THE FEDERAL JURISDICTION OF STATE COURTS.

By K. H. BAILEY, M.A., B.C.L. (Oxon.), LL.M. (Melb.),
Professor of Public Law in the University of Melbourne.

In a previous article,[1] the writer attempted to explain the manner in which the High Court (despite a contrary decision of the Privy Council in *Webb v. Outrim*)[2] has established the power of the Commonwealth Parliament to invest State courts with certain federal jurisdiction, and deprive them of certain State jurisdiction, under subsections (1) and (2) of s. 39 of the Judiciary Act.[3] The object of the present article is to examine the manner in which the High Court has established the power of the Parliament to impose the most important of the " conditions and restrictions " contained in s. 39 (2)—the prohibition of an appeal as of right to the Privy Council from a State Supreme Court exercising federal jurisdiction. In this field the Court has made an original and remarkable contribution to the history of constitutional interpretation.

The relevant sub-section of the Judiciary Act is s. 39 (2). Federal jurisdiction is vested in State Courts, but " subject to the following conditions and restrictions :—

> (*a*) Every decision of the Supreme Court of a State, or any other court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court."

It may be taken as accepted law that the extent to which a court's decision is subject to appeal is an element in any definition of that court's jurisdiction. When, therefore, the Commonwealth Parliament is given power by s. 77 (i) of the constitution to make laws " defining the jurisdiction of any federal court other than the High Court," or by s. 77 (iii) to make laws " investing any court of a State with federal jurisdiction," an enactment dealing with the system of appeals from the tribunals concerned would *prima facie* be *intra vires* in each case. An attempt might perhaps be made to draw a distinction between ' defining the jurisdiction ' of a federal court and ' investing ' a State court with federal jurisdiction, on the ground that in the latter case the Commonwealth must take the State courts as it finds them, and must leave the system of appeals to be determined by State law. But this distinction has been decisively rejected by the High Court.[4] A power to " invest " with jurisdiction is a power to confer authority to hear and determine certain matters, and it may very properly be held to include the power to declare whether and to what extent the determinations in question shall be final.

This point also arose for consideration during the proceedings in the Supreme Court of Victoria in the *Skin Wool* case (*Bardsley v. Common-*

1. (1940) II. *Res Judicatae* No. 2. pp. 109 *et seq.*
2. (1907) A.C. 81.
3. In the former article there might usefully have been added to n. 29 (p. 116) a reference to *Booth v. Shelmerdine Bros.*, (1924) V.L.R. 276, in which McArthur J. had to decide in complex circumstances whether an inferior court had been exercising State or federal jurisdiction.
4. *Commonwealth v. Limerick S.S. Co.*, (1924) 35 C.L.R. 69, 89-93 (Isaacs and Rich JJ.), 115-6 (Starke J.); (1925) A.L.R. 153, 158-9, 168; *Commonwealth v. Bardsley*, (1926) 37 C.L.R. 393, 407-9 (Isaacs J.); (1926) A.L.R. 161, 174-5. A very similar view has since been expressed by the Privy Council, in relation to the powers of the Canadian Parliament: *British Coal Corporation v. The King*, (1935) A.C. 500, 520-1.

wealth).[5] There the question was whether, in view of s. 39 (2) (*a*) of the Judiciary Act, the Full Court was competent to entertain an appeal from the decision of the trial judge, Cussen J., for in relation to s. 73 of the constitution the High Court had held, in *Parkin v. James*,[6] that the decision of a single judge was a "decision of the Supreme Court," from which an appeal would lie direct to the High Court. On a parity of reasoning, s. 39 (2) (*a*) would, if otherwise valid, produce the result that the only appeal from the decision of a single judge exercising federal jurisdiction would be to the High Court, excluding altogether the appeal provided by State law to the Full Court. The Court (Irvine C.J., Mann and Macfarlan JJ.) was unanimous in thinking that s. 77 (iii) authorized the Commonwealth Parliament, if it so desired, to say what appeals should be permitted in federal jurisdiction.[7]

When, however, the Commonwealth Parliament in exercising its power under s. 77 (iii) purports to abrogate the appeal as of right to the Privy Council, as it has done by s. 39 (2) (*a*) of the Judiciary Act, a further question arises. Is not the Commonwealth law inoperative by reason of s. 2 of the Colonial Laws Validity Act 1865, as being repugnant to Orders-in-Council, under various Imperial Acts, expressly conferring rights of appeal from State Courts to the Judicial Committee ?

I. The High Court and the Imperial Orders-in-Council.

In 1924, in *Commonwealth v. Limerick S.S. Co.* and *Commonwealth v. Kidman*[8] the High Court held that s. 39 (2) (*a*) of the Judiciary Act was not invalid by reason of repugnancy to an Imperial Order-in-Council under the Australian Courts Act 1828.[9] Something should perhaps be said as to the authority of this decision. It was the opinion of a majority (Isaacs, Rich and Starke JJ.); but the minority (Knox C.J. and Gavan Duffy J.) did not indicate any individual view on this aspect of the subject. They regarded themselves as bound, by the Privy Council's decision in *Webb v. Outrim*, to hold s. 39 (2) (*a*) invalid, and did not discuss the matter on the merits.

