Aristotelian metaphysics did not have much appeal outside the United Kingdom. In the mind of most Dominion nationalists and some exponents of the Commonwealth ideal the Privy Council was indelibly tarred with an English brush. For the more radical and the more prescient the solution was simple—to repatriate and nationalise the final appellate tribunal. Others were led to suggest a reconstitution of the Privy Council or the substitution of a new tribunal, with the object of introducing a more genuine Commonwealth character. Among them was a former Chief Justice of New Zealand, the late Sir Michael Myers, who during the 1940s had come to favour the notion of a common appeal tribunal for the whole Commonwealth including the United Kingdom as the only means of preserving the judicial link.[34]

A similar idea was formally put forward at the Commonwealth and Empire Law Conference at Sydney in 1965 by the Lord Chancellor, Lord Gardiner. He proposed a Commonwealth Court of Appeal that would replace both the Judicial Committee of the Privy Council and

30 [1926] A.C. 482.
31 cf. *British Coal Corporation* v. *The King* [1935] A.C. 500.
32 cf. *Attorney-General for Ontario* v. *Attorney-General for Canada* [1947] A.C. 127.
33 cf. *Moore* v. *Attorney-General for Irish Free State* [1935] A.C. 484.
34 (1950) 26 N.Z.L.J. 119.

the House of Lords. The idea did not find much favour among the more important Commonwealth countries. The New Zealand Attorney-General, the late Mr Hanan, is known to have expressed a welcome for this move and to have supported it somewhat effusively; once again New Zealand was conspicuous for espousing any move, however anachronous, that might seem to promote Commonwealth ties and for identifying itself with British proposals. It is plain however that the notion was too much behind its time and that those countries which had done away with appeals to London, or where dissatisfaction with the existence of an appeal was substantial, were unwilling to subject the decisions of their own courts to another exterior tribunal. Nothing more has been heard of the proposal. Mr Hanan's own views subsequently altered, and within a year or two he had become convinced that an appeal to any tribunal outside New Zealand was outdated.

In recent years also, tentative proposals have been made for some species of regional court, which would hear appeals from Australia, New Zealand and perhaps Malaysia and the remaining Pacific and South East Asian fragments of Empire. Compared with a Commonwealth Court of Appeal, such a regional court would have both advantages and disadvantages. One seldom-mentioned potential advantage is that it could create a third principal nucleus of development of the common law, comparable with England and America. There have been isolated supporters for it in New Zealand but it has not and is unlikely to command widespread enthusiasm here. More importantly it would almost certainly founder on the rock of Australian unwillingness to subject the decisions of its High Court to review by such an authority. If that authority were the High Court under another name this in turn would be manifestly unacceptable to New Zealand.

In New Zealand the legal profession as a whole and the Law Society as its official voice have consistently been enthusiastic supporters of retaining an appeal to the Privy Council. It can be said with some confidence that a majority of both older and younger lawyers is still retentionist in opinion. To examine the rhetoric and the eulogies over the years, some of them almost Byzantine in posture, would be tedious and pointless. Some of the headier statements must have caused a dispassionate observer to wonder if for the New Zealand legal establishment and many constitutionalists time has not stood still since Queen Victoria's jubilee. There have become heard however some voices of dissent, and the proposition that appeals to an outside tribunal should be abolished may now be respectable if still heterodox. The tone of retentionists has become more moderate for the most part, and the objections of the New Zealand Law Society have crystallised around the desirability of a second appeal.

The present policy of the Law Society on appeals to an outside tribunal is expressed in the following resolution of the Society's Council dated 26 November 1965—

(1) That the Society supports the retention of the right of appeal to the Judicial Committee and urges that qualified New Zealand Judges should from time to time take part in the Court's deliberations.

(2) That if the New Zealand Government is asked to consider the establishment of a final Commonwealth Court of Appeal the Society would support the Government in a practical scheme for the establishment of such a court subject to its having the opportunity to consider the constitution and jurisdiction of the Court.

