AN AUSTRALIAN VIEW OF THE HOURS OF LABOUR CASE

All lawyers educated under the system of the common law are struck not so much by the adaptation of principle to new circumstances which every day takes place in the courts but rather by the occasional rigidity to be found in a decision either not fully debated or lightly given. It was with amazement that the actual decision in *Attorney-General for Canada* v. *Attorney-General for Ontario*[1] was read by lawyers in Australia who had already appreciated the progressive views of the Judicial Committee of the Privy Council in *In re Regulation and Control of Aeronautics in Canada*[2] and *In re Regulation and Control of Radio in Canada*.[3] None of these decisions were binding on Australian courts though the persuasive authority of the constitutional doctrines enunciated in them was of the greatest weight and value in interpreting the Constitution of the Commonwealth. To the Dominions the broad principle which Viscount Dunedin had stated in the *Radio Case* read like a charter of national freedom within the framework of the Empire, while the narrow theory of co-operation laid down by Lord Atkin is as barren as Chamberlain's dream of Imperial Federation.

To an Australian unfamiliar with the working of particular matters concerned with the British North America Act the query at once presents itself, whether the real subject matter of the Hours of Labour legislation was "property and civil rights within each Province"? One can understand the importance attached to the jurisprudence of Quebec and its Civil Code, the provincial law of tort, contract, etc. But the legislation, like practically all social legislation, though it affects civil rights, is of wider dimensions and more akin to trade and commerce.[4] Hours of labour have become a matter of international importance and for that reason are rather a subject of the larger entity of commerce than the narrow field of personal rights.[5] This, by

[1] [1937] A.C. 326; 53 T.L.R. 325.
[2] [1932] A.C. 54.
[3] [1932] A.C. 304.
[4] *Cf.* Lord Sankey L.C. in the *Aeronautics Case:* "But while the Courts should be jealous in upholding the charter of the Provinces as enacted in s. 92 it must no less be borne in mind that the real object of the Act was to give the Central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole" (at pp. 70 - 71).
[5] Article 23(a) of the League Covenant provides: "Subject to and in accordance with the provisions of international conventions existing or

the way, is the tentative suggestion of an Australian lawyer not specially acquainted with this subject.

It is upon broader grounds that I wish to deal with the decision of the Privy Council. First of all, however, I wish briefly to refer to the different methods of approach to the construction of the British North America Act and the Commonwealth of Australia Constitution Act.

I

For the purpose of the present discussion, the main differences between the constitutions of Canada and the Commonwealth of Australia are these; in sec. 51 of the Commonwealth of Australia Constitution Act we find certain enumerated subject matters of Commonwealth legislative power and the residue of legislative power lies with the States (sec. 107). The contrast between Canada and Australia is illustrated by Evatt J.,[6] who has said:

> The problem [is] one of classifying disputed legislation under two already given heads of power. If the challenged Dominion law appeared to regulate civil rights in the Province rather than to regulate the trade and commerce of Canada as a whole, the Dominion power was denied. The task is essentially different under the Australian Constitution. The question is still one of construction; but it is construction of the express powers conferred upon the central Parliament. No doubt the powers of the States are very important, but their existence does not control or predetermine those duly granted to the Commonwealth. The legislative powers of the States are only exclusive in respect of matters not covered by the specific enumeration of Commonwealth powers.

Under the Commonwealth Constitution, unlike that of Canada, there is a specific subject matter in sec. 51 described as "external affairs".[7] This section has been regarded as having a scope and purpose at least as far-reaching as that of sec. 132 of the British North America Act.[8] Individual opinions of justices of the High Court and other lawyers have been expressed from time to time as to the extent of the power,[9] but no interpretation

hereafter to be agreed upon, the Members of the League: (a) Will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations."

[6] *Huddart Parker Ltd.* v. *The Commonwealth* (1931), 44 C.L.R. 492, 527.

[7] Sec. 51.—"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—(xxix) external affairs."

[8] See Evatt J. in *Jolly* v. *Mainka* (1933), 49 C.L.R. 242, 287.

[9] For instance, *Roche* v. *Kronheimer* (1921), 29 C.L.R. 329. That case was concerned with the validity of the Treaty of Peace Act 1919, and the

of the power by a Full Bench of the High Court of Australia was given until last year. The case was *The King* v. *Burgess: Ex parte Henry*[10] and concerned the validity of the Air Navigation Act 1920 and the Regulations made thereunder.