Two years later, the decision in the *Limerick* case was challenged in the two *Skin Wool* cases, *Commonwealth v. Kreglinger & Fernau Ltd.* and *Commonwealth v. Bardsley*,[10] in which a Full Bench of seven Justices sat, and this particular point was fully argued. But in the event the order of the court, in which five Justices concurred, was based on a different point altogether.[11] The three Justices who had considered the matter in the *Limerick* case (Isaacs, Rich and Starke JJ.) adhered to the views they had expressed there, Isaacs J. elaborating his former reasoning. But

5. (1926) V.L.R. 310.
6. (1904) 2 C.L.R. 315.
7. By a majority, the Court also held that s. 39 (2) (*a*) of the Judiciary Act did purport to exclude the appeal to the Full Court, but that it had been held to be invalid, *quoad* appeal to the Privy Council, in *Webb v. Outrim*; that it was not severable; and that the appeal to the Full Court was therefore competent.
8. (1924) 35 C.L.R. 69; (1925) A.L.R. 153.
9. 9 Geo. IV. c. 83, s. 15.
10. (1926) 37 C.L.R. 393; A.L.R. 161.
11. The litigation had originated before Cussen J. in the Supreme Court of Victoria. On an appeal from him to the Full Court it was contended, as explained above, that by virtue of s. 39 (2) (*a*) appeal lay from Cussen J. to the High Court only. Having held, as explained above in n. 7, that the appeal was competent, and having dismissed it on the merits, the Full Court gave leave to appeal, from its own decision, to the Privy Council. The Commonwealth thereupon obtained, from the High Court, leave to appeal to it from the Supreme Court's order granting the appeal

no other Justice dealt with the point at all. No inferences adverse to the majority decision in the *Limerick* case should therefore be drawn from the fact that it represented the views of only three out of the seven Justices then comprising the High Court.

Two entirely distinct grounds were given by Isaacs and Rich JJ. for the conclusion that s. 39 (2) (*a*) is not invalid by reason of repugnancy to the Imperial Orders-in-Council. The first was that on their true construction the Orders-in-Council apply only to the *State* jurisdiction of State Supreme Courts, and do not purport at all to authorize an appeal from a Supreme Court exercising the federal jurisdiction with which it has been invested by the Commonwealth Parliament.[12] In this view, of course, no question of repugnancy could possibly arise. For s. 39 (2) (*a*), as was noted in the writer's previous article, does not purport to bar the appeal to the Privy Council from a State court exercising *State* jurisdiction.

This is an attractive solution of the problem, and it was put forward with great erudition and ingenuity. But it cannot be accepted as good law, either in principle or upon authority. So far as concerns authority, it is right and necessary to consider together the opinions expressed both in the *Limerick* case and in the *Skin Wool* case. Of the seven Justices, two only (Isaacs and Rich JJ.) held expressly that the Orders-in-Council did not apply to the federal jurisdiction of State courts. Two (Knox C.J. and Gavan Duffy J.) held expressly that they did so apply.[13] Two more (Higgins and Starke JJ.) wrote judgments which plainly assume the latter view.[14] The remaining Justice (Powers J.) expressed no opinion at all on the point. But it is clear that as a matter of authority the view of Isaacs and Rich JJ. was a minority opinion in the High Court.

On the question of principle it must be admitted, as Isaacs and Rich JJ. point out, that remarkable consequences follow from the conclusion that the Orders-in-Council do apply to a State Supreme Court in its federal jurisdiction. The Commonwealth, while plainly able to create new federal courts without any appeal as of right to the Privy Council, could not employ the State Supreme Courts as "substitute tribunals," if the Orders-in-Council are to have their full apparent effect, without permitting the possibility of such an appeal to the Judicial Committee.[15] In matters of detail, too, the Orders do appear to contemplate cases of purely State concern. Thus it was pointed out that in the Order-in-Council of 1911, relating to Victoria, one of the rules requires the record of the case to be printed either in Victoria or in England—a needless

to the Privy Council. In the High Court a majority took the view that the question whether s. 39 (2) (*a*) could prevent the appeal from Cussen J. to the Full Court was an *inter se* constitutional question, that the cause was thereupon automatically removed into the High Court by ss. 38A and 40A of the Judiciary Act, and that all the subsequent proceedings of the Full Court were mere nullities. In this view it became unnecessary to discuss any of the further questions, relating to the power of the Supreme Court to grant an appeal to the Privy Council. See, generally, the judgment of Knox C.J., Gavan Duffy and Powers JJ.: 37 C.L.R. 393, 399-402; (1926) A.L.R. 161, 172-3. The proceedings in the Full Court of the Supreme Court of Victoria are reported in (1926) V.L.R. 310.

