# WHEN THE HIGH COURT WENT ON STRIKE

THE HON JUSTICE
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*In May 1905, the High Court of Australia went on strike. The Justices of the Court made and implemented a collective decision that they would refuse to sit unless certain demands concerning the payment of work-related expenses were met by the executive government of the Commonwealth. This little-known historical episode from the early history of the Court was a matter of contemporary political notoriety with profound implications for the Court's institutional development. Its retelling — as a clash of principles linked to personalities — provides the basis for a broader exploration of judicial independence. The compelling story of professional rivalry and personal animosity between Sir Samuel Griffith and Sir Josiah Symon illustrates that judicial independence cannot be confined to adjudication but must entail some measure of institutional or administrative independence of the judiciary from the executive.*

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* Justice of the High Court of Australia. This lecture was originally presented by the author as 'When the High Court Went on Strike' (Speech delivered at the Allen Hope Southey Memorial Lecture, Melbourne Law School, 6 September 2016). My thanks to Sam Wheeler, Natalie Burgess and David Nguyen for their research assistance. Several of the papers cited in this piece are held in the National Library of Australia. Where cited, these papers are followed by a reference to where they may be found in the National Library of Australia's ('NLA') Manuscripts Collection.

## I Prologue

The High Court of Australia did an extraordinary thing in May 1905. The Justices made and implemented a collective decision that they would refuse to sit until satisfied that certain demands concerning the payment of work-related expenses were to be met by the executive government of the Commonwealth. In short, the High Court went on strike.

The High Court's strike in May 1905 was a matter of contemporary political notoriety and was a significant episode in its early institutional development. The story of the strike has been told a number of times.[1] It can be told in a variety of ways. Easiest is to portray it as a clash of personalities. Fairer is to portray it also as a clash of principles. This retelling is an attempt to link the personalities to the principles for which they stood, recalling their own arguments in their own idiom.

## II Players

The main antagonists were Sir Samuel Griffith and Sir Josiah Symon. Both were eminent lawyers. Both had been prominent figures in the federation movement. Griffith had been Premier and then Chief Justice of Queensland before being appointed first Chief Justice of the High Court in 1903. Symon had been a long-serving member of the Legislative Assembly, and one-time Attorney-General, of South Australia. He was elected as a Senator for South Australia in the first Parliament of the Commonwealth of Australia. He became in 1904, during the second Parliament of the Commonwealth, Attorney-General of the Commonwealth in the administration of Sir George Reid.

Between Griffith and Symon there was professional rivalry and personal animosity. Their mutual dislike went back to at least 1897, when Symon as

[1] W G McMinn, 'The High Court Imbroglio and the Fall of the Reid-McLean Government' (1978) 64 *Journal of the Royal Australian Historical Society* 14; Roger B Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 262–6; Gavin Souter, *Lion and Kangaroo: The Initiation of Australia* (Pan Macmillan, 2nd ed, 1992) 94–8; Susan Priest, 'Strike of 1905' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 650, 650–1; Susan Priest, 'Australia's Early High Court, the Fourth Commonwealth Attorney-General and the "Strike of 1905"' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Cambridge University Press, 2012) 292; Susan Priest, 'Archives, the Australian High Court, and the "Strike of 1905"' (2013) 32 *University of Queensland Law Journal* 253. See also D I Wright, 'Sir Josiah Symon, Federation and the High Court' (1978) 64 *Journal of the Royal Australian Historical Society* 73.

chair of the Judiciary Committee of the Australasian Federal Convention had rewritten Griffith's 1891 draft of ch III of the *Constitution* in a manner which Griffith described in published comments as 'a serious blemish' and as incompatible with the 'dignity of a great instrument of government.'[2] Their relationship further deteriorated in 1900, when Symon and Griffith had been on opposite sides of a controversy amongst supporters of federation about how far to give way to the desire of the Imperial government to provide for appeals from the High Court to the Privy Council as the price of ensuring passage through the Imperial Parliament of the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict.[3] Then, in 1901, Symon sent Griffith into apoplexy by taking it upon himself to redraft Griffith's initial draft of the Bill for what eventually became the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'), setting up the machinery for the establishment of the High Court.[4] Two years later, in a speech in the Senate, Symon greeted with 'ominous reserve' Griffith's appointment as Chief Justice of the High Court, undoubtedly resenting Griffith being made leader of an institution to the membership of which Symon himself had a legitimate aspiration.[5] Contemporary descriptions were of Griffith as 'cold, clear, collected and acidulated',[6] and of Symon as 'quarrelsome'.[7] Symon thought Griffith to possess neither the 'aloofness from self-seeking' nor the 'patriotism' to be expected of an occupant of the judicial bench.[8] Griffith plainly thought Symon petty-minded and mean-spirited. Symon was (as historian W G McMinn said of him in 1978) 'a good hater — perhaps the best Australian politics has ever produced'.[9]

[2] Samuel Walker Griffith, 'Notes on the Draft Federal Constitution Framed by the Adelaide Convention of 1897' in John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 616, 621.

[3] See Wright, above n 1, 81–3.

[4] Ibid 83–4.

[5] Ibid 84–5, quoting J A La Nauze, *Alfred Deakin: A Biography* (Melbourne University Press, 1965) vol 2, 383. See also Commonwealth, *Parliamentary Debates*, Senate, 24 September 1903, 5440.

[6] Stuart Macintyre (ed), '*And Be One People*': *Alfred Deakin's Federal Story* (Melbourne University Press, 3rd, ed, 1995) 12.

[7] Sir Robert Randolph Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 157. See also Priest, 'Australia's Early High Court', above n 1, 299.

[8] Wright, above n 1, 85, quoting Letter from the Attorney-General of South Australia to the Premier of South Australia, 12 March 1901, Papers of Sir Josiah Symon, MS 1736, 12/13 (NLA).

[9] McMinn, above n 1, 15.

Griffith and Symon shared a common aspiration for the existence of a strong High Court. Each had worked long and hard for the establishment of the Commonwealth of Australia and for the establishment within that new federal polity of a national judiciary. Each by his actions had demonstrated a deep commitment to Alfred Deakin's celebrated characterisation of the High Court as the 'keystone of the federal arch'.[10] They differed about how that metaphorical arch was to be constructed and maintained. One of their differences might be thought superficially to have been entirely prosaic. Griffith favoured a High Court which would traverse the nation, engaging with the judiciaries and practitioners of the courts of each of the states from which it would be hearing appeals. Symon's vision was of the High Court exercising its appellate jurisdiction in modest surroundings in a single national location. That difference between them about where the High Court should do its work would be at the forefront of the opposing positions they took in the conflict that was to unfold. Yet a deeper philosophical difference was to emerge in their defences of those positions. Griffith stood for an expansive notion of judicial independence. Symon stood for an expansive notion of judicial accountability. The unfolding of the conflict between them has been fairly described as a quarrel which wound its way 'through a labyrinth of spite and petty vituperation on both sides', but which 'originated in a noble vision' and which bore on 'an important principle'.[11]

## III Setting the Stage

The *Constitution*, as it came into existence on 1 January 1901 by force of the Imperial Act of 1900, mandated in ch III the existence of 'a Federal Supreme Court, to be called the High Court of Australia',[12] which was to 'consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes'.[13] The *Constitution* provided for the appointment of the Justices by the Governor-General, for their removal to be by the Governor-General only on an address from both Houses of the Parliament praying for removal on the ground of proved misbehaviour or incapacity, and for their remuneration to be fixed by the Parliament and not to be diminished.[14] Prescription of matters

[10] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10 967 (Alfred Deakin, Attorney-General).

[11] Wright, above n 1, 86.

[12] *Constitution* s 71.

[13] Ibid.

[14] Ibid s 72.

incidental to the execution of the judicial power vested in the High Court was left to the Parliament.[15] Responsibility for the execution and maintenance of the *Constitution* and of the laws of the Commonwealth was conferred on the executive government of the Commonwealth[16] and that responsibility extended to the withdrawal from the Consolidated Revenue Fund and expenditure for the purposes of the Commonwealth of money appropriated by the Parliament.[17]

The *Judiciary Act*, as it was enacted by the first Parliament in 1903, provided for the High Court to consist of the Chief Justice and the constitutional minimum of two other Justices.[18] The Act provided for the 'principal seat' of the High Court to be at the seat of government.[19] The seat of government did not then exist. The *Constitution* required its establishment in a location to be determined by the Parliament within what would later become known as the Australian Capital Territory.[20] Until a seat of government was established, the principal seat of the High Court was to be at such place as the Governor-General from time to time appointed.[21] There was to be a Principal Registry at the principal seat of the High Court and a District Registry in each state other than the state in which the Principal Registry was located.[22] Sittings of the High Court were to be held 'from time to time as may be required at the principal seat of the Court and at each place at which there [was] a District Registry'.[23] When any matter had been heard at a sitting at one place, the Justice or Justices before whom the matter was heard were permitted to pronounce judgment or give further hearing or consideration to the matter at another place.[24] The Justices of the High Court were to have power to make Rules of Court for carrying the Act into effect.[25] The Rules of Court were to cover, amongst other matters, the appointment and regulation of sittings.[26]

[15] Ibid s 51(xxxix).

