APPEALS TO THE JUDICIAL COMMITTEE: THE CASE FOR ABOLITION

By F. R. BEASLEY*

'THE powers of the Crown are in a sense the powers of the (Privy) Council. They have risen, they have flourished, they have declined, together. They are each vague and undefined. They are each encircled with the halo of antiquity, and point to a past greatness of which the might has departed without taking away the dignity.'[1] So wrote the young Dicey in 1860 in his Arnold Prize Essay, not many years after the manner of exercising the judicial functions of the Council had been revised by statute.[2] Dicey, it is true, was referring more to what may be called the political or constitutional powers of the Privy Council which, like the powers of the monarchy, have continued to decline since 1860. The appellate jurisdiction, on the other hand, was given a new lease of life by the creation of a Judicial Committee of the Council in 1833; though its members were not necessarily more conversant with colonial conditions than the lay members of the Council, they were at least lawyers. With the growth and increasing political maturity of those colonies which today are described as members of the Commonwealth, the prestige of the Judicial Committee, at least in the eyes of the uninitiated, itself appeared greater; criticism of its actual judgments being largely confined to lawyers, both English and colonial statesmen continued to assert, and perhaps deluded themselves into believing, that the right of the subject[3] to seek justice from Her Majesty in Council was one of the bonds of empire. But, as those major colonies became dominions and rightly insisted upon their full equality with the United Kingdom, they began to object to the possibility of *legislative* interference by the United Kingdom in their domestic affairs and finally saw the declaration of their legislative independence enshrined in the Statute of Westminster.[4] Some of them have taken the logical step, without in any way weakening the spiritual bond of union, of repudiating judicial interference; so that it may be said, in somewhat grotesque parody of Dunning's famous resolution of

* B.A. (Oxon), LL.B. (Syd.), LL.D. (Melb.), Dean of the Faculty of Law, Professor of Law, University of Western Australia.

[1] A. V. Dicey, *The Privy Council*, p. 145.

[2] Long overdue reforms were effected by 3 & 4 Will. 4, c. 41 (1833), 6 & 7 Vict. c. 38 (1843), and 7 & 8 Vict. c. 69 (1844).

[3] A right in practice then restricted to the wealthy; assistance to some of the virtuous poor to drink of this fountain of justice was a much later development.

[4] (1931) 22 Geo. 5, c. 4.

1780, that 'the jurisdiction of the Judicial Committee has decreased, is decreasing, and ought to be diminished.'

The bland assumption of the nineteenth century that colonial courts could not be trusted to interpret their own law adequately and impartially was coupled with an arrogant belief in the intellectual superiority of English lawyers,[5] who were deemed capable, without any special knowledge or training,[6] of adjudicating upon complex questions of French law (Quebec). Roman-Dutch law (South Africa and Ceylon), Hindu and Musulman custom (India), to mention only a few of the divergent systems of law which came before them. But, whether or not they were aware of the chequered interpretation given to the British North America Act 1867 by the Judicial Committee, the founders of the constitution of the Australian Commonwealth were bold enough to deplore the arrogance and to challenge the assumption. In the draft constitution of 1891, the clauses relating to the proposed federal judicature provided for the creation of a 'Supreme Court of Australia' and authorized the federal Parliament to make it the sole and final court of appeal from both federal and State courts. To this only one exception was

[5] It is true that successive amendments to the Judicial Committee Act enabled judges of a large number of colonies on whom the honorific title of Privy Councillor had been bestowed to sit on the Committee. But it was an empty gesture; considerations of time and distance virtually debarred them from sitting, so that for practical purposes the Committee has always consisted of English lawyers with an occasional leavening of a Scots or Indian lawyer or two. It was also illogical. If so many colonial judges were thought sufficiently competent to sit on the Judicial Committee, perhaps on an appeal from a decision of their own courts, why were they not equally capable of giving final decisions without reference to the Committee? It is hardly an adequate answer to say that they would be a minority on the Committee; for if the majority disagreed with the views of the member (or members) most familiar with the system of law from which the appeal was brought, the absurdity of putting colonial judges on the Committee only to be outnumbered and overborne by well-meaning but ignorant English lawyers becomes still more patent.