12. 35 C.L.R., at pp. 103-9; (1925) A.L.R., at pp. 163-6 (Isaacs and Rich JJ.); 37 C.L.R., at pp. 415-9; (1926) A.L.R., at pp. 177-9 (Isaacs J.).
13. *Commonwealth v. Limerick S.S. Co.*, 35 C.L.R. 69, 82; (1925) A.L.R 153, 155.
14. 35 C.L.R., at pp. 114-6; (1925) A.L.R., at pp. 168 (Starke J.); 37 C.L.R., at p. 427; (1926) A.L.R., at p. 182 (Higgins J.).
15. 35 C.L.R., at pp. 108-9 (Isaacs and Rich JJ.), 116 (Starke J.); (1925) A.L.R., at pp. 165-6, 168; cf Hodges J.'s remark in *Outrim's* case, (1905) V.L.R., at pp. 469-70.

restriction, one might suppose, in a case affecting the Commonwealth.[16] But these matters are not decisive. The question comes back at last to the words used in permitting the appeal. They could scarcely be more comprehensive. Rule 2 provides that " an appeal shall lie (*a*) as of right from every final judgment of the (Supreme) Court (involving £500 or upwards) ; (*b*) at the discretion of the (Supreme) Court from *any other judgment of the Court* (if it is in the Court's opinion of great general or public importance)."[17] Any and every judgment of the Supreme Court seems to be included. The inconvenience of some of the rules, as applied to Commonwealth cases, is not a strong ground for holding, in the face of such clear general words, that the Orders apply only to judments given in the State jurisdiction of the courts concerned. It is rather an indication of the remarkable conservatism which these Imperial governmental forms have exhibited, even since the establishment of responsible government. As a matter of historical record, as Isaacs and Rich JJ. themselves showed, it is known that the Orders were most emphatically intended by the Imperial authorities, despite the Commonwealth's protest, to apply both to the federal and to the State jurisdiction of State courts.[18] It seems to the writer that, as a mere matter of construction, they achieve that object. In that view, therefore, there is a complete and hopeless antinomy between the Orders-in-Council and the Commonwealth's enactment in s. 39 (2) (*a*) of the Judiciary Act.

The view just considered however was only one of the two grounds upon which Isaacs and Rich JJ. upheld the validity of s. 39 (2) (*a*). The other conceded the existence of a contradiction between the Australian Act and the Imperial Orders-in-Council. But it was based on a construction of the power in s. 77 (iii) of the constitution (" may make laws investing any Court of a State with federal jurisdiction ") as necessarily including power to determine the system of appeals from those courts. An Imperial Act of 1844 authorizes His Majesty in Council to regulate appeals from courts overseas, including the Supreme Court of an Australian State. A subsequent Imperial Act, in 1900, authorizes the Commonwealth Parliament to invest certain courts, including the Supreme Court of a State, with federal jurisdiction, and in doing so to determine what appeals if any shall be competent. Thus construed, the Act of 1844 says the King in Council shall decide, the Act of 1900 says the Commonwealth Parliament shall decide. There is inconsistency, certainly. But it is between two Imperial Acts, and on familiar principles the later in time prevails. So far as concerns the federal jurisdiction of State Supreme Courts, therefore, the Judicial Committee Act of 1844 is impliedly and *pro tanto* repealed by s. 77 (iii) of the constitution. To be more precise, the Act of 1844 will still authorize an Order-in-Council regulating appeals from the Supreme Court of a State. But if such an Order-in-Council is in conflict with a valid Commonwealth Act, authorized by s. 77 (iii) of the constitution, it will *pro tanto* be invalid. The problem of repugnancy under the Colonial Laws Validity Act has disappeared. This in brief is the reasoning of the majority in the *Limerick* case.[19]

16. 37 C.L.R., at pp. 416-7 ; (1926) A.L.R., at p. 178 (Isaacs J.).
17. See *Victorian Statutes* 1928, Vol. V., pp. 888-90 (italics the writer's).
18. 35 C.L.R., at pp. 105-7 ; (1925) A.L.R., at pp. 164-6.
19. 35 C.L.R., at pp. 95-6 (Isaacs and Rich JJ.), 115-6 (Starke J.) ; (1925) A.L.R., at pp. 160-1, 168.

This argument neatly disposes of these particular Orders-in-Council. But does it not go much farther ? Does it not dissolve the authority altogether, so far as the Commonwealth is concerned, of any Imperial Acts passed before 1900 ? The Imperial Parliament, for example, passed in 1870 a Naturalization Act, prescribing the conditions under which aliens may become British subjects. Later, in 1900, the Commonwealth constitution empowered the Australian Parliament to make laws with respect to " naturalisation and aliens.[20] The question is whether, notwithstanding the Colonial Laws Validity Act, the Commonwealth can validly alter the conditions laid down by the Imperial Act for the acquisition by aliens of British nationality. On the basis of the *Limerick* case, can we not argue that the later Act of the Imperial Parliament, by entrusting this particular matter to the Commonwealth Parliament, has *pro tanto* repealed the earlier Act ? If so, the result is certainly novel. If not, there must be some peculiarity about the power contained in s. 77 (iii) of the constitution.