[16] Ibid s 61.

[17] Ibid ss 81, 83.

[18] *Judiciary Act* s 4.

[19] Ibid s 10.

[20] *Constitution* s 125. See *Seat of Government Acceptance Act 1909* (Cth).

[21] *Judiciary Act* s 10.

[22] Ibid s 11.

[23] Ibid s 12.

[24] Ibid s 13.

[25] Ibid s 86.

[26] Ibid s 86(a).

Rules of Court made by the Justices were to be laid before the Parliament and were disallowable by either House.[27]

The *Judiciary Act* provided for the Chief Justice and Justices each to be paid a salary at a specified rate and for there also to be 'paid to each Justice of the High Court, on account of his expenses in travelling to discharge the duties of his office, such sums as are considered reasonable by the Governor-General.'[28] The Act contained a specific standing appropriation for the payment of salaries,[29] but not for the payment of travelling expenses. Apart from providing for the existence of a Principal Registrar, of District Registrars, of a Marshal, and of such other officers as might be necessary,[30] the Act made no provision for the administration of the High Court. The administration of the High Court was left to the executive government. The officers of the High Court were left to be engaged under the provisions of the *Commonwealth Public Service Act 1902* (Cth), but the Associates to the Justices were exempted from its provisions by Order in Council on the basis that they occupied a special personal and confidential relation to the Justices.[31] Within the executive, administrative responsibility for the High Court fell within the portfolio of the Attorney-General's Department.

The enactment of the *Judiciary Act* had not been uncontroversial. The preceding parliamentary debates had been protracted and extensive. Many within the Parliament considered the establishment of the High Court at that early stage of national development an unnecessary luxury. They were concerned, amongst other things, that the workload would be insufficient to justify the cost.[32] The enactment was only procured with the trimming down of the Bill as introduced to reduce the proposed number of Justices from five to the enacted three, to reduce their proposed salaries and to eliminate a provision which would have provided them with pensions on retirement.[33]

The appointment of Griffith as the first Chief Justice was accompanied by the appointments of Sir Edmund Barton and Richard O'Connor as the first

[27] Ibid s 87.

[28] Ibid s 47.

[29] Ibid s 48.

[30] Ibid ss 51–5.

[31] See *Commonwealth Public Service Act 1902* (Cth) s 3; James G Drake, Minute Paper for the Executive Council, 5 October 1903, Papers of Sir Josiah Symon, MS 1736, 11/454 (NLA).

[32] Sir Zelman Cowen, 'Deakin, Alfred' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 192, 193.

[33] Cf Judiciary Bill 1901 (Cth) cls 3, 48–9.

two other Justices. At the time of the enactment of the *Judiciary Act*, Barton had been Prime Minister and O'Connor had been the leader of the government in the Senate. The Governor-General's appointments of the Justices, on 5 October 1903,[34] were preceded three days earlier by him appointing Melbourne as the principal seat of the High Court.[35] The choice of Melbourne was unsurprising given that Melbourne was the place specified in the *Constitution* for the Parliament to sit until able to meet at the seat of government.[36]

The Justices took oaths of office on 6 October 1903 in a ceremonial sitting in Melbourne. They had by then already chosen not to live in Melbourne and had made that known to the executive government. Arrangements had been made through the Attorney-General's Department for all three members of the High Court to occupy chambers in the law courts building in Taylor Square in the Sydney suburb of Darlinghurst. Barton and O'Connor lived in Sydney. Griffith, who came from Brisbane, chose to keep living there at least initially.[37]

Within a week of being sworn in, the Justices made Rules of Court which had the effect that, unless otherwise directed by the Court or a Justice, an appeal to the High Court was to be heard in the capital city of the state from whose court the appeal was brought.[38] They appointed the first sitting of the High Court for the transaction of business to be in Brisbane on 26 October 1903.[39] While in Brisbane, they made another Rule of Court, appointing sittings for the transaction of business in Adelaide on 24 November 1903 and in Perth on 2 December 1903.[40] Their first two hearings were actually in Sydney between 6 and 11 November 1903[41] and in Melbourne on 18 and 19 November 1903.[42] While in Adelaide the following week, they made yet another Rule of Court, appointing sittings for the transaction of business in

[34] Attorney-General (Cth), 'Appointment of Justices of the High Court' in Commonwealth, *Gazette*, No 55, 10 October 1903, 639, 658.

[35] Attorney-General (Cth), 'Appointment of the Principal Seat and the Principal Registry of the High Court' in Commonwealth, *Gazette*, No 52, 3 October 1903, 623, 626.

[36] *Constitution* s 125.

[37] Priest, 'Australia's Early High Court', above n 1, 293; McMinn, above n 1, 15; Joyce, above n 1, 262.

[38] Attorney-General (Cth), 'High Court of Australia: Rules of Court' in Commonwealth, *Gazette*, No 56, 17 October 1903, 667, 670–1.

[39] Ibid 672.

[40] Attorney-General (Cth), 'High Court of Australia: Rule of Court' in Commonwealth, *Gazette*, No 61, 31 October 1903, 753, 757.

[41] *Dalgarno v Hannah* (1903) 1 CLR 1.

[42] *Bond v Commonwealth* (1903) 1 CLR 13.

Hobart on 23 February 1904 and in Melbourne and Sydney on 1 and 15 March 1904 respectively.[43]

So began a peripatetic — and to Symon's way of thinking, erratic and costly — pattern of judicial behaviour. In accordance with an Order in Council made soon after the Justices' appointment,[44] the travelling expenses of the Justices and their associates were initially reimbursed in full by the Attorney-General's Department on certification by the Justices without question as to the amount. In July 1904, Henry Higgins, who was then Attorney-General in the very short-lived administration of Australia's first Labor Prime Minister, Chris Watson, wrote to the Justices expressing concern that the existing arrangements for travelling expenses might not be altogether in accord with the *Judiciary Act* and proposing that the travelling expenses of the Justices be capped at a daily rate of three pounds ten shillings.[45] The Justices replied jointly in a letter dated 19 August 1904 expressing their hope that the existing arrangement would be continued.[46]

## IV ACT I: BOOKSHELVES

The stage was in that way set for confrontation between Griffith and Symon who, by the time the Justices sent their letter, had succeeded Higgins as Attorney-General with the formation of the Reid administration on 18 August 1904. The Reid administration was made possible only through a fragile coalition of free-traders and protectionists. The administration was in a precarious political situation from the start, commanding a bare majority of one vote in the House of Representatives. It was able to cling to power until the close of the parliamentary session on 15 December 1904, only to be forced to resign as a result of losing what was treated in effect as a no-confidence motion in the House of Representatives two days after the Parliament

[43] Attorney-General (Cth), 'High Court of Australia: Rule of Court', *Gazette*, No 68, 28 November 1903, 875, 876.

[44] Minute Paper for the Executive Council, 12 October 1903, Papers of Sir Josiah Symon, MS 1736, 11/313 (NLA). See also Special Reporters, 'The High Court: Appointment of Officials — Judges Travelling Expenses', *The Sydney Morning Herald* (Sydney), 13 October 1903, 6.

[45] Letter from the Attorney-General to the Justices of the High Court, 29 July 1904 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119.

[46] Letter from the Justices of the High Court to the Attorney-General, 19 August 1904 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 20 (1905) 1119, 1120.

reassembled on 28 June 1905.[47] The story of the strike fits entirely within the period of the Reid administration and fits mainly into the period of six months that Parliament was in recess between December 1904 and June 1905.

