THE FUTURE OF APPEALS TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Most of the countries which formed part of the British Empire, when they acquired the legal power to do so, passed legislation to abrogate the power of the Judicial Committee of the Privy Council to entertain appeals from their courts. New Zealand of course has not attempted to do this yet, but the viability of the Judicial Committee as a supreme appellate tribunal and the possibility of improvements to it or substitutes for it, were very much in issue both at the Third Commonwealth and Empire Law Conference held in Sydney in 1965 and at the Centennial Conference of the New Zealand Law Society held in Rotorua in 1969. Referring to the addresses on this topic by the Australian Chief Justice, Sir Garfield Barwick, and the New Zealand Attorney-General, Hon. H. R. Hanan, at the latter Conference, the New Zealand Law Journal *commented editorially: "Both speakers made it clear that there is a present need to give this question the deep consideration that it must demand."*

It is in an endeavour to serve that need that the following articles are published.

APPEALS TO THE PRIVY COUNCIL— AUSTRALIA

G. Sawer, Ll.M., B.A. (Melb.)*

Immediately before their federation in 1900, the six Australian colonies were within the system of appeals to the Judicial Committee of the Privy Council (herein the Privy Council) set up under the UK *Judicial Committee Acts* 1833 and 1844.[1] The result of those Acts was to provide three classes of appeal from the Supreme Courts of the Colonies:[2] the appeal by special leave of the Privy Council, which was available in any case (though in fact given only in cases of difficulty and importance) and was known until 1935 as the prerogative appeal;[3] appeal by special

*Professor of Law, Institute of Advanced Studies, Australian National University, Canberra, Australia.

1 3 and 4 Wm c. 41; 7 and 8 Vict c. 69. Amending Acts were passed in 1843, 1871, 1881 and 1895 and relevant provisions also appeared in the *Appellate Jurisdiction Acts* 1876 and 1887.

2 Appeals direct from lower courts were possible, but the Board discouraged them.

3 The title was historically appropriate, but in *British Coal Corporation* v. *King* [1935] A.C. 500, the Board itself used language suggesting (without explicitly saying) that the prerogative had been merged in the statutory provisions. This was to get around the last arguable objection to the abolition of the appeal in crime from Canada—the objections of inconsistency with UK Acts and of extra-territorially having been cured by the Statute of Westminster 1931. The decision virtually overruled an aspect of *Nadan* v. *R* [1926] A.C. 482, in which the appeal by special leave was clearly treated as resting on a prerogative capable of abolition only at Westminster.

leave of a Colonial Supreme Court, also under a wide discretion but with specific provision that the case must be important; appeal as of right if the amount or value of property at stake was £500 stg or more in the mainland Colonies, and £1,000 or more in Tasmania.[4]

The appeal to London was unpopular among fairly widespread and important sections of the community, for varying reasons. Anti-imperialist and even republican sentiments were rather more prominent among radical politicians (especially if fiscal protectionists) and the infant Labor Parties than they have been since. Perhaps more important was a belief among a good many prominent Australian lawyers that the Privy Council of the later nineteenth century was not a particularly impressive tribunal—certainly not obviously better than the Full Courts of the Colonial Supreme Courts, all of which had some very able judges. I suspect that this particularised professional pride, rather than a more generalised national sentiment, was the main factor which induced the members of the Federal Convention of 1897-8 to place in their draft Constitution (Chap. 111, ss. 74 and 75) provisions which would have abolished appeals from the Supreme Courts of the States (as the Colonies were now to become) to the Privy Council, substituting a Federal High Court of Australia as their immediate appellate instance, and much curtailed appeals from High Court to Privy Council. This provision was the chief bone of contention between the Chamberlain government and the Australian negotiators when the latter went to London in 1900 to negotiate the necessary Imperial Act. However, although the opinions of a majority of the Convention members and the chief leaders in the struggle for federation on this question were strong and clear, it is possible that they did not represent the views of a majority of Australians, or of lawyers, or of Colonial politicians. Hence they were under pressure to treat the issue as negotiable, and in the circumstances displayed a good deal of adroitness and determination when securing the compromise with the UK government embodied in s. 74 of the *Commonwealth of Australia Constitution Act* 1900.