II

The Air Navigation Act 1920 of the Commonwealth gave power to the Governor-General to carry out the Air Navigation Convention by Regulations (see sec. 4).[11] For present purposes, the main question was whether such a power to carry out the Convention throughout Australia was valid under sec. 51 (xxix), it being clear that the trade and commerce power with respect to inter-state trade was exceeded in that the Act covered intra-state flying and that no one subject in sec. 51 covered the general control of civil aviation in the Commonwealth.

In limine the Court was unanimous that the Executive had sufficient power to enter into the Air Navigation Convention.[12] "The Commonwealth is bound internationally by such a treaty as made in accordance with the law and the constitutional conventions which existed at the time when it was made."[13] Evatt and McTiernan JJ. were more definite:[14]

> Fortunately there is to-day an almost universal consensus of opinion amongst the leading exponents of constitutional and international law that, with whatever limitations the status of the Commonwealth of Australia in international law may still be hedged, its Executive Government was possessed of sufficient authority to become a party to, and be bound by, the Treaty of Versailles, 1919, in pursuance of which both the mandates system and the International Labour Organization was set up.

Court held that the Act was valid as an exercise of the power with respect to naval and military defence, though one of the justices expressed the view (which has since been accepted by other members of the Court) that it might have been supported under the external affairs power. "It is difficult to say what limits (if any) can be placed on the power to legislate as to external affairs. There are none expressed. No doubt complications may arise should the Commonwealth Parliament exercise the power in such a way as to produce a conflict between the relations of the Commonwealth with foreign Governments and the relations of the British Government with foreign Governments. It may be that the British Parliament preferred to take such a risk rather than curtail the self-governing powers of the Commonwealth; trusting, with a well-founded confidence in the desire of the Australian people to act in co-operation with the British people in regard to foreign Governments."—Per *Higgins* J. at p. 339.

[10] (1936), 55 C.L.R. 608.

[11] This form of legislation has been held to be valid: *Roche* v. *Kronheimer, supra; Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1931), 46 C.L.R. 73.

[12] The Convention was identical with that dealt with by the Privy Council in the *Aeronautics Case*.

[13] Per Latham C.J. at p. 636.

[14] At p. 683.

Up to this point the judgment of the Privy Council is in absolute accord with the view held by the High Court. It is also important to note that the Privy Council does not suggest that the Executive in Canada is limited by reference to the subject matter of the Convention.

III

The next question before the High Court was whether the power with respect to "external affairs" gave the Commonwealth Parliament power to implement the Convention, and again the unanimous answer was, Yes. Reference was made to the Privy Council decisions in the *Aeronautics Case* and the *Radio Case*, and the Chief Justice said: "The regulation of relations between Australia and other countries within the Empire, is the substantial subject matter of external affairs."[15] Evatt and McTiernan JJ. said :[16]

> It is an expression of wide import. It is frequently used to denote the whole series of relationships which may exist between States in times of peace or war. It may also include measures designed to promote friendly relations with all or any of the nations. Its importance is not to be measured by the output of domestic legislation on the topic because the sphere of government is characterized mainly by executive or prerogative action, diplomatic or consular.

The views of the other justices, though to the same effect, were expressed in more limited terms.[17]

It is clear from these expressions that the Court was emphatic that the power to legislate with respect to "external affairs" was one of wide amplitude and gave to the Commonwealth Parliament legislative authority to carry out the particular Convention, although the subject matter thereof was not one of those covered by the list of subjects mentioned in sec. 51.[18]

IV

This, however, is not the end of the matter, for the debate before the Court also considered the question whether the

[15] Per Latham C.J. at p. 643.

[16] At p. 684.

[17] *E.g.*: "The power is comprehensive in terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other Powers or States." Per Starke J. at p. 658. "I think it is evident that its purpose was to authorize the Parliament to make laws governing the conduct of Australians in and perhaps out of the Commonwealth in reference to matters affecting the external affairs of the Commonwealth."—Per Dixon J. at p. 669.

[18] *Cf.* DR. W. ANSTEY WYNES, LEGISLATIVE AND EXECUTIVE POWERS IN AUSTRALIA, at p. 209.

subject matter of the treaty must be one over which the Commonwealth otherwise had power to legislate and whether the subject matter of the treaty was one which should be regarded as fit and proper for a treaty.