The conflict between Griffith and Symon began at the end of 1904. It began with an innocent inquiry about bookshelves. Griffith had decided after a year in office that continuing to live in Brisbane was impractical and that he should move to Sydney. After telling Reid about his plan in the middle of November,[48] Griffith wrote to Symon about it at the beginning of December. He had made up his mind to make Sydney his headquarters from the beginning of 1905 and he would therefore need to move his library there. There was insufficient shelving in his chambers in Sydney and he asked that Symon be good enough to move the proper authorities to give directions to have his chambers fitted with proper and sufficient shelves to be ready to receive his library, say, in February. He did not think that the shelves had to be elaborate or expensive. He required about 300 feet of shelving altogether, of which about 50 had already been provided.[49]

To a follow-up request by Griffith,[50] Symon said that he had no time to reply until after the close of the parliamentary session.[51] On 14 December 1904, the day before the Parliament went into recess, the Justices made a Rule of Court appointing sittings for the transaction of business of the Full Court in Hobart, Melbourne and Sydney on 27 February, 7 March and 20 March 1905 respectively.[52] The making of that Rule of Court was accompanied by what Griffith no doubt regarded as a routine letter to Symon requesting that arrangements be made with the government of Tasmania for a court room to

[47] Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne University Press, 1956) 34–40.

[48] Letter from the Chief Justice to the Prime Minister, 12 November 1904, Papers of Sir Josiah Symon, MS 1736, 11/146 (NLA).

[49] Letter from the Chief Justice to the Attorney-General, 2 December 2014 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1120–1.

[50] Telegram from the Chief Justice to the Attorney-General, 13 December 1904 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1121.

[51] Telegram from the Attorney-General to the Chief Justice, 13 December 1904 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1121.

[52] Principal Registrar (Cth), 'High Court of Australia: Rule of Court' in Commonwealth, *Gazette*, No 74, 17 December 1904, 1299, 1306.

be placed at the disposal of the High Court for its proposed sittings in Hobart.[53]

When Symon replied, two days before Christmas, he responded to both of Griffith's letters. What he had to say was about a great deal more than just bookshelves in Sydney and a courtroom in Hobart. Symon had gone back over the correspondence between Higgins and the Justices concerning travelling expenses. The travelling expenses of the High Court, he said, had 'attained a magnitude which lately, both inside and outside Parliament, [had] occasioned remark and evoked sharp criticism' — with some of which he, Symon, confessed he sympathised — and he felt sure that he should not look in vain to the Justices 'to assist in securing a substantial reduction in those expenses.'[54] The principal seat of the High Court, Symon observed, was in Melbourne. He did not think it ever to have been contemplated that the High Court, as a Full Court, would go on circuit. The Rule of Court which the Justices had taken it upon themselves to make to the effect that appeals should be heard in the capital city of the state from whose court the appeal was brought unless otherwise directed by the Court or a Justice should, Symon submitted, 'be expressed in the opposite way, so as to provide that appeals should be heard in the principal seat of the Court, unless otherwise directed by the Court or a Justice'.[55] The High Court, as the Full Court, should not incur any travelling expenses unless under very exceptional circumstances and, if it did travel, the expenses should be computed from the principal seat of the Court. Absent a special appropriation, the Justices' travelling expenses, in common with those of Associates and other officers of the High Court, had to be the subject of annual parliamentary appropriations the responsibility for the expenditure of which fell squarely within the portfolio responsibility of the Attorney-General's Department. As the Attorney-General, Symon proposed that from 1 January 1905 he would allow the travelling expenses of each Justice to include those of his Associate and would fix the maximum amount to cover both at 3 guineas for every travelling day in the discharge of judicial duty.[56]

[53] See Letter from the Attorney-General to the Chief Justice, 23 December 1904 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1121–2: where Symon refers to Griffith's letter (dated 13 December 1904).

[54] Ibid 1121.

[55] Ibid 1122.

[56] Ibid 1121–2.

Griffith's response was dated two days after Christmas. He said that he would discuss Symon's proposal with his colleagues. In the meantime, he took 'leave to observe that the policy of holding sittings of the High Court as a Court of Appeal in all the State Capitals was adopted after full consideration and with the warm concurrence of the Federal Government'.[57] The Justices had been willing to bear the inconvenience of travelling in the interest of federal unity and the policy had, so far as Griffith had been able to observe, received the approval of public opinion throughout the Commonwealth. The policy could only be altered by a Rule of Court or by statute, neither which could in any event come into operation until after the commencement of the next session of the Parliament. In the meantime, Griffith trusted that he was justified in assuming that the existing arrangements would not be disturbed. And, said Griffith, he wanted bookshelves.[58]

The battlelines were thus set for a barrage of correspondence to occur in the early months of 1905 between Griffith (mainly in Brisbane and Sydney) and Symon (mainly in Melbourne and Adelaide). Often, several salvos were fired in rapid succession. In the confusion and heat of the battle, letters often crossed in the mail. Short and highly targeted exchanges were made by telegram. To his increasing annoyance and frustration, Reid found himself caught in the crossfire.[59]

Targeting the making by the Justices of the Rule of Court which Griffith had described as implementing the policy of holding sittings for the hearing of appeals in all state capitals, Symon said that he could not help but to regard it as unfortunate that the learned Justices should have permitted considerations of policy to influence their actions. Questions of 'policy', it seemed to Symon, were 'for the Executive and the Parliament alone'.[60] For the Justices to take it upon themselves to incur travel expenses in the interests of federal unity was, he ventured to think, 'a mistake and quite outside the great sphere of power, influence and usefulness intended to be filled by the High Court

[57] Letter from the Chief Justice to the Attorney-General, 27 December 1904 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1122.

[58] Ibid 1122–3.

[59] See, eg, Telegram from the Prime Minister to the Attorney-General, 23 May 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1143–4.

[60] Letter from the Attorney-General to the Chief Justice, 13 January 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1123.

under the *Constitution*.'[61] He proposed that the High Court should for the present continue to sit periodically in Sydney for the hearing of appeals from Queensland as well as New South Wales. All other appeals should be heard at the principal seat of the Court in Melbourne. Symon also suggested that the High Court would be well to adopt the course followed in all other courts of having definite dates or periods fixed for its sittings.[62]

Griffith for his part, could not omit to express his surprise and regret that Symon should, even inadvertently, allow himself in an official communication addressed to the President of the High Court not only to instruct the Justices as to the principles which should actuate between them in the exercise of their discretionary powers but also to convey his disapproval of the manner in which they had already exercised them. Symon would, Griffith was sure, on reflection, be the first to admit, that it was 'not for the Executive Government to instruct the Judiciary, or to intimate either approval or disapproval of their action'.[63] Symon could be assured that

> while the Judges [would] always be willing to give due weight to the views and wishes of the Government, [the Justices would], in the exercise of their discretion, be entirely unmoved by the thought of the possibility of such disapproval.[64]

Griffith also thought it right to inform Symon that he should feel bound to take an early opportunity of offering a public explanation of the absence of his library from Sydney, where it would naturally be expected to be.[65]

Symon was not budging on the bookshelves. He noted with amazement Griffith's threat to go public on the bookshelves issue and regretted that Griffith should think the threat of publicity wise or worthy of the High Court or himself as its President. There was nothing inadvertent about Symon's disapproval of the Justices' adoption of the policy of holding sittings for the hearing of appeals in all state capitals, said Symon. He reaffirmed it. The 'recognised immunity of the Judiciary from Executive control', Symon said,

[61] Ibid.

[62] Letter from the Attorney-General to the Chief Justice, 18 January 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1124.

[63] Letter from the Chief Justice to the Attorney-General, 21 January 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1125.

[64] Ibid.

[65] Ibid.

applied 'only to the exercise of their judicial functions and does not extend to extra-judicial action'.[66] When Griffith had said that it was not for the executive government to intimate either approval or disapproval of the Justices' action, Griffith was asserting a proposition which Symon emphatically denied. It would not be in the interests of the High Court itself, or of the people of Australia, if the Attorney-General of the day did not maintain a rigorous control over its non-judicial action and especially its expenditure.[67]

By the middle of February, Griffith had made his way to Sydney where he conferred with Barton and O'Connor. The Justices closed ranks. They wrote jointly to Symon. Their tone made plain their surprise that a simple request for office furniture had resulted both in a denial of the propriety of the existing system of holding sittings of the High Court in the several state capitals for the hearing of appeals and a proposed change to the existing arrangements for the payment of travelling expenses. They thought it important to keep the question of policy involved in Symon's proposal to discontinue the holding of sittings to hear appeals in state capitals distinct from the question of the amount and mode of the computation of their travelling expenses.[68]

On the question of policy, the Justices said this:

> The present system or policy of hearing appeals in the States in which they arise was adopted after a conference between the then Prime Minister, Mr Deakin, the then Attorney-General, Mr Drake, and ourselves before the issue of our commissions. It was recognised that there was no precedent for the proposal (although a very similar one has since been made in the United States), that it would cause considerable personal inconvenience to ourselves and involve considerable expenditure for travelling expenses; and further, that after a time, and as the business of the Court increased, it would probably be found impossible to continue it to its full extent. But it was thought right, for as long and to as great an extent as was reasonably practicable, to give all litigants the full ad-

[66] Letter from the Attorney-General to the Chief Justice, 31 January 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1126.