[6] Many Scots lawyers are very critical of the 'improvements' of Scots law which the House of Lords, largely consisting of English law lords who frequently sit on the Judicial Committee, has made. All too often the law lords have assumed an identity between English and Scots law where no such identity in fact existed until the law lords created it. Professor David M. Walker, in 'Some Characteristics of Scots Law' (1955) 18 *Modern Law Review* 321, says (at 333) that 'whenever in a modern case one is assured that the laws of the two countries do not differ sceptical Scots prepare for a piece of judicial legislation.' Still cogent is the example set by Lord Cranworth, who in effect said in 1858 that if the doctrine of common employment was not part of Scots law it ought to be, thereby foisting upon Scotland, with the assistance of the other noble lords, a doctrine invented by an English judge and hitherto unknown to Scots law.

made, in clause 6 of chapter III, namely, 'Notwithstanding the provisions of the two last preceding sections, or of 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,*[7] grant leave to appeal to Herself in Council against any judgment of the Supreme Court of Australia.' The debate on this clause was brief.[8] There was no discussion whatsoever of what would be embraced by the ambiguous concept of 'the public interests of the Commonwealth', etc. Mr H. J. Wrixon Q.C. of Victoria immediately moved an amendment to delete the italicized words, not because he thought them obscure, but because he wanted to keep intact the existing practice as to appeals. 'I hope', he said, 'this Convention will not mark the inauguration of a new constitution by cutting us off from the right of appeal to the Queen in England.' His major reason appeared to be that if the Convention approved the clause as it stood, and if the constitution came into force, Australia would be the only part of the Queen's dominions to repudiate the jurisdiction of the Judicial Committee; let others take the initiative, and then perhaps Australia should follow suit. It was left to Mr George Dibbs of New South Wales to bring out the hackneyed arguments in favour of unrestricted appeals: 'To take away from the people of this country', he said, 'the right of appeal to the throne is to commence to sap the foundations of a union under the Crown, the principle upon which our federation is to be established. If we are to be under the Crown, let there be one form of law, let there be one set of decisions ruling in every part of the Empire.'[9] He was followed by the Hon. Sir John Downer Q.C. of South Australia who closed the debate by saying that 'The chief reason which actuated the committee in coming to this conclusion [i.e., that appeals should be strictly limited] was that we believed that we had reached a stage of national life in Australia in which we were fairly competent to manage our own concerns, not merely political but judicial as well. . . . Although many of us think we are doing less than we are disposed to do ourselves, at all events there will be few of us who will not consider we ought to have gone at least as

[7] My italics.

[8] See *National Australian Convention Debates* (1891), 785-7.

[9] It never seems to have occurred to Mr Dibbs and his friends that, given the vastly differing systems of law from which appeals to the Judicial Committee might be taken, 'one set of decisions ruling in every part of the empire' would have been an extraordinary hotchpot which even they might have found unpalatable.

confidence, was lost by only 19 votes to 17; but of the five queen's far as we have gone in the bill.' The amendment, despite Sir John's counsel who were delegates, four voted in favour of restricting appeals – and the four included Griffith of Queensland (afterwards the first Chief Justice of the High Court of Australia) and Barton of New South Wales (also to become a judge of the High Court). They were supported by such national figures as Sir George Grey of New Zealand, Sir Henry Parkes of New South Wales, Alfred Deakin of Victoria, Kingston and Playford of South Australia.[10]

The 1891 constitution, however, was stillborn. But when the depression of the middle nineties drove home the lesson that Australians must sink or swim together, and a new constitutional convention was summoned in 1897, the second draft went even further than the first. Clause 6 of chapter III of the 1891 draft became clause 75 of the new, with the significant addition that the constitution itself barred appeals to the Judicial Committee from all state courts, as well as from the proposed High Court and other federal courts, except where the public interests of the Commonwealth, etc., were affected. As soon as clause 75 came before the Adelaide session, Sir George Turner[11] moved an amendment in terms similar to those used by Mr Wrixon in 1891; apart from a brief and hostile interjection by Mr H. B. Higgins (afterwards a judge of the High Court) there was no debate, but the amendment was put and lost by 17 votes to 14. Then followed a general discussion of the clause itself, which was finally adopted by 22 votes to 12.[12]