The application to laws made by the Commonwealth Parliament of the doctrine of repugnancy under the Colonial Laws Validity Act was fully considered by the High Court, six months after the *Limerick* case, in *Union S.S. Co. of New Zealand v. Commonwealth.*[21] Repugnancy was found to exist between the provisions of the Merchant Shipping Act regarding the discharge of seamen and those of the Navigation Act, passed by the Commonwealth Parliament pursuant to s. 51 (i) and s. 98 of the constitution. The High Court, applying the rule laid down in the Colonial Laws Validity Act, held that the relevant sections of the Australian Act, though intrinsically *intra vires*, were void in so far as repugnant to the Imperial Act. The *Limerick* case was not referred to.

When, a few months later, in the *Skin Wool* case, the Commonwealth again contended that s. 39 (2) (*a*) of the Judiciary Act overrode the Imperial Orders-in-Council regarding appeals as of right from State Supreme Courts, the defendant naturally sought to show that the *Limerick* case was inconsistent with the decision in *Union S.S. Co. v. Commonwealth*, and had been wrongly decided. The contention however was rejected by all the three Justices who had formed the majority in the *Limerick* case. The applicability of the Colonial Laws Validity Act, in general, to legislation passed by the Commonwealth Parliament in the exercise of its constitutional powers, was vigorously maintained. The *Union S. S. Co.'s* case was followed, but distinguished. In a striking and subtle passage, Isaacs J. elaborated the difference between the position of the discharge provisions of the Navigation Act on the one hand and s. 39 (2) (*a*) of the Judiciary Act on the other.[22]

The basic proposition is that the ambit of the powers conferred by the constitution upon the Commonwealth Parliament is to be ascertained not exclusively by mere literal grammatical construction, but by reference also, where the language permits, to the general characteristics and underlying principles of the constitution as a whole. One of these general characteristics is the presence in the constitution, unwritten but effective,

20. s. 51 (xix).
21. (1925) 36 C.L.R. 130 ; A.L.R. 153.
22. 37 C.L.R., at pp. 406, 409-415 ; (1926) A.L.R., at pp. 174, 175-7.

of " the principle of responsible government." In its original meaning, of course, the term " responsible government " denotes the responsibility to the legislature of a colony of the colonial executive. But this principle, operating in an ever-widening sphere, has itself created a relationship between the United Kingdom and a colony enjoying responsible government which is indicated by the term " Dominion status." Hence in ordinary usage " responsible government " is often used in a secondary sense, to connote Dominion status. Responsible government, said Isaacs J. :

> " is part of the fabric on which the written words of the constitution are superimposed. Its influence upon the actual working of the letter of local constitutions has been the acceptance of a doctrine that the great self-governing Dominions are not any longer in tutelage, but are constituent units of the British Commonwealth of Nations."[23]

It is especially in this secondary sense that Isaacs J. treats the notion of responsible government as decisive of the particular question of interpretation involved in the *Skin Wool* case.

> " The doctrine cannot be ignored in construing a recent written instrument of constitutional powers . . . It is an acknowledged working thesis of the unwritten constitution of the Empire."[24]

Applying these principles to the construction of s. 77 (iii) of the constitution, Isaacs J. emphasised the fact that an Order-in-Council under the Judicial Committee Act 1844, though controlling the civil rights of Australian citizens in Australia to appeal on federal matters, is an executive act, done on the advice of a minister responsible only to the Imperial Parliament. It is a very different case from that of the Merchant Shipping Acts, in which the Imperial Parliament itself laid down a uniform rule which should operate throughout the British Commonwealth. It was natural to interpret the grant to the Australian Parliament, of power to make laws with respect to shipping, as being subject to the direct uniform regulative prescriptions laid down by the Imperial Parliament. But it was *not* natural to interpret an express grant of power to the Commonwealth Parliament in 1900 to confer federal jurisdiction on State courts as being subject to a power, given *in 1844* to the executive government of the United Kingdom, to determine the system of appeals from those courts. Interpreted in the light of the doctrine of responsible government, s. 77 (iii) of the constitution

> " must be read as modifying the earlier instrument, at least to the extent of leaving the will of the Australian national Parliament on the subject of civil rights in Australia, in relation to federal matters specifically enumerated in the constitution, free from the control of Imperial ministerial discretion."[25]

This piece of interpretation is a useful corrective to the exaggerated view that since the *Engineers'* case in 1920 the material for interpretation must be found exclusively within the four corners of the constitution. It should perhaps be added, too, that the antithesis upon which it rests—between the will of the Commonwealth Parliament on the one hand and

23. 37 C.L.R., at p. 413 ; (1926) A.L.R., at p. 177.
24. *Ibid.*
25. 37 C.L.R., at pp. 414-5 ; (1926) A.L.R., at p. 177.

of the Executive Government of the United Kingdom on the other—has in actual historical fact, in this particular matter, been a real one. The Commonwealth protested in vain against the terms in which, after the Imperial Conference of 1907, the Orders-in-Council were made. The decision of the majority in the *Limerick* case, as expounded by Isaacs J. in the *Skin Wool* case, reached a solution of the controversy that bears all the marks of judicial legislation. But the grasp of principle is sure and the application, though unexpected, does not seem to the writer either strained or unconvincing. As will be shown later, it is strictly in line, moreover, with recent expressions of opinion in the Judicial Committee itself. But the attitude of the Judicial Committee to the Orders-in-Council requires substantives treatment.

