AUSTRALIAN APPEALS TO THE PRIVY COUNCIL

A TWELVE YEAR SURVEY (1946-1957)

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It is not the purpose of this survey to venture upon an evaluation of a section of the work of the Privy Council whether in terms of its inherent quality, of its contribution to the understanding of Australian law or of its influence upon Australian judges. Nor is it intended to touch upon the question of the value of the appeal to the Privy Council as an institutional Commonwealth bond or as a traditional prerogative right of the subject.[1] It is proposed merely to extract and record facts regarding appeals heard and determined over a twelve year period so that reliable material may be conveniently at hand from which may be seen the nature and scope of the Privy Council's recent post-war work as it affects Australia.[2]

It will be sufficient to mention merely enough details of the cases decided as are necessary to recall the course of the litigation, the nature and significance of the points determined and the main grounds of decision.

In the 12 volumes of the Appeal Cases and in the Commonwealth Law Reports and *Australian Law Journal* between 1946 and 1957 (inclusive) there are reported 33 Australian appeals to the Privy Council which were dealt with on their merits (this excludes *Nelungaloo Pty. Ltd.* v. *Commonwealth*[3] and *Grace Bros. Pty. Ltd.* v. *Commonwealth*[4] in which it was held that appeal was precluded for lack of the certificate of the High Court required for an *inter se* question). Of the 33, 27 were appeals by special leave from the High Court and 6 were appeals direct from the Supreme Courts of New South Wales, Victoria and Western Australia.

Of the 27 appeals by special leave from the High Court, 9 were allowed and 18 dismissed. It is of interest and importance first to look briefly at each of the 9 cases in which such appeals were allowed.

APPEALS ALLOWED

1. *Hocking* v. *Bell (1947) 75 C.L.R. 125.* Mrs. Hocking sued Dr. Bell,

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[1] See the Presidential Address delivered by Lord Normand to the Bentham Club which is published in *Current Legal Problems*, 1950. Further writings, some historical, some polemic, are Weston, "The Privy Council and Constitutional Appeals 1 *(W.A.) Annual L.R.*, 255; F.R. Beasley, "Appeals to the Judicial Committee: The Case for Abolition" 7 *Res Judicatae* 399; Z. Cowen, in "Sydney Daily Mirror" Oct. 9, 1956.

[2] It has not been possible to include in this survey any information as to the petitions for special leave allowed or refused over the period though presumably most of the former were cases subsequently reported on the appeal and summarised herein.

[3] (1951) A.C. 34.

[4] (1951) A.C. 53.

a surgeon, alleging that he had negligently left in the site of an operation performed on her a piece of rubber tube. A verdict for £800 damages obtained by her at a fourth trial of the action was set aside by the Supreme Court of New South Wales on the ground that it was such as no reasonable jury could have found and (by majority) a verdict was entered for the defendant. The plaintiff appealed to the High Court of Australia which by majority (Rich, Starke, and McTiernan, JJ., Latham, C.J., and Dixon, J., dissenting) affirmed the decision of the Supreme Court. The plaintiff appealed *in forma pauperis* to the Privy Council and the Judicial Committee constituted by Viscount Simon, Lords Porter, Uthwatt, Du Parcq and Oaksey[5] allowed the appeal and restored the verdict. Their Lordships reviewed the facts of the case leading to the jury's findings and agreed with the minority in the High Court that there was evidence upon which the jury were entitled to find a verdict for the plaintiff and that therefore it was not competent for the Supreme Court to enter a verdict for the defendant. Their Lordships did not think that it could be said that no reasonable jury could have reached a verdict for the plaintiff and accordingly saw no adequate ground for a new trial.

2. *Perpetual Executors Trustees and Agency Co. (W.A.) Ltd.* v. *Maslen and Ors. (1952) A.C. 215; 88 C.L.R. 401.* Mr. Justice Walker of the Supreme Court of Western Australia had answered in favour of the Trustee Company as Executor of a Will a question as to the ownership of sums in excess of £2,000 distributed under the Wool Realisation (Distribution of Profits) Act 1948-55 (Cwlth.). The High Court had by majority (Latham, C.J. and Kitto, J., Fullagar, J., dissenting) reversed the decision of Walker, J. The Judicial Committee constituted by Lords Porter, Simonds, Oaksey, Reid and Radcliffe allowed an appeal from the decision of the High Court agreeing (in a judgment delivered by Lord Porter) with the conclusions of Walker, J. and of Fullagar, J. in the High Court.

The point involved was whether an assignment by the deceased of his interest in a partnership including book debts and all other assets of the business, passed to the assignee moneys subsequently distributed under the Act mentioned. The case in substance turned on the true construction of certain provisions of the Act and their Lordships having looked at the background of the Act and having examined its terms held, with Fullagar, J., that its provisions should not be regarded as stipulating that the moneys distributed should be dealt with as if they were the result of a contract or debt which came into existence when the wool was supplied for appraisement. So to construe the wording would, they thought, do violence to the admitted fact that the moneys represented a gift to the supplier of the wool.

3. *National Bank of Australasia Ltd. and Scottish Union* v. *National Insurance Co. Ltd. and Ors (1952) A.C. 493; 86 C.L.R. 110.* Macrossan, C.J. of Queensland had answered questions arising in the voluntary liquidation of the Queensland National Bank Ltd. as to whether the Bank's liability on redemption of certain stock was for the nominal face value of the stock in English or Australian pounds or partly in one currency and partly in the other. The High Court consisting of Latham, C.J., Dixon, Williams, Webb, and Fullagar, JJ. by majority agreed with the judgment of Macrossan, C.J., subject to a variation, and held that the holders of stock on the London Register at the commencement of the winding up should be paid in English

[5] It has been thought worthwhile to mention the names of the distinguished Law Lords who sat in cases in which appeals were allowed.

currency while the holders of stock on the Australian Register at that date should be paid in Australian currency.[6] Latham, C.J., who dissented, considered that on the true interpretation of the stock certificates in the light of the scheme under which they were issued all holders were entitled to be paid the face value of their stock only in Australian currency. The Judicial Committee constituted by Viscount Simon, Lords Normand, Oaksey, Tucker and Cohen in a judgment delivered by Lord Cohen allowed the appeal, agreeing with the conclusion of Latham, C.J. Their Lordships thought that the real question to be decided was the true construction of the words creating the stock though the document setting out the terms of the scheme should be looked at as a whole and in the light of relevant surrounding circumstances. Examining the matter as a question of construction their Lordships found a number of telling considerations in favour of repayment in Australian currency irrespective of the register upon which the stock was. They considered that the majority of the High Court had given insufficient weight to the fact that one stock had under the scheme been issued in place of the pre-existing liabilities and to the important feature that under the new scheme stock could be moved from register to register at the will of the holders. They contrasted and compared earlier decisions of the Board involving similar considerations and thought that Dixon, and Fullagar, JJ., had erred in the use they made of the place of payment as a consideration supporting an inference that the substance of the obligation was to be measured in the money of the same place.