The second session of the Convention, held at Sydney, was relatively short and adjourned without reaching clause 75. The third and final session, also the longest, began at Melbourne on 20 January 1898; clause 75 was reached on the 31st, and after an abortive attempt to give an untrammelled right of appeal was adopted without a division. However, most of the judicature provisions were 'recommitted' on 11 March, and once more the value of appeals to the Judicial Committee was discussed – at times with considerable acrimony. The whole question was raised in a curiously indirect way; not

[10] The protagonists of 'appeals as usual' were a very mixed bag. They included the four Western Australian delegates present at this debate; but their vote may be partly explained by the fact that their colony was rightly reputed at the time to be very lukewarm on the subject of federation. The other two delegates from New Zealand, traditionally a conservative and orthodox-minded colony, opposed their leader on this issue and voted for the amendment.

[11] Then Premier of Victoria.

[12] See *National Australian Convention Debates* (1897, 1st session, Adelaide), 968-89.

on the consideration of clause 75, but in the debate on clause 74. This latter clause defined the appellate jurisdiction of the High Court and ended with the words, 'and the judgment of the High Court in all such cases shall be final and conclusive'. Sir J. Abbott of New South Wales moved an amendment to add the words, 'saving any right that Her Majesty may be pleased to exercise by virtue of Her royal prerogative'. The proposer painted a dismal picture of thousands upon thousands of good loyal Australians being overcome with grief and dismay at the thought that if ever they were involved in litigation (which the vast majority, needless to say, hoped would not be their unhappy fate) they might have to put up with rough and ready justice from an Australian High Court instead of being allowed to seek the much better article on sale (to those who could afford it) in Downing Street. The proposer having set the bad example of introducing in a debate on clause 74 matters which in point of fact were more relevant to clause 75, other speakers were quick to follow suit. Mr R. E. O'Connor Q.C.,[13] for example, addressed himself to the salient words of clause 75 as to appeals where 'the public interests of the Commonwealth, etc., were concerned' and expressed the opinion that the phrase must at least include *all* constitutional questions. While he personally would support a proposal to deprive the Judicial Committee of jurisdiction over such questions, he thought it absurd to provide for special leave in such matters and simultaneously to deny it in other matters of some magnitude merely because they raised no constitutional issue. Mr Isaac Isaacs[14] could not accept the view that the continued existence of a (limited) right of appeal to the Judicial Committee 'would strengthen the bonds of union between the Commonwealth and the great body of the empire'. 'I believe', he said, 'that the bonds which unite us are far stronger and more enduring. We are bound to the empire by personal and corporate loyalty – loyalty to the traditions, loyalty to the future, of the empire of which we are proud to form a part. But I cannot bring myself to believe that the links which bind us to the empire are in any way formed of lawyers' bills of costs.' If common sense had carried the day the appeal would then and there have been abolished; but sentimentality prevailed. An amendment to continue appeals by special leave was passed by 20 votes to 19; most

[13] Of New South Wales; afterwards O'Connor J. of the High Court from its establishment in 1903 until his death in 1912.

[14] Of Victoria; afterwards Isaacs J. of the High Court from 1906 to 1930, when he became Chief Justice. He resigned in the following year to become the first Australian-born Governor-General of the Commonwealth.

of the lawyers, possibly influenced by Mr O'Connor's views, this time supporting it.