(3) That if assistance is required by Commonwealth countries in the provision of an appellate Court, New Zealand should be prepared to render aid in

the establishment and operation of such a Court including the provision from time to time of judicial assistance.

Arguments for an Appeal

The case for retaining appeals to the Privy Council rests on several arguments, not all of which of course are necessarily accepted by all who wish to preserve the institution as an appellate tribunal from New Zealand.

1. The existence of the right of appeal ensures unity of law within the Commonwealth, or in any event between England and New Zealand, and its abolition might put this unity in jeopardy.
2. It is one of the few remaining symbols of unity among Commonwealth nations, or between England and New Zealand, and as such deserves retention.
3. The decisions of the Privy Council are of a quality that local courts do not always attain and with the limited field from which the senior judiciary must be drawn can hardly aspire to as a general rule.
4. The right of appeal, coupled with the practice of appointing New Zealand Judges of the Court of Appeal to sit from time to time on the Judicial Committee, gives our judges the benefit of associating with the best legal minds of the Commonwealth and improves the quality of their own decisions.
5. It provides an appeal to a tribunal whose members are aloof from local issues and are not subject to local pressures.
6. There is need for a double system of appeals, a single appeal being unsatisfactory in important cases. New Zealand has neither the resources nor the volume of litigation to warrant the establishment of a second appellate court and an appeal to some outside tribunal is therefore necessary. Unless and until a satisfactory substitute is found this can only be the Privy Council.
   This is the view of the New Zealand Law Society and is the principal ground upon which that body officially objects to any removal of the right of appeal.

The force of the first argument as a practical proposition has been weakened by the judgment of the Privy Council itself in *Australian Consolidated Press Ltd.* v. *Uren.*[35] This revolutionary decision, which has received less attention in New Zealand than its significance warrants, is inconsistent with the view that uniformity of the law is a paramount value. Likewise it can hardly be reconciled with the theory, of which Sir Owen Dixon was the most articulate spokesman,[36] that the common law is one and indivisible in space. The pass has been sold, and by the very institution which the exponents of uniformity counted on to defend it.

There is however more to it than this. One has only to ask why—why should uniformity of the common law be preserved throughout the Commonwealth, or between Britain and New Zealand, as a supreme value—for the whole structure to come crashing to the ground. An honest answer to this question has seldom been attempted. Indeed, strict uniformity of law has the positive disadvantage of preventing any true cross-fertilisation between different parts of the common law world.

35 [1969] A.C. 590.

36 cf. for example the address "Sources of Legal Authority" published in *Jesting Pilate* 198. And cf. F. K. H. Maher "The Common Law—Tears in the Fabric" (1969) 7 M.U.L.R. 97.

The desire to preserve relics of Empire is a sentiment to be condemned not for itself but for its inaptness. It misses two large points—first that the Privy Council is no longer any sort of a Commonwealth link because most Commonwealth countries have abandoned it and second that insofar as a special relationship exists towards Britain on the part of New Zealand formal institutions are neither necessary nor sufficient to preserve it. Although its form has changed and will continue to change, it is a fact of life for the foreseeable future, Privy Council or no Privy Council.

One may concede that generally speaking the quality of the decisions of the Privy Council, considered as legal expositions, surpasses that of the judgments of our Court of Appeal. This does not warrant the inference that the decisions of our Court of Appeal should be subjected to scrutiny by the Privy Council. One of New Zealand's most distinguished lawyers points out that top quality in the strictly legal sense is not the *sine qua non* of a final appellate tribunal; what is essential is integrity, reasonable capacity, a fair standard of uniformity and adjudication by persons whose social thinking is basically the same as that of those whom they are judging.[37]

The fourth argument is hardly significant. There are other means of contact between New Zealand judges and their brethren in England and to preserve an appeal to the Privy Council simply because it may give a few New Zealand judges the opportunity of sitting on that body once or twice seems hardly sensible. Moreover one may respectfully question the proposition that the members of the Judicial Committee are necessarily the "best legal minds of the Commonwealth". There is for example room to believe that at times during recent years the quality of the High Court of Australia considered as a purely legal body may have been superior to that of the Judicial Committee and its *alter ego* the House of Lords.