4. *Leeder* v. *Ellis (1953) A.C. 52; 86 C.L.R. 64.* This case arose out of an application by a widow for relief under the Testator's Family Maintenance and Guardianship of Infants Act, 1916 (N.S.W.), the testator having left the whole of his residuary estate to Miss Leeder. The main asset, a cottage, had been valued by the Valuer-General at an amount little in excess of the mortgage upon it though after the date of the valuation the Land Sales Control Act, 1948 (N.S.W.) would have ceased to apply to it. Sugerman, J. who heard the application dismissed it because he considered in substance that the estate was insolvent. On appeal to the Full Court of New South Wales it was argued that fresh evidence should be admitted as to the value of the cottage and that an order should be made even though the estate might be insolvent. Neither of these submissions were acceded to by the Full Court constituted by Street, C.J., Maxwell, J. and Roper, C.J. in Equity, which accordingly dismissed the appeal and affirmed the order of Sugerman, J. The widow appealed to the High Court, the judges of which, namely, Dixon, Williams, Kitto, McTiernan and Webb JJ. unanimously concluded that the appeal should be allowed and that the widow should have the whole estate. The Justices were unanimous in thinking that upon the evidence before him Sugerman, J. should have made the order and three of them were of opinion that the calling of fresh evidence should have been permitted by the Full Court. The Judicial Committee on this occasion was constituted by Lords Porter, Oaksey, Tucker, Asquith and Cohen, their judgment being delivered by Lord Cohen. The appeal was allowed and the original judgment by the New South Wales Courts restored. The Board in the course of their judgment expressed disagreement with the Justices of the High Court on both grounds relied upon by that Court. It was considered that the three judges of the High Court had erred in their view that the principles laid down for the guidance of an appellate court when considering an application for leave to adduce further

[6] (1951) A.L.R. 229.

evidence in order to secure a retrial of a case before a jury had no application to an appeal of the present nature. Their Lordships thought that the principles were of general application though the circumstances which it might be relevant to take into account might be different. Their Lordships discussed and explained certain common law and equity decisions on the point and concluded that there was no justification for disturbing the Full Court's exercise of discretion in this respect. As to the ground upon which the Justices of the High Court were unanimous their Lordships considered that there was no sufficient justification for their conclusion that Sugerman, J. should have found that the estate was solvent and that there would be a surplus available for the widow. The fact that the Justices of the High Court differed from Sugerman, J. on a matter of opinion concerning value did not justify the disturbing of his order supported as it was by the evidence before him and confirmed by the New South Wales Full Court. On this matter and in other respects the Board quoted from the judgment of Street C.J. passages with which they expressed agreement.

5. *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Commissioner of Taxes of the Commonwealth of Australia (1954) A.C. 114; 88 C.L.R. 434.* This case concerned the liability to estate duty of a deceased's share in the goodwill of a partnership when the partnership agreement conferred options upon the surviving partners to purchase the deceased's share in the partnership without any consideration for the goodwill. In an earlier case of *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation (Milne's Case)*[7] the High Court had accepted the position which was treated as common ground between the parties that while the deceased's interest in the other assets of the partnership was assessable under s. 8(3)(b) of the Estate Duty Assessment Act 1941-53 (Cwlth.) as personal property, his interest in goodwill was assessable if at all under s. 8(4)(e) as notional property. A majority of the High Court (Rich, Starke and Williams, JJ.) had held that interest in goodwill was so assessable while the minority (Latham, C.J. and McTiernan, J.) were of opinion that the deceased's interest in the goodwill ceased on his death and therefore could not fall within s. 8(4)(e).

In the present case Williams, J. and the Full Court on appeal (Latham, C.J., Rich, Dixon, McTiernan and Webb, JJ.) held themselves bound by *Milne's Case* so that the substantive point was not argued before the Full Court whose judgment canvassed only and answered adversely to the appellant the question whether they should allow the point of law in *Milne's Case* to be reargued. On the appeal to the Privy Council the Judicial Committee was constituted by Lords Oaksey, Morton, Reid, Asquith and Cohen the last-named delivering the judgment of their Lordships. Before the Board the appellant argued for the first time that the deceased's interest in goodwill was part of his estate as being personal property within s. 8(3)(b) and could not therefore be property not actually forming part of the estate but only deemed to be part of the estate under s. 8(4). Their Lordships accepted this argument being of opinion that *Milne's Case* was wrongly decided and that the interest of Milne in all the partnership assets including goodwill had vested in his executors on his death although they would be bound if the option were exercised to transfer that interest to the purchaser at the price fixed in accordance with the partnership deed. It necessarily followed that the interest could not be assessable under s. 8(4) which dealt only with property not actually assessable as part of the estate under s. 8(3). The case was

[7] (1944) 69 C.L.R. 270.

remitted to the High Court with a declaration in accordance with this view.

6. *Taxation Commissioner of the Commonwealth of Australia* v. *Squatting Investment Company Ltd. (1954) A.C. 182; 88 C.L.R. 413.* This case also concerned moneys distributed under the Wool Realisation (Distribution of Profits) Act 1948-55 (Cwlth.) and raised the question of the taxability of such moneys as income of graziers who were still carrying on business as such at the date of distribution. In the case of *Ritchie* v. *Trustees Executors and Agency Company Limited and Ors.*[8] the High Court had unanimously affirmed a decision of the Supreme Court of Victoria that such moneys should be treated as income and not as capital in the hands of trustees of a will who had carried on a grazing business under a power in the will and from time to time submitted participating wool for appraisement. In the instant case, however, the High Court by a majority (McTiernan, Williams and Webb, JJ., Fullagar, and Kitto, JJ. dissenting) had held that moneys so distributed did not constitute assessable income, the majority relying upon certain passages and expressions in *Maslen's Case* (Case 2 *supra*). The Judicial Committee constituted by Lords Porter, Morton, Reid, Asquith and Cohen in a judgment delivered by Lord Morton approved *Ritchie's Case*[8] and held that the moneys distributed did constitute assessable income under the Income Tax Assessment Act 1936-1949 (Cwlth.). The Board reviewed the history of the wool scheme and in the light thereof considered the questions as to the nature of the payment and the capacity in which the respondents received it. Their Lordships concluded that the payment must be regarded as an additional payment voluntarily made to the respondents for wool supplied for appraisement, or, if the compulsory acquisition could be described as a sale, a voluntary addition made by the Commonwealth to the purchase price of the wool. It was considered that as the respondents were still trading when the payment was made it was in their hands a trade receipt of an income nature. Their Lordships commented that neither the decision in *Maslen's Case* nor the reasoning on which that decision was based afforded any assistance in the present case though they conceded that some passages in the judgment (relied upon by the majority in the High Court) divorced from their context were open to misconception.

7. *Hughes and Vale Proprietary Ltd.* v. *State of New South Wales (1955) A.C. 241; 93 C.L.R. 1.* This was a case of outstanding importance. The Judicial Committee thought that the appeal offered an opportunity to set at rest a remarkable conflict of judicial opinion which the Transport Cases had evoked among the Justices of the High Court. The question was whether the licensing provisions of the State Transport (Co-ordination) Act, 1931-1951 (N.S.W.) were invalid as contravening s. 92 of the Constitution.