Then the Convention turned to clause 75. Flushed with victory, Abbott at once moved a second amendment which he thought consequential upon the amendment just carried; his new proposal, which was agreed to on the voices, deleted all the words 'in which the public interests of the Commonwealth, or of any State, or of any other part of Her Majesty's dominions are concerned'; the net result being that appeals by special leave from the High Court, but from no other court federal or state, would still be possible. Immediately the indefatigable Mr J. H. Symon Q.C. of South Australia, who had always expressed most emphatically the claims of the new High Court to be the final arbiter of Australian litigation, moved to substitute, for the words now struck out, a new clause 'not involving the interpretation of the Constitution of the Commonwealth or of a state'. Mr Barton, the elected 'leader' of the Convention and chairman of the Drafting Committee, had limited himself to occasional interjections during the debate on the first of the Abbott amendments though he had voted against it; he now intervened to say that he thought an appeal should be allowed even in constitutional cases where the interests of some other part of the Queen's dominions might be affected, and suggested a variation of Symon's amendment to make such provision. Immediately two objections were raised; the first that the Symon amendment was virtually a direct negative of the second Abbott amendment, the other that the variation suggested by Barton would not in point of fact provide what he said he wanted. The delegates, obviously weary of the whole matter, were – equally obviously – grateful when Kingston from the chair said, 'I take it that the object of the amendment is that in a constitutional question affecting the Commonwealth or State there shall be no appeal unless the interests of some other part of Her Majesty's dominions are concerned. That is what is intended, although possibly the amendment does not say so. But whilst the amendment does not say so, we know what is intended, and we know the capacity of the Drafting Committee to put it right.' A few minutes later he put the amendment, though the printed record is silent as to whether

[15] See *Australian Federal Convention Debates* (1898, 3rd session, Melbourne), 2335. Isaacs was the last speaker before the question was put, and is reported as saying that 'I am going to be consistent, and vote against the remission of those cases [i.e., in which no constitutional issue arose] to the Privy Council. I cannot see the justification for this amendment.' Yet, according to the division list, printed on the same page as his speech, he voted *for* the amendment!

it was the Symon amendment *simpliciter* or that amendment as varied by Barton; the question was put and approved by 21 votes to 17.[15] The Drafting Committee still had to put everything into acceptable form; in its final version the controversial clause 74 became section 73, Abbott's first amendment being omitted, and the equally controversial clause 75 became section 74 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. Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise, by virtue of Her Royal Prerogative, to grant special leave of appeal from the High Court to Her Majesty in Council. But the Parliament may make laws limiting the matters in which such leave may be asked.

On the afternoon of the penultimate day of the Melbourne session the Convention met to consider the final draft. It is not clear from the printed record whether a complete version was before it or merely an outline of the Drafting Committee's intentions; for Barton's first motion was that '. . . the Convention resolve itself into committee of the whole to consider the Bill *as proposed to be amended by the Drafting Committee*.'[16] That motion having been passed, Barton later explained the reasons for the change in form of sections 73 and 74 and succeeded in convincing the Convention that the Drafting Committee's version accurately represented the intentions of the delegates; no changes were then made. It is a fair inference from the printed record of the proceedings of the two Conventions that practically all the lawyers of any standing and those delegates who had achieved prominence in public or political life believed that federation would be imperfect unless the new High Court were charged, and exclusively charged, with the responsible task of interpreting and applying the new federal constitution and the constitutions of the colonies which, it was expected, would soon become members of 'one indissoluble Commonwealth'. The opposition for the most part came from the non-legal delegates, who made up for their ignorance of the composition of the Judicial Committee and of its activities by the vigour of their assertions that (in some mysterious way) the pronouncements of a few elderly lawyers sitting in London (few of whom had ever visited Australia or then seemed

[16] My italics.

likely to) constituted an irreplaceable segment of the 'bonds of empire'.[17]

It is unnecessary to relate here the course of the negotiations between the Australian premiers and delegates on the one hand and Joseph Chamberlain (then Secretary of State for the Colonies) on the other which led to the adoption of s. 74 in its present form;[18] the story is fully told by Quick and Garran in their monumental work on the Australian constitution.[19] One comment, however, must be made. The compromise excluded from the jurisdiction of the Judicial Committee, except by leave of the High Court itself, any decision of that Court involving an *inter se* question, i.e., any question as to the precise line of demarcation between Commonwealth and State powers or between the powers of two or more States. No doubt it was anticipated that, particularly in the early, formative years of Australian federation, most constitutional issues could be resolved into the question: Is this a matter competent to the Commonwealth or to the states? The decision of every such question would be the responsibility of the High Court unless it proved to be recreant to the spirit of the constitution by the lavish grant of leave to appeal. But little or no attention appears to have been given to the possibility that a particular case before the High Court might raise a constitutional issue of grave importance in which however there was no *inter se* element whatever; here no leave from the High Court would be necessary before the Judicial Committee could take cognizance of an appeal to it. The constitution as originally framed would in point of fact have made the High Court the final arbiter in *all* constitutional cases, federal or state; the exception, where 'the

[17] The cynic may see some significance in the fact that far more of the opponents than of the supporters of Privy Council appeals ultimately found their way into Serle, *Dictionary of Australian Biography* (1949).