[67] Ibid 1126–8.

[68] Letter from Justices to the Attorney-General, 14 February 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1128–30; Letter from Justices to the Attorney-General, 16 February 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1130–1.

> vantage of appeal to an Australian Court, by making it possible for those whose cause arose at places other than the Principal Registry to employ before the Court of Appeal the same counsel and advisers who had conducted the case in the Court below, without putting them to the additional expense of sending those advisers and counsel to a hearing at the Principal Registry, with the alternative of instructing, at probably equal or greater expense, new counsel and new advisers not familiar with the case. It was also thought that in many cases it would be an advantage to litigants that the members of the Court should have that practical knowledge of the varied local conditions obtaining in different parts of Australia which could be so well gained by conducting the business of the Court from time to time in the capitals of the several States. The absence of knowledge of these local conditions on the part of the Judicial Committee of the Privy Council was always a fact strongly urged by those who strove for the embodiment of an Australian Court of Appeal in the *Constitution*. It was further thought that the periodical visits of the High Court, which is at present the only Federal Court, to the several State capitals would have the effect of fostering and, it was hoped, maintaining a federal sentiment, especially in those States which are at a long distance from the present seat of Government. As a natural corollary to this arrangement, it was further arranged that the Justices should, until the establishment of a Federal Capital, be considered free to fix their residences in any part of the Commonwealth.[69]

The Justices went on to say that the Rules of Court which they had made within a week of being sworn in gave effect to that arrangement. The Justices recognised fully that the power to control the objects of expenditure rested with the Parliament. They did not need to discuss in the abstract whether their reasonable travelling expenses would be paid since those travelling expenses were assured to them by the *Judiciary Act*. So long as their legal duty required them to travel, the possibility of the Parliament refusing to appropriate the sums necessary to enable them to perform that duty was too remote to be taken into consideration. They considered it their duty in the exercise of the powers conferred on them by law to refrain from making any change to the existing Rules of Court which they thought would be detrimental to the general interests of the Commonwealth. Their rule-making power was conferred by the Parliament, and the Parliament could always disapprove any Rules they made. They did not feel justified, without fresh intimation of the will of the Parliament, in initiating a change which they had reason to

[69] Letter from Justices to the Attorney-General, 14 February 1905, above n 68, 1128–9.

believe would be received with surprise and dissatisfaction throughout the Commonwealth.[70]

On the separate topic of the amount and mode of computation of their travelling expenses, the Justices wished it to be distinctly understood that they did not 'ask as a concession from the Executive Government, but claimed as a right, that their travelling expenses should continue to be computed as from Sydney' where Griffith had by then taken up residence.[71] They emphatically protested against Symon's suggestion that it was competent for the Attorney-General, acting departmentally, to determine, of his own motion, from time to time, either the place from which their travelling expenses were to be computed or a rate at which they were to be fixed. Such a doctrine, they said, would involve an 'intolerable interference with the independence of the Bench'.[72]

Symon counterattacked with a point by point refutation. The Justices must be entirely aware that there was not the slightest pretence for the suggestion of any attempt on his part to interfere with the independence of the Bench. Judicial independence was not, in Symon's judgment:

> to be maintained by baseless assertions that it is assailed — or by protesting without cause that its existence is threatened. Nor [was] it to be used as a shield behind which Judges may seek shelter in respect of their non-judicial acts or excessive expenditure.[73]

He regretted the attitude of antagonism adopted by the Justices and their unwillingness to co-operate in mitigating the severe and unlooked-for burden imposed on the Commonwealth by their travel. Full Court circuits were, in his opinion, a violation of the letter and the spirit of the *Constitution*. He was sure that the *Judiciary Act* would never have been enacted had it been proposed to the Parliament that the Full Court systematically, as distinct from one judge occasionally, would go on circuit. The High Court's original Rules of Court, which were enacted by the Parliament soon after the *Judiciary Act* as a schedule to the *High Court Procedure Act 1903* (Cth), made the intention of the Parliament plain that the High Court in its appellate jurisdiction was to sit at the principal seat of the Court. The policy of going on circuit was the policy

[70] Ibid 1129.

[71] Letter from Justices to the Attorney-General, 16 February 1905, above n 68, 1130–1.

[72] Ibid.

[73] Letter from the Attorney-General to the Chief Justice, 22 February 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1131.

of the Justices and not of the then Government, who were not responsible for it. There was, as the Justices had admitted, no precedent for the policy and it was not possible to treat seriously the suggestion that Full Court circuits were necessary to enable Australian Justices to gain knowledge of Australian conditions.[74] As to the suggested fostering of federal sentiment, it may be that the Justices desired either to popularise the federal union or to popularise the High Court itself. But undertaking such a mission was foreign to their duty. The High Court was not an 'instrument of federal propaganda' and the Justices were not 'missionaries of federal sentiment'.[75] To establish circuits was to appropriate public money. To do so was within the province of the Parliament and not the judiciary. The Justices had acted beyond their power. The system the Justices had created, by which the High Court sat where and when it pleased, was in practice 'full of confusion'.[76] The High Court was claiming to be able to put its unrestrained hand into the public treasury and seemed to have forgotten that 'even in the administration of justice there must be some thought and feeling for the taxpayer'.[77] Symon's proposal to contain the expenditure of the High Court was as much in the interests of the reputation of the High Court as it was in the interests of the taxpayer. The Justices could live where they liked, but they should not routinely go on circuit as a Full Court and their individual travelling expenses would be computed on the basis of the Parliament's determination that the seat of the High Court was in Melbourne.[78]

By March, it might have been thought that a stalemate had been reached. Both sides agreed that further correspondence would be unproductive.[79] The conflict received some attention in the press, where the merits of each of the

[74] Ibid 1132.

[75] Ibid 1133.

[76] Ibid 1134.

[77] Ibid 1135.

[78] Letter from the Attorney-General to the Chief Justice, 27 February 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1135–6.

[79] Letter from the Justices to the Attorney-General, 1 March 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1136–7; Letter from the Attorney-General to the Chief Justice, 8 March 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1137.

conflicting positions were acknowledged and a compromise was expected.[80] But Symon would not relent in his campaign against the Justices and the Justices had done nothing to modify their practice. On 22 March, the Justices wrote jointly to Reid requesting his personal intervention to protect the High Court from what they described as Symon's repeated public attacks.[81] In April, the conflict was to escalate beyond a mere war of words.

*Illustration 1: 'Clipping the Wings of the High Court Judges: The Federal Attorney-General Cuts Off Extravagant Travelling Allowances',* Chronicle *(Adelaide), 18 March 1905*


[80] See, eg, 'The High Court: Where Shall It Sit? An Interesting Situation', *The Argus* (Melbourne), 13 March 1905, 5; 'The High Court', *The Sydney Morning Herald* (Sydney), 15 March 1905, 6; 'The High Court', *The Advertiser* (Adelaide), 15 March 1905, 4; 'Federal Extravagance', *The Mercury* (Hobart), 17 March 1905, 4.

[81] Letter from Justices of the High Court to the Prime Minister, 22 March 1905 in *Correspondence from the Chief Justice, 1903–1913, Sir Samuel Griffiths* (High Court of Australia) 98.