II. The Judicial Committee and the Orders-in-Council.

As noted in the writer's earlier article on this subject, the effect of the Imperial Orders-in-Council upon s. 39 (2) (*a*) of the Judiciary Act was one of the matters considered by the Judicial Committee in 1907, in *Webb v. Outrim*.[26] On this point Lord Halsbury, who delivered the opinion of the Committee, was content to adopt without modification or elaboration the views expressed by Hodges J. in the Supreme Court of Victoria, in giving leave to appeal under the Order-in-Council. In the writer's view, the *ratio decidendi* adopted by Hodges J was that he could not be given, and had not in fact been given, any federal jurisdiction in the class of matter then before him ; and accordingly that s. 39 (2) (*a*) did not apply at all.[27] If this analysis is correct, any opinion expressed by Hodges J. as to the effect of s. 39 (2) (*a*) in a case where federal jurisdiction *had* been conferred ought strictly to be treated as an *obiter dictum*. The same observation must apply equally to the Privy Council's own judgment ; for it merely adopts the reasoning of Hodges J. These considerations however, though they will naturally affect the authority of the views expressed, do not affect their relevance or interest for the present enquiry.

The brief report of the argument in *Outrim's* case [28] in the Supreme Court shows that the late Sir Leo Cussen, for the Commissioner of Taxes, contended that the Judiciary Act could not validly affect a right to appeal given by an Order-in-Council in pursuance of an Imperial Act. It is true, as Sir William Irvine remarked in the *Skin Wool* case,[29] that the Colonial Laws Validity Act was not cited or expressly referred to in *Webb v. Outrim*. But counsel's argument did clearly involve the suggestion that s. 39 (2) (*a*), if otherwise valid, was void for repugnancy to the Order-in-Council. For the taxpayer, the late Sir Harrison Moore does not appear to have maintained that the Commonwealth could abrogate this appeal, if conferred by the Order. The taxpayer himself desired the matter to be decided by the Privy Council. But his counsel did suggest (*inter alia*) that perhaps in any event the Order-in-Council did not apply to decisions made in the exercise of the federal jurisdiction of a State Court.[30] Hodges

26. (1907) A.C. 81 ; see (1940) II. *Res Judicatae*, pp. 113-115.
27. See especially (1905) V.L.R., at p. 469, where Hodges J. summarily states his conclusion.
28. *ibid.*, pp. 463-4.
29. (1926) V.L.R., at p. 320.
30. This argument, it will be realized, anticipates the contention which commended itself to Isaacs and Rich JJ. twenty years later

J. apparently disagreed with this latter contention, and held that s. 39 (2) (*a*) could not validly " qualify or alter or in any part repeal " the Order-in-Council.[31]

The point to which Sir William Irvine was drawing attention, in the remark above referred to, was that *Webb v. Outrim* was discussed as involving a question of *ultra vires*, rather than a question of repugnancy to paramount law. The distinction has become very familiar in recent times, though judicial terminology does not always observe it. Possibly, the problem was not very precisely analysed in *Webb v. Outrim*. But surely the ultimate explanation is that—once having conceded that the Orders apply in federal jurisdiction—the repugnancy between s. 39 (2) (*a*) and the relevant Orders-in-Council is too direct and plain for any argument. The only possible ground, then, upon which s. 39 (2) (*a*) could be upheld would be that *on its true construction, s. 77 (iii) of the constitution itself authorises the Commonwealth to deal with the system of appeals in federal jurisdiction, regardless of the Orders-in-Council under the earlier Acts.* If it does, then the clash is between the two Imperial Acts. If it does not, it is natural to say that s. 39 (2) (*a*) is *ultra vires*. This, of course, is the manner in which the question presented itself in the *Limerick* case. It was exactly the same with Hodges J. in *Webb v. Outrim*. He realised that unless the constitution gave some affirmative power to abrogate the appeal, the Orders-in-Council must inevitably override s. 39 (2) (*a*).

As we have seen, the majority of the High Court in the *Limerick* case held that on its true construction, s. 77 (iii) of the constitution does give the necessary power. Twenty years earlier, Hodges J. had held that it did not. He did carefully examine (*inter alia*) s. 77 (iii). But he did not think its language was sufficiently explicit :

> " I have to see whether the Commonwealth Parliament has power to take away this right of appeal, and confess that I approach this subject with somewhat of a bias, as it does not seem likely that the British Legislature would have said, or have authorized a local Legislature to say, that certain of His Majesty's Courts were unfit or unsuited to deal with these matters when under the guidance of the King in Council, but that the very same Courts were fit and suitable when under the guidance of the High Court of Australia or any other local Court. If the Imperial Parliament has said so, of course there is an end of the matter, but I should not be disposed to strain the meaning of words to arrive at such a conclusion. The only source for such an authority will be the Commonwealth of Australia Constitution Act. That Act, as far as I can find, does not directly give any such power. And one might almost stop there. If there is not direct authority for such legislation, I should say that the British Parliament never intended or authorized so important an end to be attained by indirect or circuitous methods. In such an important matter, direct authority would be given or none at all. And none is directly given."[32]