The compromise had four main elements. First, appeals direct from State Courts (meaning in practice State Supreme Courts) to the Privy Council remained; the High Court of Australia also became a Court of general appeal from the State Supreme Courts, but, subject to some ingenious federal legislation shortly to be mentioned, a litigant in a State Supreme Court had a choice of going to the High Court or (in an appropriate case) to the Privy Council. Second, no appeal as of right was provided from the High Court to the Privy Council. Third, in the class of constitutional cases defined as questions 'howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States',[5] appeal lay only on a certificate of the High Court that the matter ought to be determined by the Privy Council; if such a certificate was given, the matter proceeded as an appeal of right. Fourthly, in cases other than 'inter se' ones, appeal would still lie by special leave of the Privy Council, but the Commonwealth Parliament could 'limit' the matters coming under this provision.

4 Under Orders in Council made pursuant to the *Judicial Committee Acts*. The Orders operating in 1900 had been made in 1850, 1851, 1860 and 1861. Amounts remain the same under Orders of 1909, 1910 and 1911 now in force.

5 The section also contemplates 'inter se' disputes as between States, but none has ever arisen and no one has suggested a credible illustration of such a question.

The operation of these provisions was subsequently materially affected by provisions of the Commonwealth *Judiciary Act*, especially amendments introduced in 1907, which deprived the State Supreme Courts of jurisdiction to hear 'inter se' cases,[6] and enabled any pending case 'arising under the Constitution or involving its interpretation' to be removed from any State Court to the High Court;[7] these effectively prevented constitutional cases, whether 'inter se' or not, from reaching the Privy Council direct from State Courts. Other provisions of the *Judiciary Act* operate to prevent appeals direct from State Courts to the Privy Council in non-constitutional questions arising under federal law, but these aspects of the legislation—currently under review—are clumsily drafted, involve metaphysical distinctions, and may leave some such questions in a position where they could be taken on appeal direct from State Supreme Courts to the Privy Council.[8] The constitutional validity of these provisions was open to doubt, and the Board itself held some of them invalid, but the High Court refused to follow this decision (since it was given on an 'inter se' case taken direct from a State Supreme Court) and has held all parts of the scheme valid.[9] The Board declined a further opportunity to tangle with these questions. The net result is that since 1906, no constitutional question and no other question arising under federal law has in fact gone on appeal from a State court to the Privy Council. A steady trickle of cases arising purely under State laws has so gone.[10]

There remained, then, the situation in relation to appeals from the High Court. The Australian negotiators of 1900 thought they had the best of the bargain, by the provision as to 'inter se' questions, and indeed after the conference which secured the compromise an eavesdropper could have seen the touching sight of these middle-aged gentlemen, one portly and two bearded, dancing in a ring to celebrate the victory.[11] However, they were gambling on judicial interpretation, and on some interpretations the Chamberlain side might have claimed victory. It was early seen that the section contemplated the powers of government as being divided between the Commonwealth and the States, in such a way that certain decisions might be thought of as deciding correlatively the sphere of competence of *both* Commonwealth and States. The only sort of dispute readily coresponding to this picture was one in which the Commonwealth claimed *exclusive* competence as to a matter, while a State claimed that on the contrary the Commonwealth had no competence and the exclusive competence belonged to the State. Such questions would be of frequent occurrence under the *British North America Act* 1867, because it attempted to divide powers between Dominion and Province so that each had a list of mutually exclusive heads, and one wonders whether the English Colonial Office officials who drafted s. 74 did have the Canadian situation in mind. Under the Australian distribution, however, no exclusive powers are given the

6 ss. 38A and 40A.
7 s. 40.
8 See on all these provisions Sawer, *Australian Federalism in the Courts*, pp. 22-7.
9 *Ibid.*, pp. 23-6.
10 Important examples are the *Wagon Mound cases*, [1961] A.C. 388, [1967] A.C. 617 (from N.S.W.), and *Midland Railway Co.* v. *Western Australia* [1956] 3 All E.R. 272 (from Western Australia).
11 A. Deakin *The Federal Story* (ed. La Nauze), p. 162.