The answer to the first argument seems to be that the power in sec. 51 (xxix) is as independent a power as all the other enumerated powers in that section, that it is to be construed in the same way as any of the other powers, and, therefore, it must be given its full and natural meaning. The correct method of approach to this question in Australia is to give to an express Commonwealth power the fullest meaning possible without reference to any existing powers in the States. This principle of constitutional interpretation has been familiar to Australian lawyers since 1920 when it was enunciated in the *Engineers Case*[19] which is now the leading authority as to the *method* of interpreting our Constitution. Many of the writers who had expressed a contrary view[20] did so at a time "when it was not fully appreciated that the Commonwealth's powers under secs. 51 and 52 of the Constitution must first be recognized and interpreted *before* it is possible to determine the extent of the 'exclusive power of the States' ".[21]

The other matter adverted to, that is, whether the subject matter is one "properly the subject of negotiation with a foreign country", finds its earliest clear expression in the judgment of Field J. in *Geofroy* v. *Riggs*.[22] On this question Evatt and McTiernan JJ. pointed out that[23]

> it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement. By way of illustration, let us note that Part XIII of the Treaty of Versailles declares that universal peace can be established only if it is based upon social justice and that labour unrest caused by unsatisfactory conditions of labour imperils the peace of the world. In face of these declarations and the setting up (under the treaty) of

[19] *The Amalgamated Society of Engineers* v. *The Adelaide Steamship Company Ltd.* (1920), 28 C.L.R. 129.

[20] See, *e.g.*, SIR W. HARRISON MOORE, THE COMMONWEALTH OF AUSTRALIA, 2nd ed. (1910), pp. 461 - 462.

[21] Per Evatt and McTiernan JJ. in *The King* v. *Burgess*, at p. 680.

[22] (1890), 133 U.S. 258 at p. 267. In *The King* v. *Burgess*, Dixon J. expressed the doubt on this point in the following passage: "It seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs." *Cf.* J.S. Ewart, *The Radio Case* (1932), 10 Can. Bar Rev. 298 at pp. 301 - 302.

[23] *The King* v. *Burgess*, at p. 681.

> the International Labour Organization it must now be recognized that the maintenance or improvement of conditions of labour can (as it does) form a proper subject of international agreement, for differences in labour standards may increase the friction between nations which arises even when trade competition takes place under conditions of reasonable equality.

Though the Chief Justice did not express himself in such general terms, he said :[24]

> No criterion has been suggested which can result in designating certain matters as *in se* concerning external relations and excluding all other matters from such class. It is very difficult to say that any matter is incapable of affecting international relations so as properly to become the subject matter of an international agreement. . . . . No one would be inclined to deny that the production and sale of recently invented narcotic drugs is a matter of international interest and concern. Fifty years ago it is unlikely that many persons would have thought that such subjects would be dealt with by international treaties.

One has only to glance at the list of international agreements to which Australia is a party to realize that the variety of subjects is infinite: extradition, trade and commerce, navigation, legal proceedings, war graves, sanitation, white slave traffic, submarine telegraph, lunatics, international arbitration, use of white phosphorous in manufacturing matches, obscene publications, and a host of other matters.[25]

In so far as the decision of the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Ontario* affects this question, it would seem to support the view that the social legislation which forms the subject of conventions issuing from the International Labour Organization is a proper subject matter for international agreement, as the Board did not deny the binding nature of the Convention, but in fact affirmed it.

The High Court of Australia, however, agreed that there were limitations to be placed upon the exercise of the power

[24] *Ibid*, per Latham C.J. at p. 640.

[25] *Ibid.*, at p. 641. The Department of External Affairs of the Commonwealth published on 15th August, 1935, a "List of International Agreements (Treaties, Conventions, &c) to which Australia is a party, or which affect Australia, together with prefatory notes." See *Australia and the International Labour Conventions*, a paper by Professor K. H. Bailey in Proceedings of the Australian and New Zealand Society of International Law, Vol. I. pp. 100 - 121; DR. W. ANSTEY WYNES, LEGISLATIVE AND EXECUTIVE POWERS IN AUSTRALIA, p. 209; and *Australia and the Constitution of the International Labour Organisation*, by J. Starikoff, in the International Labour Review, Vol. XXXII, No. 5, November 1935, which contains a very good account of the whole subject, and which points out that the power of a Federal State to take advantage of Article 405 of the Treaty of Versailles depends upon the extent to which "its constitutional powers to give effect to them [i.e., conventions] are limited, and no further".

with respect to external affairs. There are passages in the judgments which bear a striking resemblance to the language which was afterwards used by the Privy Council. The Chief Justice said :[26]

