

“Without the Supreme Court it is not likely that the
Federal Union could have been held together.”

“Civil Government in the United States,”

by JOHN FISKE.

THE AUSTRALIAN COMMONWEALTH BILL.

*In the literary supplement to the London "Spectator" of
December 2, 1899, there appeared the following short
notice:—*

"Advanced Australia." By W. J. Galloway, M.P. (Methuen and Co., 3/6).—As Mr. Galloway himself informs us, this little book is mainly composed of the journalistic jottings of a Manchester "M.P.," which have already appeared in the columns of a provincial newspaper. They are neither better nor worse than the average of such things, though it must be admitted that the writer is much more "up-to-date" than most of his rival antipodean tourists and chroniclers. Also, as befits an Imperial legislator, he is more political, and has evidently drawn his information largely from the leading politicians of the various colonies through which he pleasantly passed. Two generalisations Mr. Galloway makes which may give rise to dispute in Australia, but which are worth noting as the impressions of an intelligent British tourist. The one is, that Sydney, and not Melbourne, is the principal city and actual metropolis of Australia; the other, that New Zealand is the most progressive community from the democratic standpoint of the antipodean group. The latter may be generally granted, but we doubt if Victoria will concede the former. The really valuable portion of Mr. Galloway's book is his "postscript"—his brief but pointed condemnation of the clause in the Australian Commonwealth Bill providing for the establishment of a Federal High Court of Australia. Mr. Galloway warns the Imperial Parliament that if they assent to this clause they will loosen one of the essential bonds of the Empire—the judicial prerogative of the Crown. He writes:—"In Canada, the Act of 1875, which was drafted by Sir John Macdonald in 1869, gave the Supreme Court final and conclusive jurisdiction, 'saving any right which her Majesty may be pleased to exert by virtue of her Royal prerogative.' These last words, it has been held, leave untouched the prerogative to allow an appeal and the correlative right of every subject of the realm to make one. Consequently appeals from Canada, as from all other parts of the Empire, to the Privy Council are of frequent occurrence and of the utmost convenience. Three new judges from Canada, the Cape, and Australia respectively have been added to the Judicial Committee of the Privy Council within the last three years and sit regularly for the hearing of Colonial cases." Mr. Galloway here raises a very timely warning. But we imagine that Mr. Chamberlain, when the time comes to deal with the subject, will find out that this clause in the Commonwealth Bill is mainly the work of one or two prominent Colonial lawyers—such as Mr. Symon, Q.C., of Adelaide—who naturally wish to divide the large fees of the Final Appeal Court. We do not believe that the great bulk of Australians desire to be denied the right of appeal to the Imperial Privy Council."

In reply Mr. J. H. Symon wrote to "The Spectator" as follows:—

THE AUSTRALIAN COMMONWEALTH BILL.

TO THE EDITOR OF "THE SPECTATOR."

Sir—

Your short notice of "Advanced Australia," by W. J. Galloway, M.P., in "The Spectator's" Supplement of 2nd December last, page 821, contains this passage:—"But we imagine that Mr. Chamberlain, when the time comes to deal with the subject, will find out that this clause in the Commonwealth Bill is mainly the work of one or two prominent Colonial lawyers—such as Mr. Symon, Q.C., of Adelaide—who naturally wish to divide the large fees of the Final Appeal Court." For myself and my colleagues of the Federal Convention I deeply resent your odious imputation and derogatory personal reference. It is entirely unworthy of you. I have been a subscriber to the "Spectator" for thirty years and I cannot recall any instance of so scandalous and dishonoring a charge by you against any public man. You have reserved it for Australia and for men engaged in the noble work of founding a new Anglo-Saxon nation and imbued with as high a sense of honor and patriotism as the best of your Imperial statesmen. Unjust accusations of this kind tend far more to weaken the ties which unite us to the mother country than the mere transference of Australian appeals from the Queen in her Court called the Judicial Committee of the Privy Council to the Queen in her equally august tribunal—the High Court of Australia. I will not stoop to vindicate myself from an attack due either to malice or ignorance, but I claim to defend the work of the Convention and to show that the Imperial Parliament will be extremely unwise if it attempts in any point of substance to alter or amend the Commonwealth Bill.

