

Seventh Day.
26 April 1907.

IMPERIAL COURT
OF APPEAL.
(Mr. Deakin.)

upon the appeal with relation to income tax sought to be levied by the States of Australia upon officers of the Federal Government, yet I cannot complete what I have to say in this connection without calling attention to a situation that may possibly arise in connection with that case which is not an unexpected situation, since it was clearly foreseen by the leading statesmen who took part in the debates upon the Commonwealth Bill at the time it was passing through your Parliament. As you, my Lord, are well aware—and probably our colleagues have some recollection of it—the proposal ultimately placed in our constitution limited appeal to the Privy Council, and conferred upon the High Court of Australia what we believed to be and intended to be final jurisdiction in matters relating to the interpretation of our own constitution. But, owing partly to differences of opinion between ourselves as delegates, the majority of the British Parliament, led by the Government of the day, introduced amendments in that constitution which left us in a position of some uncertainty. I do not wish to detain the Conference more than to refer very briefly to the fact that Mr. Haldane, at page 67 of this report of the Debates, was, I think, one of the very first to call attention to a remarkable situation that might possibly arise in the future. I think it may very reasonably be expected to arise either in connection with this case to which I have referred, or to any decision which follows the principles it lays down. Mr. Haldane pointed out that “the clause provides that if you have litigation in a State upon a constitutional question, you may appeal either to the Privy Council or to the High Court. If you appeal to the High Court, the decision is to be final unless the High Court gives you leave to appeal to the Privy Council. It is, in other words, a court of final jurisdiction upon this matter.” Then, he continues, “As the clause makes the High Court of Australia a court of final jurisdiction, there may well be conflicting decisions between the High Court and the Privy Council. I do not think that is an academic matter.” The Attorney-General of the day, Sir Robert Finlay, admitting the apparent conflict, maintained that under such circumstances the High Court would necessarily as of courtesy, and from a sense of subordination, accept the ruling of the Judicial Committee; but members on his own side were doubtful, and those on the other side of the House, and an authority as eminent in such matters—that is, matters relating to a federal constitution—as Mr. Bryce, the present Ambassador to the United States, repeated the warning that the constitution as amended left these two tribunals in danger of conflict. He said—when replying to the Attorney-General—“He suggested that under the Amendment the Committee is now discussing the High Court of the Commonwealth of Australia will not be a court of co-ordinate jurisdiction with the Privy Council, and that it will be bound to follow the decisions of the Privy Council. I cannot feel by any means so clear as my right hon. and learned friend on that point, because we are here making a special provision for a special case.” He said again: “Surely it will not only be within the power of, but also the duty and the right of the High Court to give full effect to that provision of the Australian constitution, and to say, ‘We are in this particular matter made a final court of appeal. In all other matters we are undoubtedly a subordinate court, unless in a particular matter we are made a court of co-ordinate jurisdiction.’ They would say: ‘The only appeal is to lie from us, where we are satisfied there is some special reason; we are bound to carry out the intention of the people of Australia and of the Imperial Parliament in not going beyond the express provision; they have given no appeal unless special reasons, in our opinion, exist.’ I think, therefore, that it will be open to the High Court in future to hold that in this matter they are a court,