The contention that the Privy Council has the advantage of being independent of local pressures is still occasionally heard, but one has difficulty in taking it seriously. It can most politely be called either absurd or offensive. If it is generally valid then we should have English appeals heard by Canadian judges, Canadian appeals by Australian judges and so forth. If it is intended to apply merely to New Zealand it is a reflection on the independence of our judiciary, implying that they are less able to resist improper local pressures than their brethren overseas. This has only to be stated to be rejected. If on the other hand it merely means that they are influenced by a New Zealand ethos and sense of values, then so they should be.

The final argument is the only one of real weight and deserves a more detailed analysis.

The claim that a three-tier Court system (that is, a double right of appeal) is necessary in the interests of justice is really a matter of faith. To assert that it is necessary (or not necessary) is to assert the inherently unprovable. One *may* get a better ultimate decision, but this proposition itself conceals an ambiguity. What is meant by a "better" decision? At least one of the parties is unlikely to regard it as achieving greater justice. The fact that the Privy Council sometimes reverses the Court below proves nothing. At this altitude it is seldom that one can talk meaningfully of a right or a wrong decision as a matter of law, since

37 Private communication.

the law is arguable either way. In social terms—the making of law for the future—there is no reason to suppose that a decision of the New Zealand Court of Appeal will be less satisfactory than a judgment of the Privy Council, particularly if the disappearance of a further appeal left our Court freer to take up a creative role. A number of the decisions of the High Court of Australia, for instance, have been thought by many commentators to yield a more desirable result than those of the Privy Council which overruled them.

The decisions in the *Crown Milling* case[38] are of interest in this connection. As an exercise in pure interpretation, it is difficult to see how the majority decision of the Court of Appeal, the minority judgments in that Court, and the decision of the Privy Council could be preferred over one another. In its substantial effect, the emasculation of anti-monopoly legislation (the Commercial Trusts Act 1910) by the application of a laissez-faire economic dogma under the guise of refusing to adjudicate between economic theories, the decision of the Privy Council was surely profoundly unsatisfactory.[39] It is probably only the rarity of this sort of case in New Zealand, in contrast with Canada, that has prevented a popular demand for abolition in this country.

It has been said that if there were yet another tribunal over the Privy Council or the House of Lords, a similar proportion of the decisions of those bodies would be reversed. A four-tier system would on that basis produce better justice than a three-tier system and so *ad infinitum*. The truth is that there must be a compromise between the search for perfection on the one hand, and expense and delay on the other.

That the three-tier system is not regarded as sacrosanct overseas is illustrated by events in Australia. In abolishing appeals to the Privy Council in Federal questions, the Australians have accepted that in many cases this will produce a two-tier procedure. The Australian position is as follows—

(1) All *inter-se* constitutional questions are automatically removed from the Supreme Court of a State to the High Court.[40] In practice there is not and has never been any appeal in such cases.
(2) Other constitutional cases may be removed from a State Supreme Court by order of the High Court under s. 40 of the Judiciary Act. The same applies.
(3) All cases originating in the High Court or in a federal superior court, and decided by a single judge are subject to appeal to the Full Court—a single appeal. Otherwise there is no appeal. These form a not unimportant class.
(4) All other cases where a State Supreme Court exercises federal jurisdiction and where the appellant goes to the High Court rather than an appellate Court of the State involve one appeal only.[41]

38 *The King* v. *Crown Milling Co. Ltd.* [1925] N.Z.L.R. 258, 753; [1927] A.C. 394.
39 This is not a judgment on whether the policy of the Act was wise or unwise. If it was unwise, the remedy was for Parliament. Nor, it is submitted, is it relevant that the New Zealand Court of Appeal divided 3 to 2. Decisions of far greater consequence have been made by a similar majority in the House of Lords and by a 5 to 4 verdict in the United States Supreme Court. And we do not know whether and how the Privy Council divided.
40 Judiciary Act 1904-66 s. 40A.
41 Judiciary Act 1904-66 s. 39 (2) (b).