The Board was constituted by Lords Oaksey, Morton, Reid, Tucker and Cohen and the judgment of their Lordships was delivered by Lord Morton. The judgment traced the history of the Transport Cases in some detail noting that as far back as *Vizzard's Case*[9] there was a marked difference of judicial opinion in the High Court. It was made clear that *Vizzard's Case*[9] had not been approved by the Board in *James* v. *Commonwealth of Australia*[10] as was claimed. Their Lordships regarded the reasoning of the Board's judgment in the *Bank Case*[11] coupled with the views of the Board in that case on the effect of the three *James' Cases*[12] and with the Board's approval of the decision

[8] (1951) 84 C.L.R. 553. [9] (1934) 50 C.L.R. 30. [10] (1936) A.C. 578.
[11] (1950) A.C. 235.
[12] *James* v. *South Australia* (1927) 40 C.L.R. 1; *James* v. *Cowan* (1932) A.C. 542 and *James* v. *The Commonwealth* (1936) A.C. 578.

in the *Airways' Case*[13] as of the utmost assistance in determining the present appeal. The opinion was expressed that the judgment in the *Bank Case* could not be reconciled with the reasoning of the majority of the High Court in *Vizzard's Case* and that the decision in that case could not stand.

McCarter v. *Brodie*[14] decided by the High Court (by a majority of 4 to 2) shortly after the *Bank Case* was next considered. Here their Lordships quoted with approval from the dissenting judgment of Dixon, J. (as he then was) which had pointed out six conceptions which he regarded as fallacious and which he thought had been the basis of the views of the majority in the *Transport Cases*. In their Lordships' opinion it followed that if the validity of the Act was to be established in the present case it could only be upon the ground that the restrictions contained therein were "regulatory". The judgment recalled that in the instant case the High Court had upheld validity by a majority of 4 to 3 though Dixon, C.J. had followed *McCarter* v. *Brodie* contrary to his "personal opinion". The view was expressed that *McCarter* v. *Brodie* was largely based upon what the Board considered to be erroneous interpretations of passages in the judgment in the *Bank Case* and of references to *Vizzard's Case* by the Board in *James* v. *Commonwealth of Australia*.

On the specific question before them their Lordships expressed entire agreement with the view of the minority of the High Court in the instant case and with the observations made by Dixon, C.J. in expressing his "personal opinion". They also adopted passages quoted from the judgments of Dixon, J. (as he then was) and Fullagar, J. in *McCarter* v. *Brodie*, subject to a reservation on the question of the validity of a licensing system under which an inter-state trader might in some circumstances be refused a licence. Their Lordships considered that it would be quite wrong to apply the maxim *stare decisis* and also that it would be wrong to attach weight for the present purpose to the fact that leave to appeal had been refused in certain cases.

8. *Reardon Smith Line Ltd.* v. *Australian Wheat Board (1956) 93 C.L.R. 577.* This appeal involved the construction of a charter-party. The Judicial Committee constituted by Viscount Simonds, Lords Oaksey, Radcliffe, Keith and Somervell in a judgment delivered by Lord Somervell allowed an appeal from a majority judgment of the High Court (Webb and Taylor, JJ., Dixon, C.J. dissenting) and restored that of Wolff, J. of the Supreme Court of Western Australia. The Board held that the charter-party in question obliged the charterer to nominate a safe port and wharf and, the port and wharf nominated being unsafe, that the charterer was liable to the ship-owners for damages flowing from the breach. A number of authorities were referred to and examined by their Lordships (including a case in the Court of Appeal — a decision subsequent and in a contrary sense to that of the High Court in the instant case) and the opinion was expressed that both in principle and on authority the construction of the charter-party contended for by the appellant was correct. Their Lordships also referred to the general and difficult question as to the position of the master of the ship if and when he realises or suspects the possibility of danger at port or wharf, and adopted as a correct statement of the law a passage from a judgment of Devlin, J., in which he had dealt with that question.

9. *Commissioner of Stamp Duties of New South Wales* v. *Permanent Trustee Co. of N.S.W. Ltd. (Davies' Case) (1956) A.C. 12; 95 C.L.R. 1.* This was another case arising under s. 102(2)(d) of the New South Wales

[13] (1945) 71 C.L.R. 29.

[14] (1950) 80 C.L.R. 432.

Stamp Duties Act. The Judicial Committee constituted by Viscount Simonds, Lords Morton, Cohen, Keith and Somervell in a judgment delivered by Viscount Simonds reversed the majority decision of the High Court (Kitto, Taylor, and Webb, JJ., Dixon, C.J. and Fullagar, J. dissenting) and restored the unanimous decision of the New South Wales Full Court. In its judgment, the Board indicated that the case raised no difficulty of law but a problem of correctly appreciating the facts to which the law was to be applied. Their Lordships thought that the facts gave rise to an inevitable and irresistible conclusion that the testator's daughter had not retained *bona fide* possession and enjoyment of certain trust property "to the entire exclusion of the testator or of any benefit to him". The daugher had authorised the testator to receive the income from a trust fund, pay it into an account in her name and operate upon that account and use the moneys therein for his own purposes. The Board found that "the design and result of the arrangement were that the daughter's possession and enjoyment were reduced and impaired precisely by the measure of the testator's use and enjoyment of her income" and that it was immaterial that the moneys used were to be regarded as loans and not gifts, to the testator.

APPEALS DISMISSED

The 18 appeals from the Court dismissed were as follows:

1. *Producers' Co-operative Distributing Society Ltd.* v. *Commissioner of Taxation (1948) A.C. 210; 75 C.L.R. 134.* The Board affirmed the majority decisions of the Supreme Court of New South Wales and the High Court by holding that the exemption conferred by the Income Management Act, 1941 (N.S.W.) on a rural society if its principal business was the disposal of the agricultural products of its members did not apply where members were co-operative societies who made butter from cream sold to them by farmers. The butter was not a product of the use of the farmers' land for a dairying purpose, the two industries, the farming industry and the butter making industry being independent and the produce of the latter industry was not in any real sense the product of the former.

2. *Union Trustee Company of Australia Ltd.* v. *Bartlam and Ors. (1948) A.C. 495; 76 C.L.R. 492.* The Board here upheld the unanimous judgment of the High Court of Australia which itself had reversed a majority judgment of the Supreme Court of Victoria. It was held that the word "income" in s. 17 of the Trustee Companies Act 1928 (Vic.) in relation to a business which a trustee company was empowered to carry on under a will, had its ordinary meaning of the balance of profits ascertained on ordinary accounting principles and, in particular, after debiting costs and expenses. The trustee company was entitled to charge commission on income as so defined.

3. *Commonwealth of Australia and Ors.* v. *Bank of New South Wales and Ors. (1950) A.C. 235; 79 C.L.R. 497.* In this most important case the Judicial Committee upheld the majority decision of the High Court that s. 46 of the Banking Act 1947 (Cwlth.) which prohibited the carrying on in Australia of the business of banking by private banks was invalid as offending against s. 92 of the Constitution. It will be recalled that the Judicial Committee while holding that in the circumstances of the cases no appeal lay in the absence of a certificate from the High Court thought it right to state their views on the main question argued, partly because it might have been possibly to apply for and obtain a certificate from the High Court and partly because it appeared to them that the appellant's argument was largely based on a mis-

apprehension of the two *James Cases (supra)* already decided by the Board which it was their Lordships duty so far as they could to correct. The terms of this historic judgment and the doctrines which it formulates as to the interpretation and application of s. 92 of the Constitution are too well known to need summarising.