States; they have the undefined residue of powers left after a meagre list of Commonwealth exclusive powers has been defined; the bulk of Commonwealth powers are *concurrent* with State power in the same fields. Hence on the theory just mentioned, the number of 'inter se' questions arising in the Courts would be extremely small. From the point of view of Australian judicial nationalism, the task was to devise a theory by which *concurrent* power questions could be categorised as 'inter se'. The difficulty was that at the outset of such a case, it could not be said that the decision, whichever way it went, would correlatively affect both Commonwealth and State, because if the decision went in favour of Commonwealth having concurrent power in the field, this did not deprive the State of any power at all. A theoretical answer was found by *Dixon* J., later C.J. Although the State would not be deprived of power, its power would be affected in *quality,* because laws which it made in the field might be suspended in operation through the existence of 'inconsistent' Commonwealth laws, and the significance of this was all the greater because of the very wide meaning which the High Court gives to the notion of 'inconsistency'—much greater than the reach of 'repugnancy' under the *Colonial Laws Validity Act* 1865.[12] It is a feeble theory, having regard to the use of the word 'limits' in s. 74, but it has served, and in consequence s. 74 was held to cover all the major disputes which in fact arise as to the allocation of legislative, executive and judicial powers between Commonwealth and States. The Privy Council has the last say on the meaning of s. 74, but it has followed the High Court tendency to widen the concept of 'inter se', and indeed may have gone further by denying any requirement than an 'inter se' question should have fully reciprocal effects; see *Dennis Hotels.*[13]

Even then, if the High Court had chosen to give certificates of appeal frequently, the Privy Council might still have played an important part in the development of Australian federal constitutional law. But in fact, the High Court has given a certificate for appeal only once—in the *Royal Commissions Case* (1912-13),[14] concerning the scope of the Comonwealth's 'incidental' power, in particular its bearing on laws authorising inquiries by Royal Commission into matters not otherwise directly within Commonwealth competence. The Board's opinion—written by Haldane L.C.—was deplorable; it failed to answer the questions which the High Court had certified as requiring decision, was vague as to the specific point in the case and almost unintelligible in its general discussion of the incidental power. Hence it is not surprising that the High Court should have become unwilling to repeat the experiment, but one might have expected that in course of time the disappointment and even indignation caused by the *Royal Commission* fiasco would have abated. Instead, the strong prejudice of the High Court against not granting a certificate under s. 74 came to be supported by a political theory, again first clearly enunciated by *Dixon* J. It was that 'inter se' questions are governed by conceptions derived from federalism which must appear 'strange and exotic to those who have enjoyed only a unitary form of government'.[15] There is not much in this, seeing that the High Court's view of federalism is arid, abstract and involves a mini-

12 See Else-Mitchell (ed.) *Essays on the Australian Constitution* 2nd ed. pp. 86-91.
13 [1962] A.C. 25.
14 [1914] A.C. 237.
15 Nelungaloo, (1952) 85 C.L.R. 545 at 570.

mum of reference to the actual state of the nation at any particular time; the Privy Councillors are fully capable of understanding the arguments derived from such a system of co-ordinates. But more recently yet another consideration has been produced—that 'inter se' questions require some flexibility in development, and it is better for the High Court to keep this possibility of development in its own hands than to be restricted by the mandatory authority of Privy Council decisions.[16] It might be objected that the Privy Council can overrule its own previous decisions and has demonstrated an ample capacity for flexible treatment of precedents and principles. I think the truth of the matter is that the High Court has been to some extent influenced by nationalism and still more by pride of craftsmanship and achievement. A certificate has now been refused so often in cases where equality of division, indeterminacy of doctrine, persistence of dissents, public importance of the issue, and absence of any really determining federal consideration might have caused a different decision, that it is impossible to conceive of circumstances in which the High Court would now give a certificate.

However, widely as the concept of 'inter se' has been expanded, there remained constitutional questions which were of great importance and yet not 'inter se'. Cases concerning the distribution of federal powers between the designated organs of federal government, where there is no competing claim of State power, are not 'inter se'; for example, the rules governing isolation of judicial function.[17] Neither are cases concerning constitutional prohibitions applying to both Commonwealth and States, since a decision will detract from both or benefit both; the great example is the guarantee of freedom of interstate trade and commerce (s. 92) which has accounted for more than a hundred of the corpus to date of about seven hundred decisions of High Court and Privy Council interpreting the Constitution.[18] Probably cases involving prohibitions affecting only the Commonwealth are not 'inter se', although most examples of prohibitions affecting only the States are.[19] Notwithstanding that concurrency of power raises 'inter se' issues, the question whether a particular Commonwealth law is inconsistent with a particular State law does not.[20] Then there was the large range of non-constitutional federal cases—arising under Commonwealth laws, or executive or judicial activities, in circumstances not requiring a reference to the Constitution. Notwithstanding the potential importance of many such cases, the total number of instances in which they were appealed from High