1. Mr. Galloway you describe as a Manchester M.P., visiting Australia in the capacity of "an intelligent British tourist" and making "journalistic jottings" for a provincial newspaper. Is this the man you would ordinarily accept as an authority on the prerogative of the Crown or other grave Constitutional questions? The laws of hospitality induce us in Australia to bear with such visitors, but we do not suffer them gladly. You yourself damn his production with faint praise, as "neither better nor worse than the average of such things," and still more by saying "the really valuable portion of Mr. Galloway's book is his 'postscript.'" His postscript bears internal evidence of having been written or inspired for him by some enemy of Federation or of the High Court of Australia who has "got at" the Manchester M.P. It is inaccurate and is based on an entire misconception of the Federal Judiciary. Valued, therefore, by the postscript—*ex pede Herculem*—the rest of the book must be a very poor affair.

2. Mr. Galloway, with ignorant assurance, affirms that the three new judges from Canada, the Cape, and Australia, added to the Judicial Committee of the Privy Council about three years ago, "sit regularly for the hearing of Colonial cases." The Australian judge was in England on the occasion of the Jubilee in 1897, and on several occasions sat, not specially for Colonial cases. But he has neither been in England nor sat on the Judicial Committee regularly or irregularly since then. The new departure marked by the appointment of these judges has been a mere

compliment, but the fact that an Australian judge was considered competent, as he undoubtedly is, to take a seat upon the Judicial Committee is conclusive recognition of the competency of Australian lawyers to provide a Final Court of Appeal of unquestioned authority domiciled amongst their own people. It would be a disgrace to us, a nation of four millions of pure Anglo-Saxon race, if we could not man a competent Court.

3. Mr. Galloway "warns the Imperial Parliament that if they assent to this clause they will loosen one of the essential bonds of the Empire—the judicial prerogative of the Crown." I do not know what weight the Imperial Parliament is likely to attach to the warning of this "intelligent British tourist," but I claim a much more intimate knowledge of the subject, and I take leave to warn the Imperial Parliament that if it does not assent to the Commonwealth Bill, as the people of Australia have framed and adopted it, it will either wreck Australian Federation or it will endanger its own authority. Let me further add that the expression, "the judicial prerogative of the Crown," is sheer nonsense and "the essential bonds of the Empire" empty claptrap. The grievances of her Majesty's subjects are of two kinds, viz., those which may be the subject of redress in a Court of Law and those which are not cognisable by such a Court. With regard to the former they must be taken to the appropriate tribunal; with regard to the latter the Queen's prerogative enables her to give redress in a proper case and in such Constitutional manner as she may think fit. This prerogative, under which a British subject in any part of the Empire may petition the Queen for redress of grievances, is absolutely untouched and undiminished by the provisions of the Commonwealth Bill. In regard to all other cases no question of prerogative is concerned. The Queen dispenses justice, of which she is theoretically the fountain, by means of her Courts established by Parliament nowadays, and it is no interference whatever with the Royal prerogative nor the loosening of any bond of any kind or description that jurisdiction for the settlement of litigated disputes should be given to one Court rather than another. To contend the contrary is preposterous. It would mean that no enlargement or curtailment of jurisdiction could take place without an infringement of the prerogative. The Australian Parliaments have constantly conferred and withdrawn appellate powers from their different Courts, and their doing so might just as reasonably be condemned as an interference with the prerogative and a loosening of the essential bonds of the Empire as the erection under the Commonwealth Bill of a Federal High Court for Australia, and an enactment that the decisions of that Court shall be final and not subject to appeal in another of her Majesty's Courts thirteen thousand miles away.

4. Mr. Galloway's postscript assumes a similarity between the Australian Federal Constitution and that of Canada. There is little or none. The Canadian is not a true Federation. The Australian is a true Federation, founded mainly upon the Constitution of the United States. In our system therefore the Federal Judiciary necessarily rests upon quite a different footing and resembles in its essence and functions that of the United States. Analogies or comparisons sought to be made between our judicial system and that of Canada are quite fallacious.

5. You take upon yourself to say "we do not believe that the great bulk of Australians desire to be denied the right of appeal to the Privy Council." What warrant have you for that? In the first place Australians are not denied the right of appeal to the Imperial Privy Council. All we have done is to pay the Judicial Committee the compliment of empowering them to say whether in any particular case there shall be

an appeal or not. We have simply restricted appeals by making it a condition that the Privy Council shall in each case grant special leave, so that no appeals shall take place unless upon matters of such magnitude and importance as, in the estimation of the Judicial Committee, justify it. In the next place you must surely be aware that, by a vast majority, the people of Australia by two referendums taken, with a year's interval between, and after every clause and line had been debated throughout the length and breadth of the Federating Colonies, have ratified and accepted the Commonwealth Bill and the provisions of it establishing the High Court of Australia and limiting appeals to the Judicial Committee of the Privy Council. Twice, then, by direct vote the people have expressed their deliberate will to be in favor of their own Court and a limited appeal. In face of all this do you think you are justified in expressing the singular belief I have quoted?