4. *Bonython and Ors.* v. *Commonwealth of Australia (1951) A.C. 201; 81 C.L.R. 486.* The Board upheld the majority decision of the High Court upon a case stated by Latham, C.J. in an action brought in the High Court. The decision turned on the true construction of certain Queensland Government debentures issued in 1895 and it was held that it was impossible to infer from the mere use of the phrase "pound sterling" in the debentures that the currency of England rather than that of Queensland was intended. The substance of the obligation created by the debentures must be determined by the proper law of the contract, namely, the system of law by reference to which the contract was made or that with which the transaction had its closest and most real connection. This was held to be the law of Queensland.

5. *McDonnell* v. *Neil (1951) A.C. 342; 82 C.L.R. 275.* Sugerman, J. in the Supreme Court of New South Wales had held (in line with an earlier ruling of Nicholas, J. of that court) that a testamentary gift of residue in remainder had been intended as a gift to the issue of the testator's two daughters *per capita* in equal shares. On appeal the High Court of Australia by majority (Dixon, and Williams, JJ., Latham, C.J. dissenting) had reversed this ruling being of the view that the gift of residue was a gift *per stirpes* with the result that the issue of one daughter took one moiety and the issue of the other took the other moiety in equal shares. The Privy Council agreed with the majority judgment which they thought correctly interpreted the will apart from the invocation of authority or of any artificial rule of construction. In so far as cases upon the construction of other wills could assist, their Lordships considered that a long line of authority supported the view based upon the actual language of the will, and distinguished (as Dixon, J. had done in his judgment in the High Court) an earlier High Court decision.[15]

6. *Commissioner of Stamp Duties of New South Wales* v. *Way (1952) A.C. 95; 83 C.L.R. 570.* The Commissioner appealed against the unanimous decision of the High Court reversing the unanimous decision of the Supreme Court of New South Wales (though the judges of that Court had not agreed on the grounds). The judgment of a Board consisting of three[16] Law Lords was delivered by Lord Radcliffe. Their Lordships affirmed the judgment of the High Court and held first that a clause which required the settlor's direction and approval during his lifetime to the manner of administering the trust (for charitable purposes) he being one of the trustees, created one trust only and did not have the effect of bringing into existence a new trust on the death of the settlor to be operated by the surviving trustees. It therefore did not attract duty under s. 102(2)(a) of the Stamp Duties Act, 1920 (N.S.W.). Secondly, they held that a provision empowering the settlor to direct that the trust funds should be applied for the purpose of acquiring property from him at less than valuation was not a reservation of a benefit or interest or a right to retain or restore the trust property to himself within s. 102(2)(c) or (d). The Board in effect adopted the views of the High Court that the settlor's power of direction was fiduciary merely, and in any event was not a benefit in the sense of giving him any hold over the trust funds. The judgment really turned on the meaning and effect of the particular settlement provisions.

[15] *Sumpton* v. *Downing* (1947) 75 C.L.R. 76.

[16] See *infra* p. 479.

7. *Oakes* v. *Commissioner of Stamp Duties of New South Wales (1954) A.C. 57; 89 C.L.R. 37.* The appellant unsuccessfully appealed to the Board against an assessment of death duty under s. 102(2)(d) of the Stamp Duties Act, 1920 (N.S.W.) which provided that for the purposes of death duty the estate of a deceased person should be deemed to include "property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died". The testator had executed a settlement of a grazing property upon himself and his four children in equal shares. The settlement entitled him to remuneration notwithstanding the fact that he was a trustee. The Judicial Committee upheld the majority judgment of the High Court which had affirmed the Supreme Court of New South Wales in sustaining the assessment. The Board in its judgment took occasion to discuss the true meaning and implications of the subsection in question particularly in the light of English authority upon a corresponding section, and dismissed the appeal on the basis only that the remuneration received by the settlor was an advantage or benefit to the deceased which, if he had not taken it, would have gone to the donee under the terms of the gift. The present case was regarded as one where the donor took a benefit out of that which was given as distinct from those cases where a donor reserves to himself a beneficial interest in property and only gives to the donees such beneficial interests as remain after his own reserved interest has been satisfied. The Board did not accede to submissions on behalf of the Commissioner that there were several other advantages to the settlor under the provisions of the settlement which were benefits within the meaning of the section holding that it had not been shown (as was necessary) that such advantages impaired or diminished in the hands of the donees the value or the enjoyment of their gifts.

8. *Commissioner of Stamp Duties of New South Wales* v. *Pearse (1954) A.C. 91; 89 C.L.R. 51.* This case dealt with two questions —one arising on an appeal by the Commissioner and the other on a cross-appeal. As to the first their Lordships affirmed the unanimous decision of the High Court (upholding that of the Supreme Court) that upon the true construction of the Stamp Duties Act, 1920 (N.S.W.) the Supreme Court on appeal by way of Case Stated under s. 124 had an unfettered power of review of the Commissioner's mode of valuation of shares as well as of the actual value adopted by him. Upon the cross-appeal their Lordships agreed with the majority of the High Court in the view that legal costs which a solicitor trustee was authorised to charge by a provision in a will conferred a gift upon the solicitor, enabling him to take out of the testator's assets something which the law would not otherwise allow and so was properly assessed as such. As to this their Lordships followed a line of English cases and were not prepared to accept the explanation of those cases by which the minority in the High Court had distinguished them.

9. *Pye* v. *Minister for Lands (1954) 90 C.L.R. 635.* This case involved the true construction of certain provisions of the Closer Settlement (Amendment) Act, 1907 (N.S.W.) (as amended). The Judicial Committee held that where the Minister informs an advisory board under the Act that his intention is to resume land for closer settlement on behalf of ex-servicemen that

body must make the valuation on the basis of the prices which prevailed on the 10th February, 1942, and before issuing its report must give the owner the opportunity of electing whether he will accept or refuse the figure determined. It also held that an owner having proceeded to appeal to the Land and Valuation Court could not successfully contend that the right of election was still open for him to exercise. The judgment affirmed the decision of Sugerman, J. (which had been reversed by the Full Court of the Supreme Court of New South Wales) and the unanimous decision of the High Court, though it did not wholly adopt the grounds of the decisions so affirmed. Their Lordships approached the interpretation of the statute having in mind, *inter alia*, the statement of Lord Dunedin in *Murray* v. *Inland Revenue Commissioners*[17]: "It is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a judge to declare a statute unworkable". After careful analysis they were not prepared to give effect to the contention that the relevant provisions were unworkable and that the value of the land to be resumed could not be asssed until after the resumption was accomplished and must therefore be the value as at date of resumption.

10. *Lang* v. *Lang (1955) A.C. 402; 90 C.L.R. 529.* The Board upheld the unanimous judgment of three Justices of the High Court which had affirmed a judgment of the Supreme Court of Victoria (Lowe, J.). The point of the case concerned the required nature of proof of the intention to bring the matrimonial union to an end which is an element of constructive desertion.

It was held that where a husband's conduct is such that he must and does know that in all human probability it will result in the departure of the wife from the home, this is sufficient proof of an intention on his part to disrupt the home notwithstanding that he may hope and desire that she will not leave. The judgment contains a careful review of a number of High Court and English cases in which the question had been considered and discusses the various contending views ranging from an entirely objective approach which had been adopted in some of the High Court cases to an entirely subjective approach adopted in some of the English authorities. Though there had been a considerable divergence of view in the cases, the ultimate decision of the Board in effect disapproves the High Court cases last mentioned and substantially establishes the subjective approach while at the same time distinguishing between intention on the one hand (involving an element of volition) and a contrary desire or hope on the other.