16 *WA* v. *Hamersley Iron Pty. Ltd.* (1969) 43 A.L.J.R. 399. The Court was equally divided and the issue—validity of State receipt duties—was vitally important for government finance and Commonwealth-State relations. It was decided on analytic grounds having nothing to do with federalism. The duty (in respect of receipts for goods sold) was held invalid, on the casting vote of the Chief Justice. The question was reconsidered in *WA* v *Chamberlain Industries* (1970) 44 A.L.J.R., and the previous decision affirmed by a four-three vote. But this was achieved only because *Menzies* J., who previously voted *against* invalidity, now changed his position for reasons which command no enthusiasm among commentators. One cannot blame the State governments for feeling very dissatisfied with this performance. If a reasonably competent and dispassionate outside arbiter is ever to be appropriate, this was the occasion.

17 *Boilermakers,* [1957] A.C. 288.

18 *James* v. *Cowan* [1932] A.C. 542.

19 *Dennis Hotels, supra.*

20 *Noarlunga,* [1956] A.C. 1.

Court to Privy Council pursuant to special leave of the latter has been surprisingly small; the biggest group was taxation cases, and the number of the non-inter-se constitutional cases was only about thirty, when in 1968 the Commonwealth Parliament, by the *Privy Council (Limitation of Appeals) Act*, exercised its power under s. 74 to limit the appeal by special leave of the Privy Council. There was support for abolishing the appeal altogether, but it is not certain that such abolition would be a valid exercise of a power only to 'limit'. Hence there was doctrinal as well as political ground for leaving some possibility of such appeals. The political ground was that if the appeal by special leave had been abolished altogether, litigants in State Supreme Courts whose cases could still go to the Privy Council direct from State Supreme Courts would be inclined to take that path, rather than exercising the choice of going to the High Court, because the latter step would probably preclude any possibility of getting to the Privy Council. Hence the Act is confined to the abolition of appeals from High Court to Privy Council in cases having a 'federal element'; an appeal still lies if the case came to High Court from State Supreme Court and involves no federal element. The 'federal element' can arise either from the Constitution being involved, or a federal law, or from the federal character of the parties, or from the federal origin of the jurisdiction being exercised by the State court. It must also be noted that the Act did not touch the position of 'inter se' constitutional cases, because—rather accidentally—the parts of s. 74 dealing with them cannot be touched by the Commonwealth Parliament; to amend them would require either an amendment of the Constitution under s. 128, with a referendum—an expensive and perilous course—or else United Kingdom legislation which might well be refused unless the States joined in a request. As we shall see, the States might well refuse. In any event, the 'inter se' cases are adequately covered by the requirement of a High Court certificate and the unlikelihood that it will ever again be given.

When the Commonwealth Government decided to limit the appeal to the Privy Council, it invited the States to confer on measures to deal with the whole Australian problem, by abolishing the remaining area of appeal direct from State Supreme Courts to London. Probably this would have required United Kingdom legislation, because of the extraordinarily schizophrenic situation of Australia in these matters. The *Statute of Westminster* 1931, which gives New Zealand, Canada, etc., such ample powers to deal with Privy Council appeals as they please, applies in Australia only to the Commonwealth. The States were at their own urgent request excluded from its provisions,[21] so that the reasoning of *Nadan* v *R* (*supra*) still applies to them, and attempted legislation to abolish appeals to London would be held invalid by their own courts or on appeal by the High Court and/or Privy Council. However, there can be no doubt that the UK would on joint request from Commonwealth and States legislate accordingly. But the States in some cases ignored and in others declined the Commonwealth invitation, so that the appeal in purely 'State' cases from their Supreme Courts to the Privy Council, directly or via the High Court, is likely to remain. The State Governments did not condescend to explain their attitude, but one can guess that it is due to a combination of two factors; first, most of

21 This is not obvious from the Act; it results from the definitions in s. 1 aided by implications from ss. 8 and 9.

them are in general more old-fashioned and conservative in their attitude about the Imperial tie, and not disposed to pursue actively the destruction of its remaining practical consequences; second, they value the preservation of a separate relationship with London (pursued also by the retention of separate Agents-General there) as a method of asserting their independence from the Commonwealth, a manifestation of State-rightism. Thus a peculiarity of that federalism which causes the High Court to refuse certificates of appeal to the Privy Council causes the States to cling to the possibility of such appeals.