One other point is worth mentioning. In criminal cases the decisions of the Court of Appeal are final for practical purposes; the Privy Council plays and has played no significant part in the development of the criminal law and declines to act as a court of criminal appeal. We accept without question a single appeal in criminal cases. If this is reasonable where the liberty and even the life of the subject may be at stake, it is difficult to appreciate why it is all-important to have two appeals in civil cases.

Those who argue for retaining the appeal to the Privy Council on the ground of the need for a three-tier system often seem to assume that if external appeals were abolished the internal judicial system would be unaltered. This does not follow. Many abolitionists would concede that something more than the present structure would be desirable in the absence of external appeals, but stopping short of the impracticable step of creating an entirely new Court at the top. The late Mr Hanan, for instance, proposed a re-examination of the system to better adjust it to the absence of appeals to an outside tribunal. At the Centennial Legal Conference in April 1969 he said—

> . . . the legal profession is surely right in saying that an additional appellate body within New Zealand over the existing Court of Appeal is impracticable. It may be that it will be for others to make the decision in times to come and that perhaps the solution lies in strengthening and adapting our Court of Appeal which, I think, already has obtained the universal confidence of the legal profession in New Zealand.[42]

There are several possible approaches, one or more of which might reduce the justification for objection by proponents of a three-tier system. One is the revival of the District Court concept, something that a body of opinion would favour for its own sake. District courts might take over a great part of the more straight-forward first instance work now done by the Supreme Court and if the office carried full judicial status (and there seems no reason whatever why it should not) and an adequate remuneration there would be no reason to fear for the quality of its decisions.

In Australia, cases involving the common law or State legislation may go from a State Supreme Court to a Full Court and thence to the High Court or Privy Council. This permits of a double appeal within what is organisationally a two-tier system. Proceedings originating in the High Court itself are in some cases heard by a single Judge, with an appeal to the Full Court. The germ of a solution to the New Zealand problem may lie in the Australian pattern.

In any event, if the present Court of Appeal were to become the ultimate appeal authority for New Zealand, its membership should be enlarged from the present three members to at least five, and all members should sit to hear the most important cases. A Court of Appeal of five (plus the Chief Justice as ex officio member) would approximately correspond in size with the final appeal court in the United Kingdom and Australia. There are six Justices of the High Court and in practice not more than five Law Lords normally sit in England.

The case for abolition

Much of the case for abolition rests on the refutation of the arguments for keeping appeals. There are however certain positive con-

42 (1969) 45 N.Z.L.J. 366.

siderations. One is the example of others. Few countries of the Commonwealth retain a right of appeal to London. South Africa and the Republic of Ireland had abolished it before those countries left the Commonwealth. It has disappeared from Canada, India and Pakistan. As we have seen it has now been abolished in Federal cases in Australia[43] and one may suspect that if the power had lain with Canberra it would have been done away with altogether. Except for the remaining handful of colonies and for a few relatively minor territories, of which Malaysia is perhaps the most important, New Zealand is the only independent Commonwealth country to keep it. There are reasons for preserving an appeal in most of the retentionist territories that do not apply to New Zealand.[44] Indeed it may be asserted that New Zealand is the only stable and autonomous Commonwealth country with a firmly established local Bar and a tradition of independent Courts to continue the appeal to London.

Another objection is the unfamiliarity of the members of the Privy Council with the New Zealand background. This argument has a good deal of validity historically but it ought not to be pushed too far. There is little evidence that the Privy Council has gone seriously astray in recent years out of ignorance of New Zealand conditions. The handicap can probably be overcome in most cases, although the possibility of a blunder is always present.