[18] S. 74: 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.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

[19] Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 228-49. Quick was one of the Victorian delegates to the 1897-8 Convention; Garran was secretary to the Drafting Committee.

public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a state, are involved', was so vague and meaningless that Chamberlain, no doubt on the advice of the English law officers, rightly objected to it. Had he merely insisted on the deletion of those words, and then made *all* constitutional appeals dependent upon a certificate from the High Court, the delegates would indeed have gained all that they – and a majority of the Convention – wanted. But it was to prove a pyrrhic victory.

The adoption of the Chamberlain formula left a loophole for Judicial Committee interference in Australian constitutional interpretation, a loophole likely to become larger as decisions by the High Court on *inter se* questions[20] came to define more and more precisely the boundary between Commonwealth and State powers. It may well be that as the number of *inter se* cases diminishes, the number of cases in which a question arises of the extent of Commonwealth powers *in fields in which the states never had any competence* or could have none because of the nature of the subject matter may tend to increase – with the attendant danger of final decision, not by the High Court as the Conventions clearly planned, but by the Judicial Committee.

Quick and Garran state[21] that '[the Convention] clearly intended that the prohibition of appeals to the Privy Council in constitutional matters should include appeals from the State courts'; it was soon to be discovered that the Convention had failed in its intention when an appeal on an *inter se* matter was taken direct from the Supreme Court of Victoria to the Judicial Committee in *Webb v. Outtrim.*[22] Even the most fervent admirer of the erudition (*sic*) of the Judicial Committee, even the most ardent believer in the strength of this 'bond of empire', is hardly likely to be impressed by the judgment delivered by Lord Halsbury in the name of the Committee, Halsbury's name is associated with a number of judgments of dubious value; but if he were responsible for preparing as well as pronouncing the statement of reasons in *Webb v. Outtrim,* it can

[20] The High Court has granted a certificate under s. 74 once only, in *Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth* (1912) 15 C.L.R. 182, when the Court had been equally divided; but the Judicial Committee ignored the restricted terms of the question set out in the certificate: see [1914] A.C. 237, and (1913) 17 C.L.R. 644. Since then the High Court has consistently refused to grant a certificate, showing in this field an independence in marked contrast to its subservience to House of Lords and even to the Court of Appeal in non-constitutional cases.

[21] *Op. cit.* 246.

[22] [1907] A.C. 81, in which the name of the respondent is wrongly spelled as Outrim. The decision of the Supreme Court to grant leave to appeal is reported as *In re the Income Tax Acts; Outtrim's Case* (1905) 30 V.L.R. 463.

only be said that on this occasion even Halsbury surpassed himself in the puerility of some of his reasons and in his fantastic ignorance of the working of a federation under the Crown. What are we expected to think of an English judge who could assert, as Halsbury did, that 'no authority exists by which [the] validity [of a Victorian Act of Parliament] can be questioned or impeached'; that 'no state of the Australian Commonwealth has the power of independent legislation possessed by the states of the American Union' because, forsooth, State Acts in Australia require the assent of the Crown; that the term 'unconstitutional' has no legal meaning in Australia, unlike the situation in the United States? Halsbury was not even consistent in his ignorance; for, having denied the existence of any judicial authority competent to 'question or impeach' a Victorian Act of Parliament, he went on to assume authority to pronounce on the validity of a Commonwealth Act of Parliament! The most gloomy predictions of the 'no appeal' members of the Convention seemed to have come true; fortunately for the repute of the Judicial Committee it has rarely been guilty of such egregious blunders as are made manifest by *Webb v. Outtrim*.[23] But it must nevertheless be stated that Halsbury was by no means alone, among English judges of his day or even among their successors, in his complete failure to understand the motive forces and the practical working of a federation, even a federation under the Crown; born and bred under a unitary system of government characterized, in Dicey's phrase, by the omnipotence of Parliament, neither he nor they – with a few honourable exceptions – have ever been able to appreciate the true nature of a polity in which there are no less than seven parliaments each of which, far from being omnipotent, has had its legislative wings clipped by the federal constitution.