The repute of the Privy Council among Australian professional and academic lawyers has varied somewhat from time to time, and at any time there have been some who regarded it with disfavour and others with the highest respect.[22] It would require very careful sampling and a duration of testing which is now impossible in order to get a reliable measure of the Board's standing in Australia. I think, however, that one can hazard three probable guesses about the matter.

First, the Board has never suffered from the high degree of unpopularity which it has earned among sections of the profession in some of the countries where its writ runs or has run; for example, it has never been thought by Australians to have fundamentally distorted the Constitution as it has been thought by a strong group of Canadian professionals to have distorted the fundamental structure of the *British North America Act*.[23] This, however, may be due to the circumstance that s. 74 of the Constitution and the Judiciary Act provisions considered above made the flow of constitutional cases small, and after 1907 eliminated most cases concerned with the basic structure of Australian federalism. The Board had little option but to accept, in the rare cases that did reach it, the basic conceptions of the High Court of Australia. The only Privy Council decision to be regarded with disfavour by a wide section of the Australian profession was *Royal Commissions* (*supra*), and that was more for the reasoning, or lack of it, than for the actual result reached in the particular case—which was a matter more for political than for legal evaluation.

Second, no large section of Australian professional or academic opinion has ever considered that the Privy Council was clearly and generally superior to the High Court of Australia, whether in public or in private law. Opinions concerning individual cases may vary. It would probably be generally agreed that Lord Wright's judgement on the duty of care in tort in *Grant* v. *Australian Knitting Mills*[24] was superior in reasoning as well as outcome to those of a High Court majority including *Dixon* J. On the other hand, it has always been my view that the Board's decision in *James* v. *Cowan*[25] on the interpretation of s. 92 of the Constitution, drafted by Lord Atkin, was much inferior to the contrary decision reached by the High Court majority in that case. So far as constitutional law is concerned, there is a simple reason for thinking that the Privy Council has never been appreciably better than the High Court; it is that in major instances the Board has developed its

22 Cf. *Menzies* J. in (1968) 42 A.L.J. 79 with Sawer, *Australian Federalism in the Courts*, pp. 30-1.

23 See, e.g., 'The Neglected Logic of 91 and 92', A. S. Abel, (1969) XIX, *University of Toronto Law Journal*, 487.

24 [1936] A.C. 85.

25 [1932] A.C. 542. The Board dodged the then crucial issue—whether s. 92 bound the Commonwealth.

doctrines by reference to and in agreement with contemporary developments in the High Court. Thus in *James* v. *Commonwealth*,[26] Lord Wright trod cautiously in the s. 92 path which *Evatt* J. and a narrow High Court majority had been following since 1931, against the inclinations of *Dixon* J.; but in the *Bank Nationalisation*[27] and *Hughes and Vale*[28] cases, the Board reversed this direction in order to fall in with the Dixonian doctrines, which meanwhile had become dominant on the High Court. Similarly with the majority view of the Hight Court on taxation of interstate trade,[29] and on isolation of judicial function.[30] On the other hand, the High Court in the *Engineers' Case*[31] finally fell in with the views which the Privy Council had expressed in *Webb* v. *Outrim*,[32] thirteen years before, on federal implication problems, and which the High Court majority had in the intervening years repudiated. In no case can it be said that the Board corrected palpable error in the High Court, and it would have made remarkably little difference to the development of Australian law, public or private, if the appeal to London had been abolished in 1900.