> The Executive Government of the Commonwealth and the Parliament of the Commonwealth are alike bound by the Constitution and the Constitution cannot be indirectly amended by means of an international agreement made by the Executive Government and subsequently adopted by Parliament,

and His Honour proceeded to illustrate this statement by reference to sec. 113, which prevents the Commonwealth from imposing any law of liquor prohibition, and to sec. 116, which prohibits the Commonwealth from establishing any religion. Evatt and McTiernan JJ. said :[27]

> The legislative power in sec. 51 is granted "subject to this Constitution" so that such treaties and conventions could not be used to enable the Parliament to set at nought constitutional guarantees elsewhere contained, such, for instance, as secs. 6, 28, 41, 80, 92, 99, 100, 116, or 117.

These expressions may be compared with that of Lord Atkin :[28]

> The Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

One is forced to comment, however, that though the truth of Lord Atkin's statement is not to be denied, its application to the British North America Act seems to beg the question, which was, What is the legislative authority of the Dominion? Only after the legislative authority is determined can any question arise as to an attempted amendment of the Constitution by unconstitutional means. For if the Constitution gives the power to carry out treaties, then the power must surely be complete and full, subject only to express prohibitions; that is to say, if there is power to carry out *any* treaty, there must be power to carry out all treaties.[29]

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[26] Per Latham C.J. at p. 642.

[27] At p. 687. And *cf.* Starke J. at p. 658: "The power conferred by the Constitution upon the Commonwealth to make laws with respect to external affairs must be exercised with regard to the various constitutional limitations expressed or implied in the Constitution, which restrain generally the exercise of Federal powers. The Commonwealth cannot do what the Constitution forbids. But otherwise the power is comprehensive in terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other Powers or States."

[28] *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 326 at p. 352; 53 T.L.R. 325 at p. 330.

[29] The power must be strictly adhered to, however, and any legislation

V

In the space of four years the Privy Council decisions on appeal from Canada show a complete reversal in basic theory of constitutional doctrine. In the *Radio Case*, Viscount Dunedin stated, at some length it is true, the liberal theory of constitutional interpretation which is also found in *British Coal Corporation* v. *The King*,[30] and emphasized by Lord Wright in *James* v. *The Commonwealth*.[31] This is what was said in the *Radio Case*:[32]

> This idea of Canada as a Dominion being bound by a Convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in s. 91 or s. 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91. . . . . In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing.

This doctrine is not new. In *McCulloch* v. *Maryland* we find Chief Justice Marshall expressing it :[33]

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in pursuance of it must carry out the treaty, neither more nor less. "It is a necessary corollary of our analysis of the constitutional power of Parliament to secure the performance of an international convention that the particular laws or regulations which are passed by the Commonwealth should be in conformity with the convention which they profess to be executing. . . . . Any departure from such a requirement would be completely destructive of the general scheme of the Commonwealth Constitution. . . . ."—Per Evatt and McTiernan JJ. at pp. 687 - 688. "All means which are appropriate, and are adapted to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power."—Per Starke J. at pp. 659 - 660. "No doubt the power includes the doing of anything reasonably incidental to the execution of the purpose. But wide departure from the purpose is not permissible, because under colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which it relates."—Per Dixon J. at p. 674.

[30] [1935] A.C. 500 at p. 518.

[31] [1936] A.C. 578 at p. 614.

[32] [1932] A.C. 304 at p. 312.

[33] 4 Wheat. 316 at p. 421. There is a similar passage in the judgment of Story J., delivering the opinion of the Supreme Court of the United States in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 at p. 326: The Constitution "was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are plainly adapted to that end, which are not prohibited, but *consistent with the letter and the spirit of the Constitution, are Constitutional.*

In Australia this same doctrine, which in 1888 Lord Watson called "the silent operation of constitutional principles",[34] was expressed by Isaacs J. as follows :[35]

> It is the duty of the Judiciary to recognize the development of the Nation and *to apply established principles to the new positions which the nation in its progress from time to time assumes.* The judicial organ would otherwise separate itself from the progressive life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter. It is only when these common law principles are exhausted that legislation is necessary.