## V ACT II: THE JUSTICES STRIKE

The Justices on 13 April 1905 made another Rule of Court which, amongst other things, appointed sittings for the transaction of business of the Full Court in Brisbane on 29 May.[82] Four days later, Griffith wrote to Symon provocatively requesting that arrangements be made with the government of Queensland for a courtroom to be put at the disposal of the High Court for its sittings in Brisbane.[83] In the meantime, and most likely not known to Griffith when he wrote to Symon, the Secretary of the Attorney-General's Department, acting on Symon's instructions, had refused to pay claims made by the Justices to be reimbursed for hotel expenses while sitting in Melbourne in March.[84]

Symon replied to Griffith on 26 April. Symon was at his most spiteful. He said that he would make the arrangements for a courtroom to be put at the disposal of the High Court in Brisbane despite being unable to admit of the validity of the appointment of the sittings. Symon added that he was unable to consider that the three Justices needed to be accompanied to Brisbane by three Associates and three Tipstaffs and requested that the numbers be limited to one of each. By the way, said Symon, he saw no reason why each Justice needed to have a separate telephone in his chambers at Darlinghurst. He proposed for the present to allow one telephone for the use of the High Court to be placed wherever in the building the Justices may think most convenient. He had directed that the other telephones at Darlinghurst be discontinued at the end of the month.[85] Symon concluded by saying that it

[82] Principal Registrar (Cth), 'High Court of Australia: Rule of Court, 13 April 1905' in Commonwealth, *Gazette*, No 18, 15 April 1905, 335, 341.

[83] Letter from the Chief Justice to the Attorney-General, 17 April 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1139.

[84] Letter from the Secretary to the Attorney-General to Mr E P T Griffith, Associate to the Chief Justice, 14 April 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1138; Letter from the Secretary to the Attorney-General to Mr E A Barton, Associate to Mr Justice Barton, 14 April 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1138–9; Letter from the Secretary to the Attorney-General to Mr H E Manning, Associate to Mr Justice O'Connor, 14 April 1905 in *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1139.

[85] Letter from the Attorney-General to the Chief Justice, 26 April 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1139.

had also been brought to his attention that Justices had used steamships to travel from Sydney to Hobart for the recent Hobart sittings when they could have used their railway passes for those parts of the journey between Sydney and Melbourne and between Launceston and Hobart. It occurred to Symon that the Justices would probably prefer to pay the accounts of the steamship companies themselves.[86] The following day, acting on Symon's instructions, the Secretary of the Attorney-General's Department returned the Justices' resubmitted claims for hotel expenses while sitting in Melbourne.[87]

When, on Friday 28 April, Griffith received Symon's letter of 26 April, the battle had come to a head. As it happened, O'Connor was scheduled to conduct an eight-day civil jury trial in Melbourne commencing the following Tuesday 2 May. To arrive in time, O'Connor would have to leave by Sunday. O'Connor's impending departure for Melbourne, with no assurance that his travelling expenses would be met, provided the platform for the Justices to take a public stand. The Justices sat as a Full Court in Sydney at noon on Saturday 29 April. Griffith at that time announced from the Bench that circumstances had arisen which left the Court with no alternative but to postpone the hearing in Melbourne. Griffith did not elaborate. The hearing was adjourned, by order of the Court, for a week. No further reasons were given.[88]

The stand in Sydney was undermined by a slip in Melbourne. The Principal Registrar went home on Saturday at 12.30pm without having received the telegram telling him of the making of the adjournment order at noon. The consequence was that notice of the order was not published until Monday, to the inconvenience of the parties, witnesses and jurors in the trial scheduled to commence on the following day. Griffith was later publicly to charge the Principal Registrar with neglect of duty, following which Symon was to

[86] Ibid 1139–40.

[87] Letter from the Secretary to the Attorney-General to the Associate to the Chief Justice, 27 April 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1140; Letter from the Secretary to the Attorney-General to the Associate to Mr Justice Barton, 27 April 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1140; Letter from the Secretary to the Attorney-General to the Associate to Mr Justice O'Connor, 27 April 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1140.

[88] See generally Joyce, above n 1, 264–5; Priest, 'Strike of 1905', above n 1, 651.

conduct a formal investigation and to find the Principal Registrar blameless and unfairly treated by Griffith.[89]

On Monday 1 May, Reid met with Griffith in Griffith's chambers in Sydney. Griffith told Reid flatly that the Justices would not sit in Melbourne if their travelling expenses were withheld. After meeting with Griffith, Reid informed Symon by telegram,[90] and called an urgent Cabinet meeting to attempt to sort the matter out.[91] In Adelaide, Symon scribbled a note to himself, which read 'how can any Ct because of disagreement as to Hotel Expenses go on strike? … no wharflabourers union do such thing'.[92] He sent a telegram to O'Connor demanding an explanation for the adjournment.[93] O'Connor told him by return telegram that Griffith would respond.[94] Griffith told him curtly by telegram that the Justices could not recognise his right to demand reasons for any judicial action of the High Court except such request as might be made by any litigant in open court.[95] Griffith followed up with a one-sentence letter, the terms of which Griffith would later reveal had been settled in consultation with Reid,[96] in which Griffith requested that Symon reconsider his letter of 26 April before Griffith replied to it.[97] Unable to regard Griffith's

[89] Commonwealth, *Mr G H Castle, Principal Registrar, High Court of Australia (Correspondence Relating to Charge of Neglect of Duty)*, Parl Paper No 20 (1905) 1161–6. See also Joyce, above n 1, 264–5.

[90] Telegram from George Reid to the Hon Sir Josiah Symon, 2 May 1906, Papers of Sir Josiah Symon, MS 1736, 11/323 (NLA).

[91] Joyce, above n 1, 265.

[92] Handwritten Notes of Sir Josiah Symon, Papers of Sir Josiah Symon, MS 1736, 11/387h (NLA); see also ibid.

[93] Telegram from the Attorney-General to Mr Justice O'Connor, 4 May 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1141.

[94] Telegram from Mr Justice O'Connor to the Attorney-General, 5 May 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1142.

[95] Telegram from the Chief Justice to the Attorney-General, 5 May 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1142.

[96] Letter from the Chief Justice to the Attorney-General, 23 June 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1156.

[97] Letter from the Chief Justice to the Attorney-General, 8 May 1905 in *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1142.

letter 'otherwise than as a studied affront', Symon was 'not prepared to submit'.[98]

On Thursday 4 May, a headline appeared in *The Advertiser* in the form of a question: 'Is the High Court on Strike?' The subheading was 'The Attorney-General's Economy; Bookshelves Disallowed'.[99] The article under the headline suggested that:

> Notwithstanding carefully phrased statements of ignorance by responsible members and officials, the opinion in Melbourne [was] that the sudden suspension of sittings by the Federal judiciary was due to the refusal of the Attorney-General to grant them supplies.[100]

The Cabinet meeting Reid had called was held in Melbourne, with Symon in attendance, on Saturday 6 May. Two days later it was reported in *The Argus* that Cabinet had discussed a dispute which had recently arisen between Symon and the Justices of the High Court, the exact nature of which had not been made public but which had been resolved by the 'tactful intervention' of Reid and 'mutual concessions' on the parts of Griffith and Symon.[101] The press report quoted Reid as having subsequently stated that there was 'no trouble or bother of any kind about the High Court' and that 'the serenity and the friendship of the Cabinet [was] unbroken'.[102]

Evidently considering their stand to have been successful and Symon to have been defeated, the High Court resumed sitting. O'Connor commenced the adjourned trial in Melbourne on Tuesday 9 May.[103] Adopting a new practice (which the Justices had chosen to announce only on Friday 6 May) of convening the Full Court in Sydney by adjournment from time to time instead of appointing special sittings,[104] Griffith and Barton sat as the Full

[98] Letter from the Attorney-General to the Prime Minister, 11 May 1905, Papers of Sir Josiah Symon, MS 1736, 11/415 (NLA).

[99] 'Is the High Court on Strike? The Attorney-General's Economy — Bookshelves Disallowed', *The Advertiser* (Adelaide), 4 May 1905, 5.

[100] Ibid.

[101] 'The High Court: Expenses Difficulty Settled — Fixing the Circuits', *The Argus* (Melbourne), 8 May 1905, 4.

[102] Ibid.

[103] See 'Fish Customs Case: Judgment for the Crown — Penalty £207 and Costs', *The Argus* (Melbourne), 26 May 1905, 6.

[104] Letter from the Principal Registrar to the Secretary, Attorney-General's Department in Commonwealth, *Mr G H Castle, Principal Registrar, High Court of Australia (Correspondence Relating to Charge of Neglect of Duty)*, Parl Paper No 20 (1905) 1161, 1163, citing 'The High

Court to hear and determine a leave application in Sydney on the same day as O'Connor commenced the trial in Melbourne.[105] As if to rub salt into Symon's wounds, Griffith wrote to Symon the following week saying that as he understood that it was no longer intended to make any proposal for discontinuing the sittings of the Full Court in Sydney, he would be honoured if Symon could attend to the bookshelves.[106]

## VI Act III: The Attorney-General Strikes Back

Symon had no intention of attending to the bookshelves. When he read *The Argus* report of the Cabinet meeting in which he had participated, Symon was indignant. He wrote to Reid accusing Reid of undermining his authority at a time when, in Symon's words, the Justices were mad enough to do that which no Government and no country could endure — refuse judicial duty. The Justices were literally on strike and to have given way to them 'would have covered the administration with shame'.[107] He implored Reid to tell Griffith, if he had not already done so, that Griffith was not to go behind Symon's back on matters with which Symon was dealing as Minister.[108] Symon then wrote to Griffith on 15 May saying he was not aware of anything in his letter of 26 April which required his reconsideration.[109] Symon had dug in.