6. The provisions as to appeal are these:—

- (a) All appeals from State or Federal Courts within the Commonwealth lie to the High Court.
- (b) From the High Court appeals lie to the Privy Council as at present, except that in each case special leave must be given. This is surely a just and necessary alteration. From such a tribunal as the High Court of Australia there should be no appeal, unless either the High Court itself or the Privy Council be of opinion the magnitude or importance of the case demands. You would otherwise depreciate the status of your High Court and affix a badge of inferiority to its judgments.
- (c) But there can be no appeal in matters involving the interpretation of the Constitution of the Commonwealth or of a State. Upon this the mind of Australia is made up. We hold that if as a nation we are competent to frame our own Constitution and our own laws we are competent to interpret them. At any rate we decline to call in judges, however eminent, thirteen thousand miles away, unacquainted with local conditions, unfamiliar with the Federal system and its practical operation, and uninspired by its genius to do so for us. The Australian people are satisfied with the decisions of their own High Court upon what exclusively concerns them.
- (d) But we have been scrupulously careful not to force our tribunal upon anyone else, and so if the public interests in any other part of her Majesty's dominions are affected, we frankly concede the appeal to the Privy Council.

This is a brief summary of the appeal side of our Federal Judiciary. We submit that it is perfectly adjusted. It arrogates to itself no jurisdiction over exclusively external affairs or outside interests. It encroaches upon no prerogative. It takes away no appeal to the Queen. It simply substitutes an appeal to the Queen in her High Court of Australia for an appeal to the Queen in her Court known as the Judicial Committee of the Privy Council. We cut off a superfluous Court which Australia doesn't want. Why then should you in England or the Imperial Parliament endeavor to lower the prestige of the Australian High Court by compelling us to submit its judgments to some Court in the British Isles, whether House of Lords, Judicial Committee, Court of Appeal, or any other? The greatest service you can do us is to help to magnify and ennoble the Court of our choice. This at least will be more appreciated than disparaging criticisms and attempts, which must in the end fail, to thwart us.

7. You are rashly inviting Mr. Chamberlain to an impossible task when you say that he "will find out that this clause in the Commonwealth Bill is mainly the work of one or two prominent Colonial lawyers, such as Mr. Symon, Q.C., of Adelaide." The modified appeal now given by the Bill was not my work at all. I strenuously opposed it. My conviction was and is that no appeal to the Privy Council should be permitted. In necessarily erecting a new tribunal—the High Court of Australia—as the Supreme Court of the Federal Union, it was our duty to endow it with ample jurisdiction to do final justice in all cases to all the Queen's Australian subjects. To constitute such a tribunal and then to go to the other side of the globe for final judgment seems to me a reflection upon ourselves—a shameful admission that four millions of English-speaking people cannot manage their own affairs, and a gross disparagement of the great tribunal we are proposing and indeed obliged to create. However, the restricted appeal was carried against me by a bare majority of one, and for Federation I loyally accepted the situation. But I am proud to think my attitude is that which has marked the whole progress of the Australian movement:—

- (a) In 1857 Sir Charles Gavan Duffy obtained a Select Committee of the Legislative Assembly of the Colony of Victoria to consider the necessity of uniting the Australian Colonies. That Committee reported unanimously in favor of Federal union for the reason amongst others that the material interests of the Colonies "suffer and must continue to suffer while a distant and expensive system of judicial appeal exists."
- (b) This was invariably a conspicuous argument for Federation at every subsequent stage of the movement, and a grievance which the people recognised union would redress.
- (c) The Federal Convention of 1891, held in Sydney, with the concurrence and support of Sir Samuel Griffith, now the Chief Justice of Queensland, resolved upon and affirmed the total abolition of appeals to the Judicial Committee of the Privy Council.
- (d) The National Australasian Convention at its first session at Adelaide, in April, 1897, carried by a large majority the abolition of the Appeal to the Privy Council, upon my motion, and the report of the Judiciary Committee, of which I had the honor to be chairman.
- (e) This was confirmed at the Melbourne session of the same Convention in February, 1898.
- (f) In March, 1898, towards the close of the same session, however, under circumstances which I need not enter into, the previous decision in favor of entire abolition of these appeals was reversed by a bare majority of one vote, and the clause as it now stands, retaining the appeal, with special leave, in all private suits not affecting the Constitution, was adopted practically with the unanimous assent of the Convention. Those of us who were for abolition fell in with the modified appeal as the next best thing. The restriction upon Constitutional appeals was carried by substantial majorities.
- (g) Since then these provisions have been canvassed and debated throughout Australia, and accepted by the overwhelming vote of the people.