The learned Judge went on, in the light of these general observations, to the specific conclusion that s. 77 of the constitution did not give sufficient authority for what had been done. His reasoning, as already stated,

31. (1905) V.L.R., at pp. 469-70.
32. *Ibid.*, p. 467.

was expressly adopted, and in part quoted, by the Judicial Committee on the appeal.[33]

This is the language of an older age of Imperial constitutional development. It is the interpretation of the general words of s. 77 of the constitution, by reference not to Dominion autonomy but to Imperial supremacy. By an interesting coincidence, the decision of the Privy Council in *Webb v. Outrim* was given in December 1906, on the very threshold of the rapid twentieth-century development of Dominion status. That development is marked *inter alia* by the Imperial Conferences of 1907 and 1911, the participation of the Dominions in the war of 1914-1918, and their membership in the League of Nations. Empire in these years was transformed into Commonwealth.

The substantive constitutional changes in the position of the Dominions found expression, as was natural, in constitutional interpretation. In the *Skin Wool* case, Isaacs J. expressed it thus:[34]

> "It is the duty of this Court, as the chief judicial organ of the Commonwealth, to take judicial notice, in interpreting the Commonwealth constitution, of every fundamental constitutional doctrine existing and fully recognized at the time the constitution was passed, and therefore to be taken as influencing the meaning in which its words were used by the Imperial Legislature. This Court is necessarily as well acquainted with the advance of constitutional rules and practice, which largely make constitutional law, as the rest of the community. As a living co-ordinate branch of the Government it cannot stand still and refuse in interpreting the law to recognize the advancing frontiers of public thought and public activity, and above all of constitutional doctrines within the Empire. I speak with special reference to the influence of the introduction of responsible government and its development in creating the now well recognized inter-Imperial status of the great self-governing Dominions. Unless the constitutions granted by Imperial authority are to be read by the full light of responsible government, the effective development of the principle itself would be arrested and the basic purpose of the grant frustrated."

Nor is the change in judicial approach to be found in Dominion tribunals alone. The opinions of the Judicial Committee itself exhibit the same development. Two recent illustrations may be given, both of them from the interpretation of the Canadian constitution. The first is *Nadan v. The King*,[35] a decision in the same year (1926) as the High Court's judgment in the *Skin Wool* case. To cite *Nadan's* case in this connection may seem a little startling. For the Judicial Committee there held that the Parliament of Canada could not validly enact s. 1025 of the Criminal Code, which in terms abrogated all appeals from Canadian courts to the Privy Council in criminal cases. The decision, moreover, seems to have

33. (1907) A.C., at pp. 91-2.
34. (1926) 37 C.L.R., at pp. 411-2; A.L.R., at p. 176. In this passage, it will be noticed, Isaacs J. reconciles the requirements of "progressive interpretation" with the rule that the constitution must speak as from the date of its enactment. "Dominion status" is only one application of the principle of responsible government. "Dominion status" was not known in 1900, but "responsible government" was.
35. (1926) A.C. 482.

caused such a hostile reaction in Canada as to have been one of the elements in determining Mr. Mackenzie King's government, at the Imperial Conference of 1926, to press for the Balfour Declaration on Dominion status, and for the enquiry into the removal of the surviving legal fetters on Dominion autonomy which led to the enactment of the Statute of Westminster, 1931.[36] Now in the Privy Council *Nadan's* case turned entirely upon the prerogative appeal: upon the question whether the Dominion Parliament could validly deprive the Judicial Committee of the power to give special leave to appeal. But a fact immediately relevant for present purposes has been insufficiently noted. The Supreme Court of Ontario, pursuant to an Order-in-Council identical in substance with the Order involved in the *Skin Wool* case, had given leave to appeal to the Privy Council. Nobody thought it worth while, not even the Attorney-General of the United Kingdom who obtained leave to intervene, to contend that this leave was validly given. It was common ground therefore that the Dominion Act could validly abrogate the appeal as of right under the Orders-in-Council.[37] But, it will be recalled, this is precisely the power which was denied to the Australian Parliament in *Webb v. Outrim*.[38] The difference of view is all the more remarkable in view of the very general character of the words in the British North America Act which were thus assumed to give sufficient authority for the abrogation of the appeal as of right. The power of the Dominion Parliament under s. 91 (27) is to make laws relating to " the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters."

Applying to these general words the test proposed by Hodges J. in *Webb v. Outrim*, the authority is scarcely more direct, at any rate in the sense of explicit, than it is in s. 77 (iii) of the Commonwealth constitution. The explanation of the different result, on this point, in the two cases is to be found in their respective dates. In the twenty years that lay between them, the " silent operation of constitutional principles " had altogether transformed the judicial approach to a grant of legislative powers to a self-governing Dominion. It would scarcely be fanciful to treat *Nadan v. The King* as impliedly overruling *Webb v. Outrim*, on this particular point.