It is not my intention to attempt to review the Australian constitutional cases that have gone to the Judicial Committee; it is enough to say that where the Committee has upheld the appealed decision its intervention has been superfluous, and that in most cases where it has reversed or varied the appealed decision it could well be argued that the so-called lower court has shown a much more intelligible and intelligent approach to the issues at stake than

[23] In another sense it is unfortunate that subsequent judgments of the Judicial Committee showed some improvement in quality; a few more decisions of the calibre of *Webb v. Outtrim* might have spurred the Commonwealth Parliament into using the power contained in s. 74 of the Constitution to abolish all appeals.

their Lordships are wont to do. It is necessary, however, to make a brief reference to *James v. The Commonwealth*,[24] not because with the assistance of a tenacious minority of the High Court the Judicial Committee irrevocably[25] fastened upon our constitution an historically untenable interpretation of s. 92, but because of the subsequent *volte-face* of the member of the Committee who delivered the judgment in its name. From 1936 until at least 1948 the words of Lord Wright in *James's* case were judicially accorded that veneration usually reserved for Holy Writ; *James's* case was the guiding light, for all time, to the interpretation of s. 92. A judge of the High Court or of a State Supreme Court, or for that matter a member of the Judicial Committee itself, who could not base his opinion in any subsequent case on the sacrosanct words of Lord Wright was clearly inexpert in judicial exegesis. It was left to the Judicial Committee itself, in the *Banking Case*,[26] to start the process of casting some doubt on Lord Wright's omniscience; not in reference to the principle of interpretation of s. 92, but in the subsidiary matter of the application of Lord Wright's version of that principle to the line of *Transport Cases*. Is it irreverent to suggest that in *McCarter v. Brodie*[27] hero-worship assisted Latham C.J. and McTiernan J. to the conclusion that the *Banking Case* had left the *Transport Casse*[28] (and therefore Lord Wright's dicta) virtually untouched, and also convinced Williams and Webb JJ. that much less ambiguous words would have to be used by the Judicial Committee before they could believe that a Committee bereft of Lord Wright's assistance could dare to challenge any of his assumptions? It was left to Dixon J., always a hostile critic of the *Transport Cases*, to be fully confident that the *Banking Case* had overruled them all and that in parts of his judgment the great Lord Wright had been shown to have feet of clay; in his iconoclasm Dixon J. received and for the most part has continued to receive the support of Fullagar J.

This confusion was worse confounded by Lord Wright's subsequent

[24] [1936] A.C. 578, (1936) 55 C.L.R. 1.

[25] I.e., so long as the opinions of that Committee are regarded by the High Court as binding.

[26] *Bank of New South Wales v. The Commonwealth* [1950] A.C. 235, (1949) 79 C.L.R. 497. For the decision of the High Court itself see (1948) 76 C.L.R. 1.

[27] (1950) 80 C.L.R. 432.

[28] *Willard v. Rawson* (1933) 48 C.L.R. 316; *The King v. Vizzard* (1933) 50 C.L.R. 30; *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)* (1935) 52 C.L.R. 189; *Bessell v. Dayman* (1935) 52 C.L.R. 215; *Duncan and Green Star Trading Co. Pty. Ltd. v. Vizzard* (1935) 53 C.L.R. 493; *Riverina Transport Pty. Ltd. v. Victoria* (1937) 57 C.L.R. 327; and *McCarter v. Brodie* (1950) 80 C.L.R. 432.