8. Apart from all other larger grounds of objection, neither the Privy Council nor any other court in England is suitable for appeals from Australia, because of distance and delay, and because of the needless expense. Mr. Isaacs, Q.C., of Melbourne, has just gone to London

with a fee of 3,500 guineas, to argue an appeal from the colony of Victoria before the Judicial Committee. Such a fee would be impossible in the High Court of Australia. And as to delay, I know a professional gentleman who went to London last year and waited months for an important appeal to come on, and at last, in sheer weariness, was obliged to return to the colony without the business being disposed of.

9. You, in England, may think you know better what is good for Australia than the Australians themselves. You may be right. But even if our Federal Judiciary be defective, or not what you would like it to be, it is what the Australian people have decided to have. Permit me to offer some reasons why the Imperial Parliament may wisely resist the persuasions of the "intelligent British tourist," and abstain from attempting to amend or alter the Commonwealth Bill:—

I.—The Commonwealth Bill, in its origin, is unlike any other Federal measure—indeed, unlike any other piece of proposed legislation that ever was framed—certainly in any English community. It owes its existence to the people themselves. This is not the case of a people declaring themselves in favor of a principle or a policy. The Australians did that, and much more. They affirmed their desire for Federal union, but they kept hold of the settlement of details. Under the widest suffrage they chose a special Convention to frame the Federal Constitution, and the bargain between the Federating colonies. They refused to entrust this solemn task to any Parliament. They refused plenary power even to the Convention. They insisted upon having the Bill submitted at large to themselves, for acceptance or rejection. This was done by means of a referendum, under the widest suffrage, and after the Bill had been debated in its minutest details from end to end of the country. So it became the people's Bill in a very literal sense—unalterable without their direct consent. Indeed, the pride which they felt in being called upon directly to shape their own Federal Constitution was a potent influence for the cause of union.

II.—This great fact was, and is, universally recognised. When, therefore, as the result of the Premiers' Conference, in January, 1899, some amendments were conceded in order to secure the inclusion of New South Wales and Queensland, it was a foregone conclusion that these must be submitted to the people. Neither Ministers nor Parliament had power to assent to any alteration. And so there was a second referendum.

III.—Clearly the Constitutional position now is that no alteration or amendment can be made in the Commonwealth Bill without the direct assent of the Australian people.

This is not, I am afraid, sufficiently apprehended or understood with you, or by English M.P.'s—even those who have graduated as "intelligent British tourists."

The Australian Bill is not at all on the same footing as the British North America Act, 1867, under which the Canadian Dominion came into being, and which not only never had any direct popular vote or sanction, but was actually framed in London. It was one thing, therefore, for the Imperial Parliament to interfere with, and amend the Canadian Bill, but it is quite another to amend or alter our Commonwealth Bill—the work of at least three and a half millions of Australians citizens, who insisted upon doing it themselves and refused to confide it to any Parliament. It simply cannot be done.

IV.—The Commonwealth Bill, therefore, has been "passed" by the people themselves as the Constitution of their choice and under which they desire to live. It is what they want. It embodies the Federal compact. All it requires is the Imperial Seal. It resembles an instrument between parties which is inoperative without a stamp. It is the office of the Commissioners of Inland Revenue to affix the stamp—they cannot question or vary the terms of the deed.

V.—We, Federalists, therefore strongly contend that it is not to be thought of that the Imperial Parliament should attempt to alter or amend. Australia expects the Federal Constitution, as embodied in that Bill, to be affirmed and passed intact. It is not denied that the Imperial Parliament has the legal power to alter or reject the Bill, but we do deny its Constitutional right, under the circumstances, to do either. Rejection is, of course, not thinkable. Alteration is, we conceive, equally unthinkable. It is "the Bill, the whole Bill, and nothing but the Bill."