11. *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd. and Ors. (1955) A.C. 457; 92 C.L.R. 113.* The Privy Council considered as of first rate importance the question raised by this appeal, namely, whether an action *per quod servitium amisit* lies at the suit of the Government of New South Wales for the loss of the services, by reason of the tortious act of a wrongdoer, of a police constable appointed under the Police Regulation Act. The Board answering the question in the negative upheld the majority decision of the High Court after a careful consideration of the fundamental character of the office of constable, the origin and development of the type of action in question and some recent cases which on their face appeared to support the cause of action. Disapproving of such cases and distinguishing a Canadian and an American case the Judicial Committee held that there was a fundamental difference between the domestic relation of servant and master upon which this type of action rests and that of the holder of a public office, e.g. a constable

[17] (1918) A.C. 541.

and the State which he is said to serve. Their Lordships approved the High Court's decision in the earlier case of *The Commonwealth* v. *Quince*[18] and agreed with the judges of the High Court that the case of a constable was not in principle distinguishable from that of a soldier with which *Quince's Case* dealt. They expressed the opinion that this form of action should not be extended beyond the limits to which it has been carried by authority long recognised as stating the law.

12. *Australian Woollen Mills Pty. Ltd.* v. *The Commonwealth (1955) 93 C.L.R. 546.* The Company made claims upon the Commonwealth totalling approximately £176,000, based upon the subsidy scheme introduced in favour of woollen goods manufactured for the home market after the reintroduction of post-war wool auctions. The Judicial Committee affirmed the unanimous decision of the High Court, dismissing the company's action. The main issue was whether or not the subsidies were payable to the company under a series of binding contracts as alleged by it. Their Lordships examined the correspondence, on the true construction of which the question turned, and concluded that the letters could not be read as offers to contract but contained statements of policy and other indications that the basis of the arrangement was administrative not contractual. Their Lordships thought that there was force in counsel's criticism of the passage in the judgment of the High Court in which it was said that there was nothing in the nature of an implied request or invitation to manufacturers to purchase wool so that there could be woollen goods on the home market. But they did not think that such an implied request established a contract. Another issue in the action concerned a claim to repayment of a sum of approximately £67,000 which the company had refunded at the demand of the Commonwealth but claimed to have been wrongfully so demanded. Their Lordships considered this matter on its merits and in the light of the events which had happened between the company and the Commonwealth in implementing the scheme. They held that the Commonwealth was entitled to the refund at the same time indicating that in any event the company "might well have failed to surmount the obstacles which the law places in the path of those who seek to recover back money paid."

APPEALS BY SPECIAL LEAVE DISMISSED

The following appeals by special leave from the High Court were dismissed:

13. *Perpetual Trustee Company (Limited)* v. *Pacific Coal Company Limited (1956) A.C. 165; 93 C.L.R. 479.* A mining lease made in 1919 provided for a fixed rental and for a royalty per ton of coal won. Questions arose as to the effect upon this lease of the National Security (Prices) Regulations, of a Prices Regulation Order thereunder and of the Landlord and Tenant (Amendment) Act, 1932 (N.S.W.). The Board upheld the decision of the High Court which had allowed the appeal of the coal company from part of a majority judgment of the Full Court of New South Wales. Their Lordships, having regard to the wording of the Regulations as a whole and their object as revealed by that wording, held that the rights of the coal company were "rights or privileges for which remuneration is payable in the form of royalty" even although part of the total remuneration was payable in the form of a fixed rent. It was also held that the power under the Regulations to fix and declare the maximum rate "at which any declared services may be supplied" applied to a mining lease, as the Regulations contemplated the lessor under such a lease as providing a supply of mining rights throughout the term of the lease as and when the

[18] (1937) 68 C.L.R. 227.

lessee exercised these rights. It followed that the Prices Commissioner had power to fix the maximum rates per ton of coal payable by the lessee under the mining lease. The last question for decision was the true construction of the words of the Prices Regulation Order "the amount per ton of coal mined payable on the 31st August, 1939" and their Lordships decided that the date refers to the mining of coal and not to the payment of royalty. The Landlord and Tenant (Amendment) Act, 1932 (N.S.W.) operated to reduce the tenant's liability as to the amount per ton payable in 1939 by 22½%.

14. *Commissioner for Motor Transport* v. *Antill Ranger & Co. Pty. Ltd. (1956) A.C. 527; 93 C.L.R. 83.* The State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954 (N.S.W.), purported in substance to validate and prevent recovery of mileage charges which according to the effect of the decision in *Hughes and Vale Pty. Ltd.* v. *State of New South Wales* (Case 7, *supra*) had been unlawfully imposed and collected. The question was whether the statutory immunity so accorded to acts which had been held illegal was not as offensive to s. 92 of the Constitution as the illegal acts themselves. The Board regarded the question as one of novelty and importance but agreed with the High Court in holding the act invalid having no doubt that the conclusions reached in the unanimous decision of that Court were right and the reasons (with which their Lordships fully agreed) unimpeachable. The view was expressed that the denial of the right to recover exactions rendered unlawful by s. 92 was once more subjecting an inter-State trader to the same exactions and in letter and in spirit similarly infringed s. 92. The truism that s. 92 protects the subject only from legislation which takes as its criterion of operation an act of trade or commerce or an essential attribute of trade or commerce is (said their Lordships) "a proposition couched in necessarily vague and general terms. To exclude from its scope an enactment whose only object is to validate an exaction which the section renders unlawful would, in their Lordships' opinion, be a mockery of the spirit of the Constitution".

15. *O'Sullivan* v. *Noarlunga Meat Ltd. (1957) A.C. 1; 95 C.L.R. 177.* The High Court had (by majority) held that a section of the Metropolitan and Export Abattoirs Act, 1936-56 (S.A.) (s. 52(a)) requiring premises used for slaughtering stock for export to be licensed was inconsistent with the Commonwealth Commerce (Meat Export) Regulations and had also held that such regulations were within constitutional power. Before the Judicial Committee the appellant raised two issues — first was there an inconsistency, second were the regulations *intra vires* the Customs Act 1901-1954 (Cwlth.)? Their Lordships overruled a preliminary objection that these issues constituted *inter se* questions, agreeing fully with the view which had consistently been taken by the High Court that a question of inconsistency under s. 109 of the Constitution is one not between powers but between laws made under powers and dissenting from a submission that certain cases which had previously come before the Board demanded a fresh approach to the matter. "It is the extent of the power that must be in debate in order to raise an *inter se* question", said their Lordships. As to the issue of inconsistency the Board held (the meaning of s. 109 as long settled in the High Court being accepted by the parties) that the impugned section was a special condition confined to the use of premises for slaughtering for export. As such it was in the precise field which the regulations intended exhaustively to cover and being inconsistent therewith was accordingly invalid. As to the second issue their Lordships (agreeing with Fullagar, J.) held that the regulations were within the regulation-making power conferred by the relevant section of the Customs

Act, the power under that section to prescribe "conditions of preparation or manufacture for export" covering the ouster of the condition imposed by s. 52(a).