The Justice thought it necessary to make another stand. On Tuesday 23 May, when O'Connor had still not returned from Melbourne, Griffith and Barton convened as a Full Court in Sydney. Griffith then read a long state-

Court: Recent Adjournment Explained — The Circuit Question, Compromised Arrived at', *The Age* (Melbourne), 6 May 1905, 15.

105 *Crowley v Glissan* (1905) 2 CLR 402.

106 Letter from the Chief Justice to the Attorney-General, 17 May 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1142.

107 Letter from the Attorney-General to the Prime Minister, 9 May 1905, 2–3, Papers of Sir Josiah Symon, MS 1736, 11/395 (NLA).

108 Ibid 4.

109 Letter from the Attorney-General to the Chief Justice, 15 May 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1142.

ment,[110] copies of which were handed out to the press and which were to be reported extensively the following day.[111]

The statement started with a memorandum, which Griffith said he had prepared to be read when the High Court had convened at noon on 29 April to order the adjournment of the trial in Melbourne but which he had not then read because Reid, who had arrived in Sydney from Melbourne on the morning of 29 April, had asked him not to. The memorandum attributed the cause of the adjournment to what was described as: 'the Attorney-General's persistence in his assertion of a right to treat the whole matter [of travelling expenses], both as to principle and amount, as … entirely in his discretion'.[112] The Justices recognised that the power of controlling expenditure rested with the Parliament but thought they were 'entitled to know the determination of the Governor-General in Council before, and not after, expenses [were] incurred' and could not assent to the doctrine that their right to them should depend on the favourable consideration of the Attorney-General.[113]

Griffith went on in the statement which he read from the Bench on Tuesday 23 May to recount subsequent communications with Reid. They included a telegram Griffith had sent to Reid on 19 May referring to Symon's letter of 15 May and asking Reid to take decisive action which would render public action on the part of the High Court unnecessary. Griffith referred to the existence of some further communications, which he said were confidential. Griffith then disclosed in substantial part the contents of a telegram which he had sent to the Prime Minister the previous day and the Prime Minister's reply that morning. Griffith had written to Reid:

> I have today addressed an official letter to you as follows: — Letter begins: Sir, — Referring to recent correspondence between the Attorney-General's Department and the Judiciary, I have the honour to request from you, as the head

[110] See Attachment to the Letter from the Associate to the Chief Justice to the Secretary of the Attorney-General's Department, 22 June 1905 in Commonwealth *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1153–5.

[111] See, eg, 'High Court Judges: The Expenses Question — Statement by the Chief Justice; Attorney-General's Authority Disputed; Appeal to Prime Minister; An Official Snub', *The Age* (Melbourne), 24 May 1905, 8; 'High Court Deadlock: Limiting Judges' Travelling Expenses — Protest to the Attorney-General; "An Intolerable Interference with our Independence"; Rejoinder by Prime Minister; "Impossible to Overlook Peremptory Terms"', *The Sydney Morning Herald* (Sydney), 24 May 1905, 8.

[112] Attachment to the Letter from the Associate to the Chief Justice to the Secretary of the Attorney-General's Department, 22 June 1905, above n 110, 1154.

[113] Ibid 1153–4.

> of the Government, assurances on the following points: (1) That the travelling expenses of the Justices of High Court shall be regulated retrospectively as from 1st January last by Order in Council; (2) that the allowances shall be fixed by the Order in Council on a definite basis, at a specified daily rate, in addition to fares; (3) that while Judges reside in Sydney their travelling expenses incurred while holding Court in Melbourne shall be allowed on the same basis as travelling expenses to Sydney would be allowed if they resided in Melbourne. (Letter ends.) For reasons with which you are acquainted, it is essential that I should receive a reply before the sitting of the Court tomorrow.
>
> S W GRIFFITH[114]

Reid, who was travelling in western New South Wales and who was clearly quite annoyed to be bothered again with an issue he thought had been resolved, had replied to Griffith:

> Your telegram reached me on my arrival at Moree this evening. I observe that it demands from me, as the head of the Government, certain assurances to be transmitted to you before the sitting of the High Court tomorrow morning at ten o'clock. In the first place, I must ask you to address official communications on the subjects mentioned to the head of the Ministerial Department which deals with official business of that nature, as directed by Orders of the Governor-General in Council, of which you must be aware. In the second place, I wish to observe that if you address to the Attorney-General, who is the head of the Department, as explicit a statement of your desires as you have addressed to me, couched in the ordinary forms of official correspondence, and containing a request for the consideration or reconsideration of the three points set forth in your telegram, I have no doubt whatever that a satisfactory solution of the difficulty would be arrived at. I am bound to add that, even if your telegram had been address[ed] to the proper Minister, it would be impossible to overlook the peremptory terms in which compliance with your wishes is demanded.
>
> G H REID[115]

Griffith said in his statement from the Bench on 23 May that the receipt of Reid's telegram that morning left the matter remaining on 23 May where it

[114] Telegram from the Prime Minister to the Attorney-General, 23 May 1905 above n 59, 1143; Attachment to the Letter from the Associate to the Chief Justice to the Secretary of the Attorney-General's Department, 22 June 1905 above n 110, 1154–5.

[115] Telegram from the Prime Minister to the Attorney-General, 23 May 1905, above n 59, 1143–4.

had been on 29 April except so far as it had been aggravated by subsequent communications. The reasons which had rendered necessary the postponement of the hearing in Melbourne now placed the Brisbane sittings in jeopardy. The Justices would decide on O'Connor's return to Sydney what course they would take.[116]

Interviewed on 24 May in Tamworth, Reid referred to the Chief Justice as having made a 'peremptory demand' and said that he 'viewed with profound regret and concern any difficulty between the Executive and the judiciary'.[117] He said that no one knew better than the Chief Justice that his communication should have been addressed to the Attorney-General. He said that he had no doubt that, if the Chief Justice had put his demands in a letter couched in the ordinary form of official correspondence to the Attorney-General requesting him to submit the views of the Justices for the consideration of the government, it would have become the duty of the Attorney-General to comply with that request. He said that he was absolutely sure that if the Chief Justice were to take that course the result would be satisfactory to both parties.[118]

Interviewed that same day in Adelaide, Symon was less conciliatory. He said that nothing in the Justice's statement could 'justify or palliate the refusal of judges to do their duty' or which would 'permit the highest public servants of the Commonwealth to do or to profit by what the humbler public servants [were] not permitted to do'.[119]

The High Court reconvened on Friday 26 May, after O'Connor's return to Sydney. Unappeased and themselves indignant, the Justices were not then prepared to escalate the conflict further. Griffith read another statement from the Bench in which he said that his statement on 23 May had been made under 'judicial responsibility'.[120] Saying that they had been informed since 23 May that advances had been made to their Associates for travelling expenses, but not suggesting that anything else of substance had changed,

[116] Attachment to the Letter from the Associate to the Chief Justice to the Secretary of the Attorney-General's Department, 22 June 1905, above n 110, 1155.

[117] 'The High Court: Sir Josiah Symon's Reply to the Judges', *The Advertiser* (Adelaide), 25 May 1905, 5.

[118] Ibid. See also Telegram from the Prime Minister to the Attorney-General, 23 May 1905 above n 59, 1143–4.

[119] 'The High Court: Sir Josiah Symon's Reply to the Judges', above n 117, 5; 'High Court Expenditure: Sir Josiah Symon's Reply to the Judges — Interesting Correspondence', *The Register* (Adelaide), 25 May 1905, 7.

[120] Attachment to the Letter from the Associate to the Chief Justice to the Secretary of the Attorney-General's Department, 22 June 1905, above n 110, 1155.