VI.—That this is the view held by the Federal leaders and statesmen of Australia is plain from this extract from a speech, delivered at Wagga, in August last, by the Right Honorable G. H. Reid, the Premier of New South Wales, and reported in the "Sydney Morning Herald" of 5th August:—

"There will be no safety or security for Australian union until you know that the Bill that Australia has drafted for the Imperial Parliament to pass, word for word, is passed by that august tribunal word for word. You must know that it is no small thing to ask the mother Parliament to accept the draft of an Imperial Act for the union of Australia. It is no slight thing to request that every word we have drawn and drafted for the Imperial Act, shall be accepted without the changing by the Imperial Parliament of a dot or comma. Only under such circumstances can we hold that the union of Australia is safe, because if some, perhaps, harmless change is made in the Bill there is room for the enemies of Federation, if they happen to be in the place of power, representing the voice of New South Wales, to raise an agitation that the democracy of Australia has been outraged by the interference of the will of the Australian people by a foreign Parliament. All sorts of talk of that kind can be resorted to if you do not want the thing to go through."

VII.—The foregoing facts and considerations make it clear that no alteration or amendment of the Commonwealth Bill can take effect without the previous approval and assent of the Australian people. How does this operate as regards suggested amendment by the Imperial Parliament? It would not be consistent with the dignity of the Imperial Parliament to pass the amended measure, subject to an Australian referendum. Such a course would be subordinating the Parliament of the Empire to the people of the Federating colonies—making the efficacy of a piece of Imperial legislation depend upon the assent of those affected—or it would be thrusting upon Australia a Constitution which qua the amendment she doesn't want, on pain of having no Federation at all. This last aspect is one which could not lightly be laid before the Australian democracy. The only alternative would be, in case of suggested amendments, for the Imperial Parliament to stay its hand and

send the Bill back to Australia, with the proposed alterations, for submission to yet another referendum. My own conviction is that such a referendum would never be taken. Quite other results would happen. Either Federation would be wrecked or the authority of the Imperial Parliament would be gravely compromised.

VIII.—For sheer disaster to Federation there is, perhaps, little to choose between the consequences of the Imperial Parliament dictating the sort of Constitution we are to live under, by finally enacting an amended Bill, and the consequences of remitting the Bill and amendments back to the Australian people before final enactment. The former I need not dwell on. The latter would reopen closed controversies and revive the whole struggle with fresh elements and added bitterness. The inevitable delay alone would be intolerable. Australia is, like a greyhound in the leash, straining to reach Federal union. Whoever interposes or does anything tending to thwart the national aspiration will, in the present temper of the public, be only too quickly set down as an enemy. Really one shrinks from contemplating such possibilities.

IX.—But you must see that amendment means either that Australia is to accept such Federal Constitution as the Imperial Parliament, which, with great respect, doesn't understand us, chooses to give, or the whole subject is to be reopened here, and the hand on the dial of union put back, perhaps, for years. Nor is it to be forgotten that the Imperial Parliament, though paramount, does not "represent" Australians.

X.—It is to be remembered there have been already in all the Federating colonies, except Queensland, two referendums, and these are very costly. Expense is not the final test, but it is too important to be overlooked.

XI.—Finally, let it be understood that this irresponsible talk about severing ties is both mischievous and offensive. Is it suggested that you bind us closer to the mother isle—God bless her—or inspire us with warmer love, by compelling us, against our will, to go to a court there with our lawsuits? Is it seriously supposed that our proposal to keep our quarrels and their settlement to ourselves, and not to wash our litigious linen in England, indicates a weakening of ties or loyalty, whilst, in a transport of patriotism, such as the world has never before witnessed, the flower of Australian manhood is standing shoulder to shoulder, for Queen and country, in South Africa? Ten thousand Privy Councils or Courts of Appeal will never so indissolubly bind the Empire together as this war.

The mail leaves to-morrow. I should have tried to polish and condense, but there is no time. I must, therefore, ask you to accept, and make public in your columns this vindication and explanation, with all its faults. The distance between us, and the imminence of the business in hand, makes it imperative I should write now, once for all, and fully. I leave it to you to do me justice.

I am, Sir, &c.,

J. H. SYMON.

Member of the Australasian Federal Convention, and Chairman of its Judiciary Committee.

Selborne Chambers, Adelaide.

24th January, 1900.