recantation and confession of error![29] After his retirement from active judicial work the noble lord found time for contemplation; he even took upon himself, at an age when most men are satisfied *cultiver son jardin,* to visit[30] the country whose constitutional destiny he had manipulated so adroitly from the Olympian heights of Downing Street! It is of course sheer coincidence that it was not until after he had visited Australia and had obtained some first-hand knowledge and experience of its constitutional and economic problems that he found the need for soul-searching and finally accused himself of the most perverse interpretation of s. 92. But the harm arising out of that interpretation had been done; the recantation is politely ignored, and the task of putting Lord Wright's generalizations in the proper perspective, without destroying the *raison d'être* of *James's* case, has been quietly but most skilfully done, by both High Court and Judicial Committee. The latest transport case to go before the Judicial Committee (*Hughes & Vale Pty. Ltd. v. New South Wales*)[31] has finally clamped tight the straitjacket which s. 92 has put around the commerce power, both federal and state; it can hardly be said, in one sense, to be an opinion of the Judicial Committee since it consists largely of quotations from High Court judgments linked together by the conjunctions needed to give it some semblance of literary unity. But it has solved a problem for Dixon C.J., whose consistent disapproval of the whole line of *Transport Cases* was at odds, when *Hughes & Vale v. New South Wales*[32] was before the High Court, with his deep respect for precedent; and precedent, at least temporarily, won the day until fortuitously the Judicial Committee gave that special leave which it had consistently refused in earlier *Transport Cases* and then handed down an opinion which no doubt commended itself to the learned Chief Justice of the High Court – since it coincided with his own and at long last gave effect to it.[33] It is no part of my theme

[29] See 'Section 92 – A Problem Piece' (1954) 1 *Sydney Law Review* 145.

[30] For the first time in his life; he recently informed the writer that he hopes to visit Australia again!

[31] [1954] 3 W.L.R. 824; [1955] A.C. 241.

[32] (1953) 87 C.L.R. 49.

[33] The logical result of the triumph of the opinion of Dixon C.J. can be seen in the spate of decisions in 1955, viz. *Hughes and Vale Pty. Ltd. v. New South Wales (No. 2)* (1955) 93 C.L.R. 127; *Hughes and Vale Pty. Ltd. v. Queensland, ibid.* 247; *Armstrong v. Victoria, ibid.* 264; *Nilson v. South Australia, ibid.* 292; and *Pioneer Tourist Coaches Pty. Ltd. v. South Australia, ibid.* 307. It will not escape notice that these decisions mark successful challenges to the legislation of four Australian States which have sought to regulate and control road traffic. Tasmania is not affected by the decisions, being separated from the mainland by the Bass Strait; the legislation of Western Australia, of the

that the Judicial Committee's decision in *Hughes & Vale* was unsound; but it is an essential part of that theme that a series of decisions starting in 1933 and followed with substantial consistency by the High Court for more than twenty years should never have been considered by that Committee at all, that the Committee would have performed a much greater service to the development of Australian constitutional law by continuing to refuse special leave and thus in effect to compel the High Court to confess error if error has been made. The Committee could well have refused special leave *because* of that long series of decisions; but with very little sense of responsibility, it nonchalantly assumed a task which, it is again submitted, the High Court itself should have performed – if it had to be done.

When one remembers the consistent refusal of the High Court, since 1912, to grant a certificate under s. 74 with regard to *inter se* issues – because it has always insisted upon its *constitutional* obligation to decide those issues for itself – it is impossible to view with anything but the gravest concern its deference to Judicial Committee pronouncements on matters of the utmost constitutional importance though not involving an *inter se* issue. Is there some mysterious quality in an *inter se* issue which evokes judicial courage and responsibility, and some equally mysterious factor in other issues which fosters judicial apathy? Where is that spirit of independence which moved the High Court to refuse to follow *Webb v. Outtrim*? It seems to have completely disappeared. Not only does the cynical observer imagine (or is it only imagination?) that he can detect sighs of judicial relief when the Judicial Committee obligingly takes up the task of cutting the Gordian knot in non-*inter se* constitutional matters, but he can in fact see a most marked subservience to House of Lords and even Court of Appeal decisions in other fields of law.[34] We have shaken off the last vestiges of *legislative* control of our fortunes; why do we retain an equally unnecessary *judicial* control of our highest courts? To urge that action be taken under s. 74 to stop *all* appeals from High Court to Judicial Committee does not necessarily imply a confident belief in the superior wisdom of the

---

same pattern as that of the other four mainland States, has not yet been challenged because the great distance between that State and its nearest neighbour makes most forms of competition between road haulier and railway unprofitable to the former, who would gain very little by successfully attacking the State Transport Co-ordination Act 1933-54.