An even more remarkable illustration of the expression in judicial interpretation of the modern constitutional law of Dominion status is to be found in *British Coal Corporation v. The King*.[39] There the Judicial Committee had once again to consider an attempt by the Canadian Parliament, re-enacted after the passing of the Statute of Westminster 1931, to abrogate the prerogative appeal in criminal matters. Two of the three grounds of attack upon the validity of the Dominion law had been removed by the Statute of Westminster, viz., its extra-territorial operation and its repugnancy to an Order-in-Council under the Judicial Committee Act 1844. But there remained the argument that a Dominion law could not abrogate the prerogative appeal unless the Dominion, either

36. Kennedy, *The Imperial Conferences* 1926-1930 *and the Statute of Westminster*; (1932) 48 L.Q.R., at p. 193.
37. (1926) A.C., at p. 490.
38. In *Nadan's* case, Lord Cave certainly quotes with approval the reasoning in *Webb v. Outrim*; but apparently under the impression that the power to abrogate the prerogative appeal had been there involved; (1926) A.C., at pp. 492-5.
39. (1935) A.C. 500.

expressly or by necessary intendment, had been empowered to do so. Lord Sankey accepted the principle, but held it inapplicable to the power in question.

> " In construing the words of the (British North America) Act, it must be remembered what the nature and scope of the Act are. They are indicated in the words used by Lord Loreburn L.C. in delivering the judgment of the Judicial Committee in *A-G. (Ontario) v. A-G. (Canada)*.[40] . . . ' It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada ' . . . Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted . . . ' Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire —to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house ' . . . ."[41]

Between this language and that of Isaacs J. in the *Skin Wool* case there is, as the reader will have observed, a most striking similarity. Lord Sankey went on to show that among the powers of self-government there is necessarily included the power to administer justice ; that the system of appeals is a most essential part of the administration of justice ; that the power of Canada to control appeals as of right to the Privy Council " is not doubted " ;[42] and finally that the regulation and control even of the prerogative appeal should be treated as " a prime element in Canadian sovereignty as appertaining to matters of justice."[43] Applying this analysis to the interpretation of the power conferred by s. 91 (27) of the British North America Act, the conclusion is that it does invest the Dominion Parliament with the power to regulate or prohibit the prerogative appeal to the Judicial Committee.

> " It does not indeed do so by express terms, but it does so by necessary intendment. Section 91 of the Act . . . is, according to its true construction in their Lordships' opinion . . . intended to make and is apt to make the Dominion Legislature supreme, and endow it with the same authority as the Imperial Parliament."[44]

Having regard to these two decisions, the writer submits with some confidence that *Webb v. Outrim* would to-day be decided by the Judicial Committee in favour of s. 39 (2) (*a*) of the Judiciary Act. The reasoning of Isaacs, Rich and Starke JJ. in the *Limerick* and *Skin Wool* cases derives strong support, as has been shown, from the Privy Council's decisions on the Canadian constitution. But though by coincidence the judgment in *Nadan v. The King* was delivered in London during the hearing in Melbourne of the *Skin Wool* case, the Privy Council opinion was not reported in time to be taken into account in the High Court's reasons for

40. (1912) A.C. 571, 581.
41. (1935) A.C., at pp. 517-8.
42. *Ibid.*, pp. 520-1.
43. *Ibid.*, p. 521.
44. *Ibid.*, p. 519.

judgment. It remains to be considered therefore how the High Court, in the *Limerick* and *Skin Wool* cases, disposed of the authority of *Webb v. Outrim*.

III. The High Court and the Privy Council.

The writer has attempted to show that on strict analysis the decision of the Judicial Committee in *Outrim's* case that s. 39 (2) (*a*) was invalid should be treated as having been given *obiter*. The *ratio decidendi*, on the point of jurisdiction, was that the Supreme Court had not been invested with federal jurisdiction at all in the class of matters to which *Webb v. Outrim* belonged. It could not be necessary therefore to decide whether the Commonwealth Parliament could validly abrogate the appeal to the Privy Council where a Supreme Court was exercising federal jurisdiction. But the majority of the High Court in the *Limerick* case did not pursue this analysis to what the present writer regards as its logical conclusion. Isaacs, Rich and Starke JJ. were content to distinguish *Webb v. Outrim* from the cases then before the Court. Whereas in *Webb v. Outrim* the State Supreme Court would, apart altogether from s. 39 of the Judiciary Act, have had (State) jurisdiction to determine the matter in suit, there could be no jurisdiction other than federal jurisdiction in which a State court could determine a suit against the Commonwealth as defendant, as in the *Limerick* case. The decision that s. 39 (2) (*a*) was invalid did not therefore control the High Court in the *Limerick* case.[45] The same ground of distinction was available, and was availed of, in the two *Skin Wool* cases.[46] In the writer's opinion, this ground of distinction is technically valid. But it can scarcely apply to the other case—*Commonwealth v. Kidman*, the appeal in which was heard together with the *Limerick* case, For there the Commonwealth had been the original plaintiff, and there seems no possible reason for denying that the Supreme Court would have had (State) jurisdiction, apart altogether from the Judiciary Act, to entertain the suit. Accordingly, there seems to be no valid ground of distinction between *Commonwealth v. Kidman* and *Webb v. Outrim*. If the Judicial Committee really did hold s. 39 (2) (*a*) invalid, that determination should certainly, it would seem, have controlled the High Court's decision in *Commonwealth v. Kidman*.