Griffith announced that the Justices had decided to go ahead with the sittings in Brisbane on Monday 29 May. Griffith concluded with the following statement:

> In the case of private persons, the Judges have ample means of protecting themselves against attacks upon them and interference with them in the discharge of their duty. In the case of the Executive Government, their only protection lies in publicity. We did not resort to this means until the position had become intolerable.[121]

The dispute was by this time being commented on in the press where opinion was divided.[122] Neither side were seen to be covering themselves in glory. Displaying a greater sense of proportion than either of the antagonists, the Editor of *The Examiner* wrote:

> There has been a good deal of unnecessary warmth imported into the controversy on both sides. The Chief Justice is disposed to be choleric, and the Attorney-General assertive. The washing of judicial dirty linen in public is not seemly. The High Court judges have a right to be treated with respect, and not as if they were a body of understrappers. On the other hand, whilst the taxpayer is prepared to allow their Honors liberal expenses, the judges must remember that it is the duty of Cabinet to see that there is no money spent unnecessarily.[123]

A fortnight passed without further communications between Symon and Griffith and without further public announcements. There had been a lull in the fighting, but the battle was still not over.

[121] Ibid.

[122] See, eg, 'The High Court Dispute: Ministerial Friction — Sir Josiah Symon Again Replies to the Judges', *The Advertiser* (Adelaide) 29 May 1905, 8; 'The High Court Quarrel: Wait Till Parliament Meets', *The Age* (Melbourne), 30 May 1905, 5; Charles Nuttall, 'Running Amok' (graphic), *TableTalk* (Melbourne), 1 June 1905 (cover page).

[123] 'High Court Expenses', *The Examiner* (Launceston), 29 May 1905, 4.

*Illustration 2: Charles Nuttall, 'Running Amok',*
TableTalk *(Melbourne), 1 June 1905*

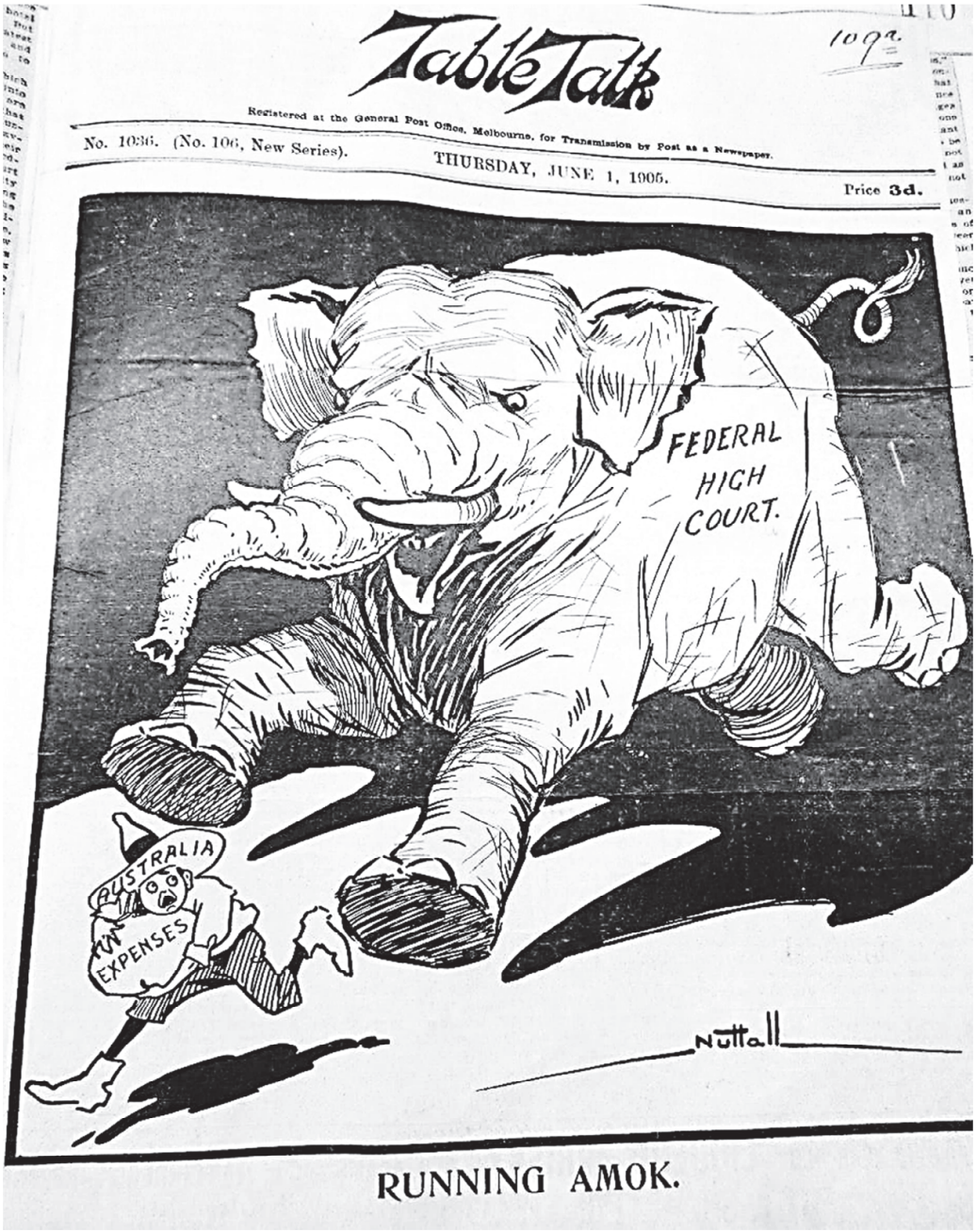

*Illustration 3: 'Tilting at a Windmill',*
Worker *(Brisbane), 31 June 1905*

On 9 June 1905, Symon went again on the offensive. He wrote to Griffith referring to the explanation the Justices had given on 23 May for having adjourned the trial in Melbourne on 29 June. He stated it to be his duty to express his:

> profound regret that the Justices of the High Court should have initiated so grave a departure from the accustomed traditions of the Bench as to refuse judicial duty and delay justice in order to compel the Executive to concede a pecuniary demand.[124]

On the same day, Symon wrote a separate letter to Griffith giving an explanation for the short-lived absence of communications between them.[125] Symon explained that Griffith's telegram to Reid, to which Griffith had referred in his statement from the Bench on 23 May, had been forwarded by Reid to Symon.[126] Having waited a fortnight in the hope of receiving a communication directly from Griffith, Symon had, he said, on 8 June dealt with the requests made by Griffith in the telegram to Reid and had submitted his decision to Cabinet. Upon his recommendation, the Government had decided to meet the wishes of the Justices by an Order in Council determining three things. First, the travelling allowance of the Justices would be computed from the principal seat of the High Court, Melbourne, subject to the proviso that, for so long as sittings were held in Sydney, a concession would be made. The Justices would be paid travelling allowance while sitting in Melbourne instead of being paid travelling allowance while sitting in Sydney. Second, the amount of travelling expenses, in addition to necessary railway or steamer fares, would be 2 guineas a day for each Justice travelling singly to take business in original jurisdiction and 5 guineas a day for the three Justices together travelling to take Full Court business. The rates were to be exclusive of the travelling expenses of Associates. Third, travelling expenses from 1 January to date (including the same concession as to Melbourne expenses in lieu of Sydney expenses) were to be allowed at the maximum of three guineas a day for each Justice and his associate.[127]

[124] Letter from the Attorney-General to the Chief Justice, 9 June 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1144–5.

[125] Ibid 1145.

[126] See Telegram from the Prime Minister to the Attorney-General, 23 May 1905, above n 59, 1143–4.

[127] Letter from the Attorney-General to the Chief Justice, 9 June 1905, above n 124, 1145. See also Memorandum, Papers of Sir Josiah Symon, MS 1736, 11/474 (NLA).

Each of the demands Griffith had made in his telegram to Reid had been met, in letter but not in spirit. On 14 June, Griffith wrote a very long letter to Symon in which he recounted almost all of their previous correspondence, starting with his letter about the bookshelves.[128] In that correspondence, said Griffith, the Justices had by the middle of March definitely put forward three claims:

> (1) That the matter of travelling expenses was one to be regulated by the Governor-General in Council, and not by the Attorney-General from time to time; (2) that they should, until some new arrangement was made by Executive authority, be computed on the basis arranged by Mr Deakin; and (3) that the amount should be such as to indemnify the Justices against actual pecuniary loss.[129]

The Justices, Griffith said, 'had received no satisfactory or definite reply and [Symon] had closed the correspondence'.[130] It was only then that Griffith had made contact with Reid in the hope of facilitating the administration of justice. If the points Griffith had made in his telegram to Reid differed in some small details from the position taken by the Justices in their previous correspondence with Symon, the reason was to be found in that circumstance.[131]

Turning to the first of the elements of the decision which Symon had announced, Griffith said that if he had correctly understood the method of computation of travelling allowance, the Justices were to be penalised for living in Sydney inasmuch as they would have to pay their own expenses of travelling between Sydney and Melbourne. Turning to the second, Griffith continued:

> The proposal that a reduced lump sum shall be allowed to the three Justices when travelling together, now made for the first time, appears to my learned colleagues and myself quite inexplicable. It has fortunately happened that we are on terms of personal friendship, and have on most, but not all, occasions been able to arrange to reside together while on Circuit. But this is an accident which cannot be regarded as a permanent condition. It might easily happen

[128] Letter from the Chief Justice to the Attorney-General, 14 June 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1145–8.