Thirdly, since about 1949 a close personal relation of friendship and mutual respect has ben established between leading British lawyers, particularly the Lords of Appeal in ordinary who usually make up the Board, and leading Australian lawyers, particularly the High Court justices and the small group of Sydney and Melbourne barristers who argue the heaviest High Court cases. Air travel and the relative frequency of important appeals up to 1968 facilitated this process. The practice was established of appointing all High Court Justices as Privy Councillors and they have made many short visits to London and sat on appeals from areas other than Australia. Visits to Australia by leading British judicial personalities have become an annual event. These contacts have promoted a sense not of dependence or subordination, but of general equality. The High Court has been exposed to a standard of criticism depending not merely on the reported judgements, but on nuances or behaviour in the course of argument and in social gatherings. Australian barristers have come to appreciate the greater courtesy to counsel during argument habitually accorded by the Privy Council as compared with the High Court. and the superior personal style of the British, but on the other hand they have found among the Australians a greater vigour and intellectual thrust.[33] All of which confirms the general impression that Australian lawyers would not now regard the complete disappearance of the Privy Council appeal as a disaster, but neither would they regard it as a clear gain on any other ground than that of the costs of litigation.

Since the latter part of the nineteenth century, there have been numerous proposals for changing the character of the Privy Council, so as to make it less English (or Anglo-Scottish) and more Imperial, or British Commonwealth, or Commonwealth, in structure. The *Judicial*

26 [1936] A.C. 578.
27 [1950] A.C. 235.
28 [1955] A.C. 241.
29 See *Freightlines and Construction Holdings* v. *W.P.W.* [1968] A.C. 625.
30 See *Boilermakers* [1957] A.C. 288.
31 (1920) 28 C.L.R. 129.
32 [1967] A.C. 81.
33 Some Australian counsel have been irritated by the leisurely habits of the Board, and were stunned to find that their Lordships do not automatically receive transcripts of argument.

Committee Amendment Act 1895 took a first step in this direction, by authorising the appointment of up to five Colonial judges, and one of the first judges to sit under this provision was Sir Samuel Way, the Chief Justice of South Australia.[34] The limitation on numbers was repealed in 1928, and every effort has been made to use these provisions when appropriate judges from the Empire and Commonwealth have been in London, but almost by definition the judges who could usefully discharge such responsibilities in London have been needed in their home country, and no regular system of rostering or rotation has ever been attempted.[36] Since 1947, plans for making the Privy Council, or a substituted Commonwealth Court, peripatetic, with a core membership 'afforced' from the regions it visited, have been put forward, and a little later there have emerged alternative or additional proposals for a number of 'Commonwealth Supreme Courts', each covering a neighbouring group of countries—Britain-cum-Caribbean, Africa, Asia, Australasia-Oceania, etc. Such topics have been on the agenda of several Imperial and Commonwealth Conferences, notably those of 1900, 1930 and 1960, but the discussions were always inconclusive. The last substantial discussion of such proposals was at the third Commonwealth and Empire Law Conference held at Sydney in August 1965. This may probably be regarded as decisive of the matter, at least for many years. Although the conferences in question are completely unofficial, they are often attended by people who can speak in a guarded fashion for the policy-makers of their countries. This one was attended by Lord Chancellor Gardiner, and was preceded by a debate on the possibilities of intra-Commonwealth judicial machinery in the House of Commons.[37] In consequence, Lord Gardiner was able to state that his Government would co-operate in the creation of a Supreme Commonwealth Court of Appeal if a large number of Commonwealth members showed a desire to move in such a direction; in particular, if the proposals required a transfer of supreme appellate power in relation to England (and possibly Scotland and Northern Ireland) from the House of Lords to a Commonwealth Appeal Court, this too would be favourably considered.[38] It was about as handsome a gesture towards the sentiment for Commonwealth judicial cohesion as a UK government could be expected to make. Support for such a Court was expressed by the Attorneys-General of Uganda and of British Guiana, and by the Chief Justice of the Appeal Court for East Africa, and by a barrister from Zambia, but in none of these cases could any view of the respective

34 He proceeded to use his influence, behind the back of the South Australian government, to obstruct the Australian federal negotiators in 1900 on the matter of Privy Council appeals. The story, not yet published, was unearthed by the History Department, Institute of Advanced Studies, The Australian National University. Way sat on six reported P.C. cases in 1897. Also appointed and sitting in 1897 were de Villiers, from Cape Colony, and Strong from Canada.

35 *Administration of Justice Act* 1928 p. 13.