[34] See R. W. Parsons, 'English Precedents in Australian Courts' (1949) 1 *University of West Australia Annual Law Review* 211; and F. R. Beasley, 'The New Unification' (1951) 1 *University of Queensland Law Journal* 1.

members of the former tribunal. Far from it; the course of constitutional interpretation, if in the hands of the High Court alone, is not likely to run more smoothly, there will be inconsistency and at times incoherence; but surely it is better that the mistakes, if there are to be any, should be made by Australian judges deeply versed in the constitutional structure and the legal system of their country than by members of a distant Judicial Committee for most of whom that constitutional structure and that legal system have little more rhyme or reason than the famous Hampton Court maze.

Neither Canada nor South Africa – nor India, Pakistan and Ceylon – have suffered from assuming complete control of their own judicial system; indeed, the Judicial Committee must be profoundly thankful that the recent constitutional issues in South Africa have had to be decided, and finally decided, by the Appellate Division of the Supreme Court of that country. With New Zealand we are the only members of the British Commonwealth of Nations who allow Judicial Committee rulings to determine, in the last resort, many important questions of our law; we find ourselves therein in the strangest of company, in a congeries of colonies most of which have a long way to go before they acquire even the most rudimentary form of self-government.

For many reasons appeals to the Judicial Committee are a lottery, the element of chance appearing twice – in the financial ability of a particular litigant to buy a ticket in the Downing Street sweepstake, and in the unpredictable nature of the result. An analysis of Judicial Committee decisions during the three years 1953 to 1955[35] shows that in the great majority of cases the purchaser of a ticket did not win a prize; all he did was to involve himself and his unwilling opponent in even greater costs. The accompanying table lists all the reported appeals for the three years.

[35] As reported in the Weekly Law Reports.

	1953	1954	1955	*Result*
Australia				
High Court	1	6	1	5 affirmed, 3 reversed
New South Wales	–	2	–	1 affirmed, 1 reversed
Victoria	–	1	–	Affirmed
Basutoland	–	2	–	Both affirmed
Bermuda	–	–	1	Affirmed
Canada				
Supreme Court	4	1	2	3 affirmed, 2 reversed, 1 part affirmed and part reversed, 1 judgment varied
Alberta	–	–	2	Both affirmed
Ontario	–	1	–	Affirmed
Ceylon	8	2	–	6 affirmed, 3 reversed, 1 leave refused
Eastern Africa	1	2	4	4 affirmed, 3 reversed
Fiji	1	1	–	2 reversed
Hong Kong	–	1	1	2 reversed
Jersey	–	1	..	Affirmed
Kenya	–	1	–	Leave refused
Malaya (Federation)	1	2	3	4 affirmed, 1 reversed, 1 reversed in part
Malta	1	1	1	2 affirmed, 1 reversed
Singapore	3	–	–	3 affirmed
Trinidad & Tobago	1	–	1	1 reversed, 1 part affirmed and part reversed
West Africa	5	6	3	6 affirmed, 6 reversed, 1 varied, 1 part affirmed and part reversed
West Indies	–	–	1	Reversed
Windward & Leeward Islands	–	–	2	2 reversed
	26	30	22	42 affirmed 28 reversed 3 part affirmed and part reversed 1 reversed in part 2 judgment varied 2 leave refused
			78	78

Surely a meagre harvest for so lavish a sowing!

The stock reasons for retention of the right of appeal to the Queen in Council had little validity when the constitution of the Commonwealth was framed; they have none whatever today, when we have a High Court of fifty-three years' experience, whose present members command the respect of the whole community, and which ought to be entrusted with the same final responsibility in the judicial sphere as our legislatures have in their field. It is a slur upon the High Court itself – no doubt an unintentional slur – that the power contained in s. 74 to abolish appeals to the Judicial Committee has not yet been exercised.