On the practical level, the principal disadvantage of the present appeal is the expense and delay involved. The cost certainly prices such an appeal out of the means of the great majority of New Zealanders. Only the Crown, substantial corporations, or individuals who are wealthy or supported by a special fund or the resources of an organisation could sustain it. Under the Legal Aid Act 1969 aid can be granted for such an appeal in certain circumstances,[45] but if the cost of that scheme is to be kept within bounds the Minister's approval is likely to be granted sparingly. Plainly costs vary greatly, and are probably considerably increased if the New Zealand barrister is to represent his client before the Privy Council. Usually the unsuccessful party is ordered to pay the taxed party-and-party costs of his opponent. In *Chemists Guild* v. *Stilwell*[46] the unsuccessful party was ordered to pay £2,733($5,466) by way of costs to his opponent, in addition to bearing his own costs. A successful litigant in the Court of Appeal a year or two ago, faced with a threat to carry the case to the Privy Council, was advised that if he lost he could well be liable for his own costs together with something in the neighbourhood of $3,000 for his opponent's.

One may well ask whether such a right of appeal is not an unnecessary luxury for the wealthy and a denial of justice for the ordinary citizen.

The fundamental objection to the right of appeal to the Privy Council is political in nature—that to have our laws determined by any outside tribunal, however eminent, is inconsistent with our autonomy, with our sense of national self-respect, and with our image and reputation in other countries. It is a colonial leftover unbecoming to our sense of identity and hardly a convincing institution in the year 1970. The

43 Privy Council (Limitation of Appeals) Act 1968. (Aust.).
44 e.g. a small and weak Bar; strong internal antagonisms; a felt need to protect constitutional guarantees.
45 Section 15 (1) (g).
46 [1966] N.Z.L.R. 654.

needs of national policy demand that we should be clearly seen to be no longer some sort of British dependency, and this image is obscured while we continue to subject ourselves to be judged in London.

This argument might be counterbalanced if the quality of our domestic courts was poor or injustice was frequent. The requirements of justice would then conflict with the sentiment of nationality and some would consider that justice should have precedence. This is of course a stock excuse for colonialism and one is reminded of the remark of John Robert Godley, one of the founders of the Canterbury settlement: "I would rather be governed by Nero on the spot than by a Board of Angels in London". Fortunately, it is irrelevant to New Zealand.

The reasons for the past adherence of New Zealand to the appeal to the Privy Council are not esoteric. The facts of our history make a degree of attachment to English institutions and the concept of Imperial unity understandable and inevitable, although its strength and the infantile quality of the relationship with Britain during much of the 20th century seem much greater than these facts warrant. European New Zealand was peopled largely by immigrants from England and Scotland at a time when rapidly improving communications permitted frequent and speedy contact with the land they had left. The Irish element, with its sense of separate nationality, was comparatively small and Continental Europeans few. New Zealand was utterly dependent for defence and economically on Great Britain; only after 1939 was "the shield of the British Navy" seen to be a mirage. Suspicion of European powers was profound and Asia was an alien, potentially hostile area on the map. For generations most New Zealanders were indoctrinated with what Condliffe called a mother complex towards England and an almost religious devotion to the British Empire and Commonwealth. The idea of national identity was played down.

The legal profession in most countries, and perhaps in New Zealand particularly, are notoriously conservative, and this general outlook is more likely to colour their attitudes after it has ceased to be relevant. Lawyers will be slower than most to think and feel as New Zealanders, to regard this country and not some ideal of Empire or "Home" as the object of their allegiance. The shattering of the glass castle of illusion by Britain's decision to seek its destiny within Europe may be effecting a profound change here. Moreover lawyers have their own professional reverence towards London as the source of the common law. They are subject to the occupational hazard of preferring the perfect answer to practical and speedy justice, despite their assent to the maxim "*interest reipublicae ut sit finis litium*".

The essential question in considering whether to retain or do away with appeals to the Privy Council is whether the existence of a right of appeal corresponds with the needs and interests of New Zealand. The purely legal aspects of this question are not unimportant, and it has been argued that on this level there is no adequate case for preserving an appeal. Ultimately however the issue is political in the wide sense and even the unanimous view of the legal profession (in fact there is not unanimity) should not be permitted to be conclusive. On political grounds it is submitted that abolition is desirable. The time has arrived when we should accept fully and gladly rather than grudgingly the implications of a responsible independence, and interpret our own laws for ourselves.