36 The colonial governments concerned were not always eager to pay the fares and salaries.

37 25 March 1965.

38 The prepared papers of the conference have been published (*Record of the Third Commonwealth and Empire Law Conference*, Law Book Co. Ltd., 1966), but unfortunately not the discussion which is far more important and includes Lord Gardiner's observations. The Law Council of Australia keeps a transcript and I am much indebted to the Council's Secretary for sending me a copy.

governments—for or against—be presumed. Two lawyer-backbenchers from the House of Commons also advocated a Commonwealth Supreme Court. The proposal was strongly opposed by the Chief Justices of India and of Pakistan, and in each case it could be assumed that they represented the probable views of their Governments. It was also opposed by a barrister from Tanzania; he seems not to have spoken with any authority, but it is known that his view coincided with that of the Nyerere Government, and it weakened the contrary view of the Chief Justice of the East African Court of Appeal. A barrister from Singapore was prepared to support a Commonwealth Court if it dealt solely with the enforcement of a Commonwealth Bill of Rights, and attached machinery of habeas corpus, to protect individuals against local oppression. (Others who opposed the whole idea had very particularly opposed the notion that such a Court should have anything to do with fundamental rights, which they thought too 'political' a topic for such a tribunal.) The attitude of the Australians and New Zealanders was particularly interesting.

A South Australian barrister[39] gave temperate support for the proposals, while pointing out some difficulties which might tend to discourage some Asian and African supporters. In particular, he said such a tribunal must proceed on a basis of 'strict law', and not indulge is sociological jurisprudence, because a policy-oriented Court could not possibly suit the divergent polities from which appeals would come. An Australian judge[40] opposed the proposals, mainly because of the cost to litigants, and so did a New South Wales barrister, mainly because of constitutional difficulties.[41] The President of the New Zealand Law Society did not attack the proposal outright, but in a delicately worded prepared statement he said that New Zealand would not be satisfied with a tribunal whose judges were of any lesser calibre than those of the Privy Council, and he doubted whether a Commonwealth tribunal drawn from a considerable number of countries could reach that standard. Perhaps even more significant than the cold water of these Australasian contributions was the absence from this discussion of anything like even a semi-official expression of Australian and New Zealand views. It must surely have been known to the Attorneys-General of New Zealand and the Commonwealth, as it was certainly known to the respective Chief Justices, that the topic was going to be raised, and that the Lord Chancellor was going to give some encouragement to, if not privately press for, Australasian collaboration in the planning and working of some such system. Indeed, it is likely that the Lord Chancellor came to Australia chiefly for that purpose. If so, he received a dusty answer.

Among the various strands of thought which have influenced these eighty years of discussion about the appellate problem, we can distin-

39 H. A. Zelling, Q.C., since appointed to the South Australian Supreme Court.
40 R. M. Eggleston, of the Commonwealth Industrial Court, formerly of the Victorian bar.
41 J. D. Holmes, Q.C., since appointed J.A. in the New South Wales Supreme Court. As he pointed out, it would require a constitutional amendment to bring the High Court of Australia within a new external appellate system, and this is exceedingly difficult to procure under the Australian system. UK legislation could be requested, but probably the States would have to endorse a request—and some might easily refuse—and in any event this recourse would be politically difficult.

guish two main themes.[42] The older was the organic theory of the British Empire, which degenerated into the romantic yearnings of Lionel Curtis and his circle. The present day Commonwealth with its conferences and secretariat is the ghost of that Empire sitting crowned on its grave, and with as much chance of producing vigorous organs of government as an earlier famous ghost. Apart from a few Conservative Party lawyers in England, I doubt whether there is a serious expectation anywhere that a Commonwealth Supreme Court could now be produced out of that tradition. Second was the situation of individual Colonies and Dominions whose legal professions and judiciary valued, largely for technical reasons but in some cases for sentimental ones as well, the kind of skill and integrity which the London resort provided. Probably this would have remained a strong influence in more of the relevant countries, but for the offsetting influences of nationalism, and—in the non-Anglo-Saxon parts—of an indigenous moral culture.[43] Some of the smaller Commonwealth countries still feel that they have an insufficient reservoir of legal talent, or that the work of their Courts may be exposed to distortion by local pressures. For the countries of mainly British racial stock and cultural heritage, the maintenance of the Privy Council appeal, whether for reasons such as those just mentioned or (more usually) from historical inertia, has not raised serious conflicts with national sentiment. Indeed, for them a nascent nationalism might well be more affronted by accepting the decisions of a tribunal in which judges of other races and from other cultures participated, even though from within the Commonwealth. In the countries not of substantially British racial and cultural origin, however, the use of the Privy Council in its present form—an ancient British institution sitting in London and composed mainly of Englishmen—is apt to be too great an affront to local nationalism, whereas the professional argument in favour of an external resort might be accepted by political leaders if the relevant tribunal is plainly multi-racial and multi-cultural.