16. *Charles Marshall Pty. Ltd.* v. *Collins (1957) 2 W.L.R. 600; 95, C.L.R. 353.* In this case the Board affirmed the unanimous judgment of the High Court holding that there was no inconsistency between the Commonwealth Metal Trades Award 1952 (part of the law of the Commonwealth for the purposes of s. 109 of the Constitution) and the Factories and Shops (Long Service Leave) Act, 1953 (Vic.) which was therefore valid. The Act imposed upon employers the obligation to grant their employees thirteen weeks' long service leave with pay after twenty years of continuous service and in certain cases leave *pro rata* for shorter periods of service. The Board, which in this instance was constituted by four Lords of Appeal in Ordinary, had regard to certain sections of the Conciliation and Arbitration Act, 1904-52 (Cwlth.) which made reference to long service leave and the fact that the award made no reference to nor purported to deal with it, the question plainly not having been raised in the logs setting out the disputes which led to the award. Their Lordships agreed with the High Court that long service leave being a separate item in industrial relations was an entirely distinct subject-matter from those regulated by the award, and were of opinion that there were no grounds in principle or authority for construing the award as covering the field of long service leave. Nor did their Lordships agree with submissions that there was an actual conflict between certain specific provisions of the award and of the Act. The two documents were dealing with separate and distinct matters and apparent inconsistencies disappeared when the words were construed in the limited context of the respective documents.

17. *Attorney-General for Australia* v. *The Queen and the Boilermakers' Society of Australia and Ors. (1957) 2 W.L.R. 607; 95 C.L.R. 529.* The fact that this appeal was heard by a Board of seven Lords of Appeal including the Lord Chancellor shows that it was considered to raise constitutional questions of great importance. The Board affirmed the judgment of the High Court which by a majority of four Justices to three (Dixon, C.J., McTiernan, Fullagar, and Kitto, JJ., Williams, Webb, and Taylor, JJ. dissenting) had held that it was unconstitutional to combine judicial and non-judicial power in one tribunal. The first part of the judgment after mentioning the fact that the Commonwealth Court of Concilliation and Arbitration had adjudged the Union guilty of contempt of the Court for disobeying its order, fining it £500 and directing that it pay costs, reviewed the relevant provisions of the Conciliation and Arbitration Act to see what part the Court played in the system established thereby. The clear conclusion was reached that there had been vested in the Court powers, functions, and authorities of an administrative, arbitral and executive character as well as judicial power even to the extent of fining a citizen and depriving him of his liberty. It was apparent that the Court was established in substance for the purpose of the settlement of industrial disputes and that the functions of a body so established are not judicial notwithstanding that it may be called a court or a superior court or record — the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order. The judgment then proceeded to examine the Constitution and its Chapters dealing with the Parliament, the Executive Government and the Judicature and the view is stated that in the absence of any contrary provision the principle of the

separation of powers is embodied in the Constitution. The provisions of Chapter III "The Judicature" negatived the possibility of vesting judicial power in courts other than those prescribed thereby or extending the jurisdiction of such courts beyond the limits thereby prescribed, and it is to Chapter III alone that the Parliament must have recourse if it wishes to legislate in regard to the judicial power (though the incidental power s.51 (xxxix) is an exception).

The Board did not doubt that the High Court's decision was right or that there was nothing in Chapter III (to which alone recourse could be had) which justified the union in one court or body of judicial and non-judicial functions. Their Lordships thought it right to make an independent approach to what they regarded as a short, if not a simple question of construction of the Constitution, but indicated that the exhaustive examination of the problem and the review of the relevant authorities which were to be found in the majority judgment of the High Court had been of the greatest assistance to them and appeared to lead inevitably to the conclusion which they and the High Court had reached. Their Lordships did not dissent from the view that the doctrine of separation powers should be applied with "great circumspection" but recalled how often it had been stated in the High Court that the Constitution was based upon the separation of the functions of government, at the same time stating that first and last the question is one of construction. They were inclined to concede that the doctrine has not always been closely observed as to the separation of legislative and executive powers as distinct from separation of executive and judicial powers and did not intend to cast any doubt upon the line of authorities in the High Court where the union of legislative and executive power has been considered. Specific consideration was given to the dissenting judgments of Williams, J. and Taylor, J. The view was expressed that there was no room for reading into the Constitution by implication power to conjoin other functions with judicial functions provided they were not "inconsistent"; and their Lordships did not agree with the view (of Taylor, J.) that the arbitral functions of the Court did not bear the indelible imprint of legislative or executive character but that, on the contrary, both in their nature and their exercise presented a number of features characteristic of judicial functions and that accordingly such functions could be placed in combination in the absence of express or implied provisions of the Constitution to the contrary.

The fact that the validity of the impugned provisions had been assumed without question for a quarter of a century and in a series of cases, though it had been a matter of concern to the High Court, could not be allowed to stand in the way of an invalidity which to their Lordships, as to the majority of the High Court, had been convincingly demonstrated. An objection that the appeal raised an *inter se* question was overruled as it could not be said that State powers were in any real sense affected by a decision that a federal power which might have been lawfully exercised in one way has been unlawfully exercised in another way.

18. *Martin* v. *Scribal Pty. Ltd. (1956) 95 C.L.R. 213.* The Board upheld the dismissal of a suit for infringement of a patent in respect of a ball-point pen though on somewhat different grounds from those relied upon by Sholl, J. of the Supreme Court of Victoria and by the High Court on appeal. The defendants did not before the Board deny that the patent had been in fact infringed by them. Their Lordships held (a) (agreeing with the High Court) that there was in fact disconformity between the original specification lodged with the application and the accepted (amended) specification; (b) that the

grant of a patent for an invention different from the invention described and claimed in the completed specification lodged with the application for a patent is not permitted by the terms of the Patents Act 1903-50 (Cwlth.) (now repealed); (c) that disconformity of the kind in question was a ground on which a patent might at common law be repealed by *scire facias* and was accordingly available as a ground of revocation under s. 86(3) of the Act; and (d) that the acceptance by the Commissioner of Patents of the amended specification did not preclude the validity of the patent being challenged on the ground of disconformity which fell within the words "any other lawful ground of objection" used in s. 46 of the Patents Act. Though it was unnecessary to consider whether the patent was invalid for ambiguity their Lordships saw no reason to disagree with the view of the High Court that this defence had not been made out. They felt bound to observe, however, that they could not agree with the view expressed by the High Court that the plaintiff made a false statement in his application amounting to representation that he was at the date of his application in possession of the invention for which a patent was ultimately granted, this having been the ground on which the suit was dismissed by the High Court.

CASES FROM STATE SUPREME COURTS

Of the six reported appeals direct from the Supreme Courts of New South Wales, Victoria and Western Australia, two were upheld and four were dismissed, though in one of them a cross-appeal was allowed. The appeals were upheld in the cases of *Slazengers (Australia) Pty. Limited* v. *Burnett*[19] and *Bank of New South Wales* v. *Laing*.[20] In *Slazengers' Case* the Board constituted by Lord Simonds, Lord Normand, Lord Morton, Lord MacDermott and Lord Reid in a judgment delivered by Lord Simonds held, displacing the reasoning of both the New South Wales Supreme Court and the High Court in an earlier case,[21] that a worker did not "receive injury" on his daily journey between his place of abode and place of employment unless it were such an injury as would entitle him to compensation if received in the course of his employment. If the injury were a disease "received" during the journey and if it were a disease to which the employment including the journey was a contributing factor then the worker would have been entitled to compensation. The Board regarded the case as raising a question of difficulty and importance as to the meaning and effect of the relevant section of the Workers' Compensation Act, 1916 (N.S.W.).