This is not the course which the Privy Council has adopted in *Attorney-General for Canada* v. *Attorney-General for Ontario.* The Board has clung fast to a reactionary method of interpretation and abandoned the thesis enunciated by Lord Sankey L.C.:[36] "In interpreting a constituent or organic statute such as the Act [i.e., the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted." Instead, Lord Atkin says:[37] "While the ship of State now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure." And again, referring to sec. 132—"it is impossible to strain the section so as to cover the uncontemplated event."[38]

There is an amazing contrast between the language of Lord Atkin and that of Viscount Dunedin, yet in that very contrast lies the decision. Despite the efforts to distinguish the *Radio Case,* it seems that there is no material distinction unless the

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expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."

[34] *Cooper* v. *Stuart* (1889), 14 App. Cas. 286 at p. 293.

[35] *The Commonwealth* v. *The Colonial Combing, Spinning and Weaving Co. Ltd.* (1922), 31 C.L.R. 421 at p. 439. "In dealing with such a question it must not be forgotten that it is a constitutional power intended to provide for the future and bearing upon its face an attempt to cover unknown and unforseen developments. A wide operation should be given to such a power."—Per Rich and Evatt JJ. in *The King* v. *Brislan; Ex. parte Williams* (1935), 54 C.L.R. 262 at p. 283—*The Broadcasting Case Cf., Pensacola Telegraph Co.* v. *Western Union Telegraph Co.* (1877), 96 U.S. 1, per Waite C.J. at p. 9.

[36] *British Coal Corporation* v. *The King,* [1935] A.C. 500 at p. 518.

[37] *Attorney-General for Canada* v. *Attorney-General for Ontario,* [1937] A.C. 326 at p. 354; 53 T.L.R. 325 at p. 330.

[38] [1937] A.C. at p. 350.

term "civil rights" is strained and the liberal theory is applied to the construction of provincial powers and the reactionary theory to those of the central Parliament. Yet do the Provinces negotiate, can they negotiate treaties? Of course the answer to both questions is in the negative. If, however, Great Britain becomes a party to the convention as well as Canada, the convention may be implemented by Canada, but not otherwise. So that by merely agreeing, the Dominion can get power so long as it takes care to clothe the agreement in a wider form. Yet the Privy Council affirm that "Counsel did not suggest any doubt as to the international status which Canada has now attained, involving her competence to enter into international treaties as an international juristic person",[39] and later in the judgment :[40]

> It is true . . . . that as the executive is now clothed with the powers of making treaties, so the Parliament of Canada, to which the executive is responsible, has imposed on it responsibilities in connexion with such treaties. . . . . *There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive.*

It would seem that all that is left to the Dominion is the responsibility of its executive as an "international juristic person" to negotiate the conventions and then to invite nine different provinces to join in co-operation to legislate for matters in which they had no part in negotiating, and for the faults of whose administration they are not liable to other nations. This is a bitter sop to a proud nation which is acknowledged to be an "international juristic person".[41] Of course there is the other alternative, that the Dominion and Great Britain combine to adhere to the International Labour Conventions. In that event the form of the agreement works the necessary magic. What a strange contrast, however, to the concept of Dominion autonomy!

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[39] *Ibid.*, at p. 349.

[40] *Ibid.*, at p. 52.

[41] The following passage makes interesting reading in 1937: "The King is the common head of the United Kingdom and of all the self-governing dominions, and the legislature of each of these dominions has, subject to its own Constitution, full autonomy. It seems strange that in this year 1907, when the world is resounding with praises of the system of the British Empire, which allows its different members to enjoy this freedom and independence, we should be asked to decide solemnly that the idea is an entire delusion. . . . . It is too late to set up a contrary theory unless it is intended to make a revolutionary change in the concept of the Empire."—*Baxter* v. *Commissioner of Taxation* (*N.S.W.*) (1907), 4 C.L.R. 1087, per *Griffith* C.J. at p. 1126.

VI

The decision in *Attorney-General for Canada* v. *Attorney-General for Ontario* does not bind the High Court of Australia, as the Privy Council is not an Appellate Court from Australia on a question of this sort.[42] Appeals from the High Court on questions arising under the Constitution as to the limits *inter se* of the powers of the Commonwealth and the States are only permissible after a certificate has been first obtained from the High Court, and the High Court has granted this in one case only.[43] In fact, Privy Council appeals from Australia are extremely rare, and on constitutional questions practically unknown. *James* v. *Cowan*[44] and *James* v. *The Commonwealth*[45] are out of the ordinary, and the questions which were there raised are hardly likely to come before the Privy Council again in a generation.