The 'White Dominion' question is now reduced to the attitude of Australia and New Zealand. For them, so far as they want or need or from inertia continue with an external resort at all, the present Privy Council is quite satisfactory. It is in any event a rapidly diminishing need, and not one which would justify for a short interim period the efforts and uncertainties attending the creation of an itinerant multinational tribunal. It would, however, be unthinkable for the countries still feeling a need for an external appeal to contemplate a tribunal containing Australian and New Zealand judges if that tribunal was not accepted by Australia and New Zealand. Indeed, the obvious unwillingness of India and Pakistan (and probably Nigeria) to participate creates a similar difficulty, because all these countries have an ample reservoir of talented lawyers and might be expected to provide strong judges for a Commonwealth Court.

The conclusion is that any notion of a single supreme Commonwealth tribunal can be regarded as dead. This does not exclude the possibility

42 A distinct theme has been that of providing a tribunal to decide—judicially or as arbitrator—disputes between Commonwealth governments. This has never been a real starter and was repudiated by Lord Gardiner in Sydney.

43 At the Sydney conference, Chief Justice Cornelius of Pakistan pointed out the difficulty of Pakistan accepting an appeal to a tribunal most of whose members would be ignorant of the Islamic moral principles which Pakistani courts are required to respect.

of regional arrangements, probably transitionally, to assist countries which still need some assistance. I cannot regard either Australia or New Zealand as coming within this category; both have an ample reservoir of legal talent and integrity. For the reasons mentioned by Mr Holmes at the Sydney conference, there are formidable, perhaps insuperable, constitutional difficulties in creating an Australia-New Zealand joint Court of Appeal, and in any event I agree with the view of Justice Eggleston at that conference that the importance of higher appeals for purely doctrinal reasons, the only ones relevant in Australasia, is habitually exaggerated. The present system of appeal from Ceylon, East Africa, the West Indies, Malaysia, Singapore and Hong Kong to London work reasonably well. Insufficient attention has been paid to the achievements of the Privy Council in relation to India; from the 1870s until 1947, the volume of these appeals was so large that they required a separate series of law reports, and right through that period the Board always had at least one member with extensive judicial experience in India—at first an Englishman, and then for a long period an Indian. In view of the transitional nature of the problem, it would be far more sensible for the UK government to carry the costs of having in London, continuously, a succession of judges from the countries maintaining the appeal, appointing them Lords of Appeal in Ordinary so that they could sit in the Judicial Committee of the House of Lords—a step much less potentially compromising for English legal standards than the one proposed by the Lord Chancellor in Sydney—as well as in the Privy Council. This would at least mitigate the neo-colonial aspects of the present situation; it would also provide the experience of sitting in an external tribunal suggested by Mr Zelling at the Sydney conference as another solution to the whole problem, and it is a system which requires no new bureaucracy and can be phased out at any time. There may need to be government contributions to the costs of litigants. I would strongly advise the Australian and New Zealand governments to make some contribution to the costs of a plan like that just suggested, rather than participate in any plan for a regional Commonwealth Court of Appeal.

Five years have passed since the Sydney conference, at which some of those supporting the Commonwealth Court proposals said it was a matter of urgency. Evidently it was not. These years, however, have not been devoid of Australian activity designed to help northern neighbours in matters of legal administration. Sir Garfield Barwick, Chief Justice of the High Court, has been particularly active in promoting Austral-Asian judicial conferences, and collaboration and research at all professional levels has been promoted throughout this region by 'Lawasia', an association in which Australian academic and professional lawyers and judges have joined. These activities, however, are regional in the fullest sense; they are not confined to Commonwealth countries.