Laing's Case (supra) in which the Judicial Committee overruled the judgment of the Supreme Court of New South Wales really involved a technical point under the common law system of pleading in New South Wales. The Board constituted by Lord Porter, Lord Reid, Lord Tucker, Lord Asquith and Lord Cohen in a judgment delivered by Lord Asquith considered the issue raised by a plea of never indebted to a common *indebitatus* count for money lent, and in particular the question whether the plea put the plaintiff to the proof of the performance of conditions precedent to the present payability of the debt. Their Lordships answered this question in the affirmative and held that in a customer and banker case one condition precedent is the existence in the customer's account of funds sufficient to meet the demand. In the instant case this had not been shown by the plaintiff.

The four cases in which the appeals direct from Supreme Court decisions

[19] (1951) A.C. 13. [20] (1954) A.C. 135.
[21] *Peart* v. *Hume* . . . (1948) 75 C.L.R. 242.

were dismissed were (1) *The Minister for Public Works* v. *Thistlethwayte*;[22] (2) *James Patrick & Co.* v. *Sharpe*;[23] (3) *Johnson* v. *Commissioner of Stamp Duties*;[24] and (4) *Midland Railway Co. of W.A.* v. *W.A.*[25] In *Thistlethwayte's Case* the Board affirmed a judgment of the Supreme Court of New South Wales which had followed and applied the High Court's decision in *The Commonwealth of Australia* v. *Arklay*.[26] The Board upholding the correctness of the principle approved in *Arklay's Case* held that the proper measure of compensation on resumption of land temporarily subject to price control was not the price which would have been officially approved but the price which willing vendor and purchaser would have agreed upon (apart from control) having in mind that the control being temporary might reasonably be expected to terminate before long. Their Lordships also dealt with the admissibility of certain evidence in a manner consistent with this principle.

Patrick v. *Sharpe* decided that certain amendments which had been made to the Workers' Compensation Act 1928 (Vic.) particularly in definitions of "disease" and "injury" made it no longer necessary for a claimant to prove that the sudden fatal physiological change constituted by an auricular fibrillation was associated with any external event or action of the deceased. Their Lordships briefly reviewed the law as it was prior to the amendments, distinguished certain earlier Australian cases, and affirmed the correctness of an earlier Victorian Supreme Court decision upon the present question, agreeing with the Court's decision in that and the instant case.

Both the appeal and a cross-appeal were dismissed in *Johnson* v. *Commissioner of Stamp Duties* (1956) A.C. 331. The appeal raised the question of the territorial competence of the New South Wales Legislature to impose an estate duty on cesser of interest upon death (Stamp Duties Act, 1920-1952 (N.S.W.), s. 102(2)(g)) and the counter-appeal raised a similar question *qua* the imposition of such duty on personal property outside New South Wales if the deceased was a person domiciled in New South Wales. As to the first question the Judicial Committee agreed with the Supreme Court's view that s. 102(2)(g) on its true construction was confined to property within New South Wales at date of death and that so construed it had sufficient relevant territorial connection with New South Wales to withstand the challenge of invalidity. Their Lordships stated that the presence of property within a State's jurisdiction has always been regarded as a cogent reason for recognising the right and power to tax that property, and did not accept an argument that the legislation was contrary to the comity of nations. As to the other question it was decided that the domicile of a deceased person within New South Wales at date of death was a quite insufficient ground by itself to make good the lack of any other connection with the State and that there were no other sufficient features of the legislation to validate a tax upon extraterritorial personalty. Nor was s. 144 (a severance provision) effective to validate such a tax to the extent that it could apply to situations which might contain territorial elements additional to domicile of the deceased as it was not legitimate to use s. 144 "to introduce into the subsection to eke out its deficiencies, factors which are not already there".

The Board in the *Midland Railway Case* dismissed an appeal from portion of the judgment of the Supreme Court of Western Australia (Dwyer, C.J.) but allowed a cross-appeal by the Government of Western Australia against another portion thereof. By a contract entered into in 1886 between W. and

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[22] (1954) A.C. 475. [23] (1955) A.C. 1.
[24] (1956) A.C. 331. [25] (1956) 30 *A.L.J.* 266. [26] (1953) 87 C.L.R. 159.

the Western Australian Government it was provided, *inter alia*, that the Government would grant in fee simple to W. "by Crown grants in the form prescribed by the Land Regulations of the Colony" 12,000 acres of land for every mile of the 250 miles of railway which W. was to build under the contract. At the time the form of grant under the current Land Regulations reserved only gold, silver and other precious metals. Section 9 of the Petroleum Act, 1936 (W. Aust.) provided in effect that notwithstanding anything to the contrary contained in any grant all petroleum on or below land should be deemed always to have been the property of the Crown and that Crown grants issued after that Act should contain a reservation of petroleum. The judgment of the Board constituted by Lords Oaksey, Radcliffe, Tucker and Cohen was delivered by Lord Cohen and was based upon the view arrived at by their Lordships as to the true construction of the contract reading it as a whole and having regard to certain specific provisions thereof. Their Lordships were satisfied that it imposed upon the Crown no more than an obligation to grant a fee simple of the land in whatever might be the form current at the date when any particular grant was called for by the terms of the contract without the addition of a further obligation to ensure that the legislature would not at any time during the currency of the contract alter the prescribed form of grant. Thus the Act applied consistently with the contract to land granted thereunder after the date of the Act. Their Lordships found it unnecessary to pronounce upon submissions regarding the true meaning of s. 4(2) of the Constitution Act, 1890 (W. Aust.) *qua* the operation of the Petroleum Act because the contract upon the construction which they placed upon it exposed the contractor to the risk of such Acts as the Petroleum Act and accordingly he could not be heard to complain if the risk materialised. Hence the Act also applied to land granted under the contract before its date.

CLASSIFICATION OF CASES

The 33 cases may be grouped, with indication of result and subject-matter, and according to type in the following table:

REVENUE CASES (7).

Perpetual Executors v. *Commissioner*. Appeal Allowed. Estate duty. Meaning and application of s. 8(3)(b) and s. 8(4)(e) of the Commonwealth Estate Duty Assessment Act.

Squatting Investment Case. Appeal Allowed. Nature of payments under the Wool Realisation (Distribution of Profits Act, 1948-55 (Cwlth.), and the capacity in which received as relevant to principles of income tax law.

Producers' Co-operative Distributing Society Ltd. v. *Commissioner*. Appeal Dismissed. Income Tax. Meaning and application of conditional exemption of a rural society under Income Tax Management Act, 1941, (N.S.W.).

Way's Case. Appeal Dismissed. New South Wales Death Duty. Meaning and application of s. 102(2)(a) and s. 102(2)(c) and (d) of the Stamp Duties Act, 1920 (N.S.W.)

Oakes' Case. Appeal Dismissed. New South Wales Death Duty. Meaning and application of s. 102(2)(d) of the Stamp Duties Act, 1920 (N.S.W.)