The subject of Privy Council appeals was widely canvassed prior to Federation, and the constitutional provisions limiting appeals are the result of compromise.[46] The reason for the withdrawal of constitutional questions was discussed by Griffith C.J. (himself one of the framers of an early draft of the Constitution) in 1907 :[47]

> It was common knowledge, not only that the decisions of the Judicial Committee in the Canadian cases had not given widespread satisfaction, but also that the Constitution of the United States was a subject entirely unfamiliar to English lawyers, while to Australian publicists it was almost as familiar as the British Constitution. . . . . And no disrespect is implied in saying that the eminent lawyers who constituted the Judicial Committee were not regarded either as being familiar with the history or conditions of the remoter portions of the Empire, or as having any sympathetic understanding of the aspirations of the younger communities which had long enjoyed the privilege of self-government.

[42] Commonwealth of Australia Constitution Act, 1900, sec. 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." There is a third limb to the section which gives further power to the Parliament to limit appeals.

[43] *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.*, [1914] A.C. 237.

[44] [1932] A.C. 542.

[45] [1936] A.C. 578.

[46] See the short account in H. E. EGERTON, FEDERATIONS AND UNIONS WITHIN THE BRITISH EMPIRE, at pp. 58, 66 - 7, 212 - 3.

[47] *Baxter* v. *Commissioner of Taxation (N.S.W.)* (1907), 4 C.L.R. 1087 at pp. 1111 - 1112.

There was a struggle for some years between the Privy Council and the High Court in connection with the construction of sec. 74, but this was resolved in favour of the High Court and is now a matter of history. Australian professional and public opinion would not oppose the abolition of Privy Council appeals. Such appeals on general matters are now comparatively few, and a bar to their continued existence would not operate as a hardship.

One of the most undesirable features of Privy Council appeals in constitutional matters is that there is in that body no responsibility for continuous administration. The Board forms a court the personnel of which changes more rapidly than in any other court in the world. For instance, in *James* v. *The Commonwealth*, the most important appeal from Australia in the history of the Commonwealth, six of the Law Lords, including Lord Atkin, were not sitting, and the Board was composed of the Lord Chancellor, one Law Lord, the Master of the Rolls, and two other members.

It is interesting to see who were the members of the Board in each of these recent cases.

Aeronautics Case	Lord Sankey L.C., Viscount Dunedin, Lord Atkin, Lord Russell of Killowen, and Lord Macmillan.
Radio Case	Viscount Dunedin, Lord Blanesburgh, Lord Merrivale, Lord Russell of Killowen, and Sir George Lowndes.
British Coal Case	Viscount Sankey L.C., Lord Atkin, Lord Tomlin, Lord Macmillan, and Lord Wright.
James v. *The Commonwealth*	Viscount Hailsham L.C., Lord Russell of Killowen, Lord Wright M.R., Sir George Lowndes, and Sir Sidney Rowlatt.
Hours of Labour Case	Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright M.R., and Sir Sidney Rowlatt.

This comparison shows that in the last case the Board consisted of (1) no members who were in the *Radio Case*, of two who were in the *Aeronautics Case*, three who were in the *British Coal Case* and two who were in *James' Case*, and (2) one member who was not in any of the other four cases, one who, though he was in one of the others, it was not one of the

Canadian appeals, and three who were each in two of the other cases—Lord Atkin and Lord Macmillan who were both in the *Aeronautics Case* and the *British Coal Case*, and Lord Wright who was in the *British Coal Case* and *James' Case*.

Short paragraphs have appeared in the Australian press referring to the possibility of Canada taking steps to abolish Privy Council appeals. The desirability of retaining them is certainly very doubtful and Australian experience demonstrates that they are unnecessary.

JOHN D. HOLMES.

Sydney, Australia.

Books Received.

Owing to the fact that the present issue was devoted to a symposium on the Constitutional cases, a number of Book Reviews must be reserved for a later issue. The following new books have been received since our last publication.

Later Criminal Careers. By Sheldon and Eleanor Glueck. New York: The Commonwealth Fund. London: Humphrey Milford, Oxford University Press. 1937. Pp. xi, 403. ($3.00)

Federal Subsidies to the Provincial Governments in Canada. By J. A. Maxwell. (Harvard Economic Studies, Vol. LVI.) Cambridge: Harvard University Press. 1937. Pp. xi, 284. ($3.00)

Annual Survey of English Law, 1936. By The London School of Economics and Political Science. The University of London, Department of Law. London: Sweet & Maxwell. 1937. Pp. xxxv, 431. (10s. 6d.)

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