The difference in the nature of the proceedings in *Kidman's* case and in the *Limerick* case was adverted to by all the three Justices who gave the majority decision.[47] But their Honours devoted themselves to showing the manner in which, pursuant to s. 38 of the Judiciary Act, the case must be taken to have been decided in federal jurisdiction. They did not advert to the fact that the case can properly be regarded as being in this respect on all fours with *Webb v. Outrim*. In the writer's submission, the

45. (1924) 35 C.L.R. 69, 93-5 (Isaacs and Rich JJ.), 116-118 (Starke J.); (1925) A.L.R. 153, 159-60, 168-9.

46. (1926) 37 C.L.R. 393, 404-5 (Isaacs J.); A.L.R. 161, 173-4; Rich and Starke JJ. adhered to the views they had expressed in the *Limerick* case.

47. 35 C.L.R., at pp. 84-7 (Isaacs and Rich JJ.), 118-9 (Starke J.); (1925) A.L.R., at pp. 156-7, 169-70.

The statement above may do less than justice to the views of Starke J. He seems to have gone further than Isaacs and Rich JJ. in distinguishing *Webb v. Outrim*, and to have held that it must be treated as a case in which federal jurisdiction could not have been conferred on the State court. This view seems open to criticism. Hodges J. certainly treated the case as "involving the interpretation of the (Commonwealth) constitution" [s. 76 (ii)].

majority decision in the High Court in *Commonwealth v. Kidman* does not successfully distinguish *Webb v. Outrim*.

Both in the *Limerick* group however and in the *Skin Wool* cases it was contended on yet another ground that *Webb v. Outrim* should not be regarded as binding upon the High Court. The question whether s. 39 (2) (*a*) was in conflict with the Orders-in-Council, it was said, constituted a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State, within the meaning of s. 74 of the constitution. Hence—as the majority of the High Court had held in *Baxter v. Commissioner of Taxation* (N.S.W.)[48]—the views of the Privy Council should be treated as having persuasive authority only.[49] In this view, of course, there was no need to "distinguish" *Webb v. Outrim*. It simply need not be followed.

On this issue the opinion of the High Court, as disclosed in the two series of cases, was sharply divided, Knox C.J., Gavan Duffy J. and Higgins J. holding that no *inter se* question was involved, Isaacs and Rich JJ, maintaining the affirmative view, and Starke and Powers JJ. expressing no view at all.[50] Strictly, it cannot be said that there was a judgment of the majority of the Court either way. The point remains open.

The opposing contentions were vigorously and fully put forward in the *Skin Wool* case by Isaacs J. and Higgins J. respectively. The negative case was that the exercise by the Supreme Court of the function conferred by the Order-in-Council was not the exercise of a "constitutional power" of the State. The only powers therefore whose limits were in question were those on the one hand of the Commonwealth Parliament and those on the other hand of the King-in-Council. The affirmative case was that the State "constitution" included all the rules, whencesoever derived, as to the powers of the Supreme Court; that behind all powers of government in Australia there stood, mediately or immediately, the Parliament of the United Kingdom; that accordingly the relevant conflict was between the *legislative* power of the Commonwealth to forbid an appeal to the Privy Council and the *judicial* power of the State to grant it. In this controversy, the writer's opinion inclines to the affirmative view, that the question did fall within s. 74. But the matter raises questions too large for present discussion.

If the High Court were again asked to reconsider its majority decision in the *Limerick* case, there would, in the writer's opinion, no longer be any need to distinguish *Webb v. Outrim* by an elaborately refined argument, or to avoid its consequences by a controversial resort to s. 74. The High Court could properly treat the Privy Council as having itself rejected the principle upon which *Webb v. Outrim* was decided. From the welter of technicalities in which the whole subject is set, there emerges quite clearly the proposition that all constitutional questions that concern the relation of Imperial and Dominion powers must now be approached in the light of "Dominion status." The vigour with which he established this proposition must be reckoned one of the distinctive contributions of Sir Isaac Isaacs to the development of Australian public law.

48. (1907) 4 C.L.R. 1087: A.L.R. 313.
49. See on this matter, (1940) II. *Res Judicatae*, pp. 116-7.
50. Knox C.J. and Gavan Duffy J.: 35 C.L.R., at pp. 81-2, (1925) A.L.R., at p. 155; Higgins J.: 37 C.L.R., at p. 426, (1926) A.L.R., at p. 182; Isaacs and Rich JJ.: 35 C.L.R., at pp. 101-3, (1925) A.L.R., at p. 163; 37 C.L.R., at pp. 417-20, 430, (1926) A.L.R., at pp. 178-80, 183.