[129] Ibid 1147.

[130] Ibid.

[131] Ibid.

> that, for reasons which must be obvious, it might be desirable, or indeed necessary, that the Justices should occupy separate sitting rooms, or live in separate lodgings. The proposal that they should have a joint purse for travelling expenses seems inconsistent with any adequate notion of dignity of the office, or with any regard to the usages or persons such as may be expected to fill the office of a Justice.[132]

Griffith's letter to Symon went on to set out a revised and enumerated series of very specific demands which covered the amount and method of computation of the travelling expenses of the Justices and which separately covered the amount and method of computation of the travelling expenses of their Associates and Tipstaffs. Griffith concluded the letter with a request to Symon that the letter be brought to the attention of Cabinet.[133]

On 19 June, Symon replied. He said that, in compliance with Griffith's wish, he had brought Griffith's letter before Cabinet and that he had the honour to inform Griffith that the Government saw no reason to depart from the decision conveyed in his letter of 9 June.[134] Three days earlier, Symon had written to Griffith announcing that he had given consideration to the topic of the official staff of the Justices and had made a decision that the office of Tipstaff was to be abolished and that the salaries of Associates were to be reduced.[135]

The conflict, unseemly from the start, had by this point descended into a seemingly never-ending farce. It was brought to an abrupt end with the resignation of the Reid Government barely 10 days later. Reid was replaced as Prime Minister by Alfred Deakin. Within Deakin's administration (his second), Isaac Isaacs became Attorney-General. Isaacs quickly produced peace. The view of the Deakin Government, Isaacs told Griffith, was that the Parliament in enacting the *Judiciary Act* had deliberately entrusted the whole question of High Court circuits to the Justices. The travelling expenses of Justices were set by Order in Council at a capped daily amount of three

[132] Ibid 1147–8.

[133] Ibid 1148.

[134] Letter from the Attorney-General to the Chief Justice, 19 June 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1151.

[135] Letter from the Attorney-General to the Chief Justice, 16 June 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1148–9.

guineas payable to each Justice individually.[136] The Justices were to retain their Tipstaffs and the salaries of their Associates were not to be reduced. The Justices' steamship fares were to be met. Each Justice got his own telephone in his chambers at Darlinghurst. And Griffith got his bookshelves.[137] The correspondence between the Attorneys-General and the Justices on the topics of the sitting places and expenses of the Court was presented to the Senate and ordered to be printed.[138]

## VII EPILOGUE

Griffith was victorious, and his victory was permanent. The practice of circuits established by the first three Justices in 1903 received in November 1905 the ringing public endorsement of representatives of the legal profession in every state including South Australia.[139] The practice was to remain an institutional characteristic of the High Court even after the seat of the High Court moved to the Australian Capital Territory in 1980.[140] The practice remains to this day.

Symon was anything but gracious in defeat. In opposition in the Senate, Symon attempted in vain to fight a rear-guard action throughout the second half of 1905. First, he introduced a Private Member's Bill to amend the *Judiciary Act* to abolish High Court circuits, for the purpose he said, of making the High Court, as an appellate tribunal, 'a stationary, and not a perambulating, Court.'[141] The Bill was defeated on the voices without debate at

[136] Minute Paper for the Executive Council: Subject — Travelling Expenses of the Justices of the High Court, 16 August 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1158; Letter from the Attorney-General to the Chief Justice, 22 August 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1159.

[137] Letter from the Attorney-General to the Chief Justice, 12 July 1905 in Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1158; Letter from the Attorney-General to the Chief Justice, 22 August 1905' in *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1158–9.

[138] Commonwealth, *Correspondence between Attorneys-General and the Justices of the High Court re Sitting Places and Expenses of the Court*, Parl Paper No 26 (1905) 1119, 1119–59.

[139] Everard Digby, 'The Home of the High Court and a High Court Bar' (1905) 3 *Commonwealth Law Review* 49.

[140] *High Court of Australia Act 1979* (Cth) s 14.

[141] Commonwealth, *Parliamentary Debates*, Senate, 2 November 1905, 4473.

its second reading.[142] Afterwards, during a debate on estimates, he moved a motion to reduce the salaries of Associates and to abolish Tipstaffs. He argued in support of the motion that, while the High Court was above all executive interference and all executive criticism in its judicial capacity, the High Court in its administrative position was just as much subject to the control of the executive as any other department of the public service. Were the High Court to be cut adrift from all executive control, he argued, it would become a menace to the working of the *Constitution* instead of occupying the position of its guardian.[143] The motion was defeated.[144]

Griffith remained Chief Justice until his retirement in 1919. After the Parliament amended the *Judiciary Act* to expand its numbers to five,[145] Isaacs and Higgins were each appointed to the High Court in October 1906.[146] Symon remained in the Senate until 1913 when, on failing to be re-elected, he returned to a lucrative full-time private practice as a barrister in Adelaide. A leader of the bar in South Australia, Symon appeared frequently in the High Court throughout the period in which Griffith remained Chief Justice. Tainted by the events of 1905, he seemed never afterwards to be considered a serious contender for appointment to it.

Griffith's triumph and Symon's ignominy cannot gainsay the mixture of pettiness and principle which fuelled the actions and reactions of each. To the extent the principle can be separated from the pettiness, their battle was about the boundaries of judicial independence and about the balance between judicial independence and judicial accountability. And to that extent, recalling their battle has some enduring significance.

On judicial independence, it is the broader principle espoused by Griffith that has stood the test of time. Commencing with a series of decisions of the Supreme Court of Canada in the 1980s and 1990s,[147] modern exposition of

142 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1905, 5251.

143 Commonwealth, *Parliamentary Debates*, Senate, 28 November 1905, 5835–6.

144 Ibid 5850.

145 *Judiciary Act 1906* (Cth) s 4, as amended by *Judiciary Amendment Act 1906* (Cth) s 2.

146 Sir Zelman Cowen, 'Isaacs, Isaac Alfred' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 359, 360; Ian Holloway, 'Higgins, Henry Bournes' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 321, 322.

147 *Valente v The Queen* [1985] 2 SCR 673; *R v Beauregard* [1986] 2 SCR 56; *R v Généreux* [1992] 1 SCR 259; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and the Jurisdiction of the Legislature in Respect Thereof* [1997] 3 SCR 3. See *Fingleton v The Queen* (2005) 227 CLR 166, 191 [53].

the concept of judicial independence has resulted in broad consensus that judicial independence cannot be confined to independence in adjudication and that some measure of institutional or administrative independence of the judiciary from the executive is necessary to ensure adjudicative independence. Institutional or administrative independence has in that way come generally to be recognised to be a functional extension of adjudicative independence. Its precise measure has defied abstract definition and no single preferred model has emerged.[148]

Judicial independence is inseparable from judicial accountability and inevitably in tension with it. That tension, a contemporary commentator has suggested, 'should be reconciled by the exercise of wisdom and good judgement, so that the proper balance between these very important principles is maintained.'[149] Symon let temper cloud his judgement. But Symon's emphasis on accountability in judicial administration was misplaced only to the extent that he sought to limit judicial accountability to accountability to the executive. Accountability in adjudication is traditionally ensured by an institutional requirement that adjudication is ordinarily to occur in public and that an adjudicative outcome is ordinarily to be justified by reasons that are published. The events of 1905 suggest that the requisite balance between independence and accountability in judicial administration is better pursued less by means of the executive acting as a check on the judiciary than through the adoption of broader mechanisms of accountability which exhibit a similar openness to public scrutiny.

[148] Shimon Shetreet, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges' (2009) 10 *Chicago Journal of International Law* 275, 286.

[149] Shimon Shetreet, 'Judicial Independence and Accountability: Core Values in Liberal Democracies' in H P Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 3, 9.