Pearse's Case. Appeal Dismissed. New South Wales Death Duty. Construction of s. 124 of the Stamp Duties Act, 1920 (N.S.W.) as relevant to the Supreme Court's powers of review and question whether authority in a will authorising a solicitor trustee to make charges constitutes a gift.

Commissioner of Stamp Duties v. *Permanent Trustee Co. Ltd. (Davies' Case)*. Appeal Allowed. Estate Duty. Application of s. 102(2)(d) of Stamp Duties Act, 1920 (N.S.W.).

CONSTRUCTION OF OTHER STATUTES (10 Cases).

Maslen's Case. Appeal Allowed. Construction of certain provisions of Wool Realisation (Distribution of Profits) Act 1948-55 (Cwlth.).

Bartlam's Case. Appeal Dismissed. Meaning of the word "income" in s. 17 of the Trustee Companies Act 1928 (Vic.).

Slazengers' Case. Appeal Allowed. Meaning of the phrase "receive injury on his daily journey" in Workers' Compensation Act, 1916 (N.S.W.).

Pye's Case. Appeal Dismissed. Meaning of provisions of Closer Settlement (Amendment) Act, 1907 (N.S.W.) as to relevant date of valuation.

Thistlethwayte's Case. Appeal Dismissed. Meaning and application of provisions of Public Works Act, 1912 (N.S.W.) as to basis of valuation for resumption of land subject to price control.

Patrick's Case. Appeal Dismissed. Meaning of provisions of Workers' Compensation Act, 1916 (Vic).

Perpetual Trustee Co. Ltd. v. *Pacific Coal Co. Pty. Ltd.* Appeal Dismissed. Construction of National Security Prices Regulations and a Prices Regulation Order thereunder.

O'Sullivan v. *Noarlunga Meat Ltd.* Appeal Dismissed. Construction of Commonwealth (Meat Export) Regulations as relevant to the question whether they were intended to cover the field and whether the impugned provision fell within that field; construction of regulation-making power conferred by Customs Act; (also decided that a question of inconsistency under s. 109 of the Constitution is not an *inter se* question).

Charles Marshall Pty. Ltd. v. *Collins.* Appeal Dismissed. Construction of Commonwealth Metal Trades Award 1952 as relevant to the question whether it was intended to cover the field of long service leave.

Martin v. *Scribal Pty. Ltd.* Appeal Dismissed. Construction of sections of Patents Act (Cwlth.) (also question of repeal of patent at common law).

CONSTITUTIONAL CASES (5).

Hughes and Vale Case. Appeal Allowed. Scope of s. 92 of the Constitution *qua* licensing interstate hauliers.

The Bank Case. Appeal Dismissed. Scope of s. 92 of the Constitution *qua* nationalising of private banks.

Commissioner for Motor Transport v. *Antill Ranger & Co.* Appeal Dismissed. Scope of s. 92 of the Constitution *qua* invalidating a statute purporting to grant immunity for acts infringing that section.

A.-G. for Australia v. *The Queen and the Boilermakers' Society of Australia.* Appeal Dismissed. Constitutionality of combining judicial and non-judicial power in one tribunal.

Johnson v. *Commissioner of Stamp Duties.* Appeal Dismissed. Territorial competence of State Legislature to tax in certain circumstances property within and without the State. (Also construction of s. 102(2)(g) of Stamp Duties Act, 1920 (N.S.W.)).

CONSTRUCTION OF COMMERCIAL DOCUMENTS (4 Cases).

National Bank of Australasia. Appeal Allowed. Construction of bank stock certificates *qua* currency in which redeemable.

Bonython's Case. Appeal Dismissed. Construction of Queensland Government debentures *qua* currency intended.

Reardon Smith Line Ltd. v. *Australian Wheat Board.* Appeal Allowed. Construction of a Charter Party.

Midland Railway Co. v. *W.A.* Appeal Dismissed (Cross Appeal Allowed). Construction of contract with W.A. Government *qua* reservation in Crown grants of petroleum.

CONSTRUCTION OF WILLS (1 Case).

McDonnell v. *Neil.* Appeal Dismissed. Construction of gift in remainder whether *per capita* or *per stirpes.*

GENERAL (5 Cases).

Hocking v. *Bell.* Appeal Allowed. Question whether jury's verdict against a surgeon such as no reasonable jury could find.

Leeder v. *Ellis.* Appeal Allowed. Scope of principles applicable as to reception of fresh evidence by an appellate court on an application for re-trial. Application under Testator's Family Maintenance and Guardianship of Infants Act, 1916 (N.S.W.).

Lang v. *Lang.* Appeal Dismissed. Nature of proof of intent required for constructive desertion.

A.-G. for N.S.W. v. *Perpetual Trustee Co. Ltd.* Appeal Dismissed. Crown's action against tortfeasor for loss of service of injured police constable.

Laing's Case. Appeal Allowed. Issues raised by a plea of never indebted to an *indebitatus* count for money lent.

Australian Woollen Mills Pty. Ltd. v. *The Commonwealth.* Appeal Dismissed. Question whether correspondence regarding government subsidies for wool by manufacturers created a series of contracts.

In most of the cases in which appeals were allowed there had been dissenting judgments or differing judicial opinions in the courts below. Thus in

seven of the nine decisions of the High Court set aside the judgment had been that of a majority.

A substantial number of the cases were brought before the Privy Council for the purpose of securing a review of earlier authorities or groups of authorities. But except in three constitutional cases, few questions of great or fundamental importance arose. The *Hughes and Vale Case* finally settled a major constitutional question as to interstate transport which had been extremely controversial over a long period. The question was settled in the way in which a minority of the judges of the High Court including the present Chief Justice had long considered proper. The elaborate *dicta* in the *Bank Case* must surely be among the most authoritative *obiter* pronouncements ever made. They have not met with universal approbation from legal writers[27] but nevertheless have had and will have a profound effect on Australian constitutional evolution. Of outstanding importance was *A.-G. for Australia* v. *The Queen and the Boilermakers' Society of Australia* confirming as it did a majority decision of the High Court running counter to previously received constitutional interpretation as to the conferring of judicial power, and touching the wider doctrine of the separation of powers. Nor were there many instances in which it was necessary to examine and pronounce upon specific doctrines of common law or equity. *Hocking* v. *Bell* had given rise to a good deal of disputation and the Board's decision reversing the majority judgments of the Supreme Court and the High Court has been regarded as a solid blow in the cause of the weight and finality to be attached to the verdicts of juries.[28] A considerable number of federal and State statutory provisions (fiscal and otherwise) were authoritatively construed, and some of these decisions were of far-reaching effect. Socially noteworthy was the upholding of the validity of long service leave legislation in *Charles Marshall Pty. Ltd.* v. *Collins*.

The Board on all occasions consisted of at least five Lords of Appeal in Ordinary except in *Way's Case*, in which four Law Lords sat but Lord Simonds withdrew on his appointment as Lord Chancellor, and in *Midland Railway Company's Case* in which four Law Lords sat. In no case did any Privy Councillor holding high judicial office elsewhere in the British Commonwealth sit.[29]

[27] See, for example, (1956) 1 *Public Law* 198.
[28] See *Jones* v. *Green* (1956) 73 W.N. (N.S.W.) 628, at 629.
[29] See the short debate in the House of Commons, 29th June, 1956, 555 *H.C.D.* col. 131.