

PLEASE NOTE

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OF FEDERATION, FARE DODGING AND FALSE IMPRISONMENT –

MR ROBERTSON'S EVENING OUT

The decision of the Privy Council in the case of *Robinson v The Balmain New Ferry Company Ltd*¹ remains a part of many tort courses, and tort textbooks, in common law countries.² I am as guilty of this as the many others to whom I refer. Yet the reason for including it tends to be to dismiss it as an aberration to a general rule, a case that is non-representative rather than paradigmatic.³ Whilst for doctrinal explanatory purposes this is a perfectly satisfactory way of dealing with the case, it is an interesting question to consider why the case did not set any kind of general principle – why the dog did not bark rather than why it did.

A Cause Celebre

Many here will know the facts of this cause célèbre but a brief overview for those who have not had the pleasure of reading of the exploits of Mr Robertson.⁴ It was the Monday of a long weekend (bank holiday) in June 1905. It was 7.45pm when he went to Circular Quay in Sydney and entered the wharf of the Balmain New Ferry Company with Miss Mercia Murray (Tony Blackshield says it was his fiancée; it is certainly true that they later married, in 1907). The happy couple wanted to go on one of the companies' ferries but both boats had just left, and when Miss Murray indicated that she wanted to catch another boat from another wharf nearby

¹ [1910] AC 295

² See, eg, Trindade, Cane & Lunney, *The Law of Torts in Australia* (4th edn, 2007) 60; *Winfield & Jolowicz on Tort* (17th edn, 2006) para 4-18.

³ Balkin & Davis, *Law of Torts* (3rd edn, 2004) para. 3.31; *Markesinis & Deakin's Tort Law* (5th edn, 2003) 427.

⁴ The description of the facts is distilled from a number of sources: the trial judge's notes (manuscript version in the State Records Office of New South Wales, printed version in court file at the Judicial Committee of the Privy Council) and contemporary newspaper accounts from *The Sydney Morning Herald*, *The Daily Telegraph*, *The Australian Star*, and *The Evening News* (contemporaneous newspapers published in Sydney).

she and Robertson proceeded to leave. Here the problems began. The difficulty was that entry and exit to the wharf was via a turnstile above which was a notice stating that entry and exit to the wharf was conditional upon the payment of 1p. This was because the company only collected fares at Circular Quay. When they attempted to leave the attendant at the entry turnstile told them they needed to leave by the other exit and when they went to that exit the attendant there asked for the payment of one penny. Robertson pointed out that he had not in fact travelled on the ferry and wanted to leave the wharf to go about his lawful and proper business. There then was a dispute in the evidence; Robertson and Miss Murray stated that when Robertson tried to exit from the turnstiles he was thrown back with great force by one of the attendants and that he was threatened with a fist; perhaps unsurprisingly, the attendants alleged that it was Mr Robertson who had provoked matters by advancing on the attendant with a blackthorn stick, catching one of the attendants under the lapel of his jacket whilst stating repeatedly ‘Don’t use force, don’t use force.’ As the case was decided by a civil jury this evidentiary conflict was never explicitly resolved but it seems very unlikely that the 49 year old Mr Robertson would have been as aggressive as was indicated; indeed at one point it seems that one of the attendants got the story wrong and had to be corrected by counsel.⁵ During this time – which was about 5 minutes – Robertson asked the crowd that had now gathered (estimated variously at between 20 and 200, who were hostile to Robertson asking him ‘Why don’t you pay the fare’) to call a constable but no one did. At this point Robertson paid for Miss Murray to leave, telling her that he would now have to stay and see it out. She fetched a constable, who told Robertson that his course of action should be to pay under protest and complain to the company but this advice was refused, Robertson pointing out he was a lawyer and that this was not what he needed to do. Finally he said that that he would not be detained any longer and pushed through the gap between the turnstile and the bulkhead, despite the efforts of one of the attendants to stop him (somewhat half-hearted according to the evidence, no doubt everyone was keen to end the stand-off). The couple then went off to Miss Murray’s parents before Robertson returned to Circular Quay via the Balmain New Ferry Company’s boat, where the attendants were still on duty. One told Robertson that he had not paid the penny from previously; further exchanges followed but the attendant was unable to say what he had said further (but we can probably imagine).

⁵ See Chief Justice Darley’s Notebook, State Record Office of New South Wales, Item No. 2/2854 (Darley’s Notebooks), pg. 51.

The Dispute Between the Parties

As a result of his experiences, Robertson brought an action against the company for assault and false imprisonment. On one level, it is perfectly obvious how the company wanted to defend the action. This appears in an affidavit filed by the company's manager in support of the appeal to the High Court of Australia⁶; it was noted that 10,000 people a day travelled on the company's ferries, and in the same petition Robertson said that 50,000 people a day used Sydney ferries. What the company wanted to argue was that this very large transport business simply could not operate if people were allowed to leave the wharf without paying; the only workable practice was to charge everyone.

The difficulty was how this might be framed in terms of a defence to an action for false imprisonment (the assault action fell or succeeded with the false imprisonment action). This difficulty was particularly acute in New South Wales which did not introduce the Judicature Acts reform in full until 1970. Old style pleading was the norm, so the plaintiff pleaded a standard count in his declaration. To this pleading the defendant responded with the general issue i.e. not guilty. This original choice of plea needs some analysis because if the defendant had wanted to plead that they had good cause to detain the plaintiff, the general issue might not have been the correct plea; generally pleas of confession and avoidance needed to be specially pleaded and the general issue would be an incorrect plea. The reason for the general issue plea, however, becomes clear when one looks at the way the defendant argued the case at trial. Here the primary defence of the company was that the actions of the attendants went beyond the course of their employment with the result that the company was not vicariously liable for their actions.⁷ The general issue was the appropriate plea to raise this kind of defence.⁸ The company was clearly confident in this line of argument – it took only two days to respond to the declaration – and at the end of the plaintiff's case defendant's counsel applied for a non-suit. This was rejected by the

⁶ I have not yet viewed this document; it is referred to in Robertson's petition for leave to appeal to the Privy Council (*Printed Papers on Appeal*, 1909 (Vol 17), Judgments Nos. 55-60 (Privy Council)).

⁷ As is clear from the Darley CJ's notes, all the evidence lead by the defence went to this issue.

⁸ *Bullen & Leake on Pleadings* (London: Stevens & Sons, 3rd ed 1868) p. 702, citing *Mitchell v Crassweller* (1853) 13 CB 237; 138 ER 1189. Rath, *Principles and precedents of pleading in the Supreme Court of New South Wales at common law* (Sydney: Law Book Co, 1961) refers readers to Bullen & Leake 3rd ed for NSW practice in this period (I am grateful to Geoff Lindsay for this reference).

trial judge, Darley CJ saying that he would not non-suit in the face of the notice (meaning, I think, that the attendants took the notice as their instructions – as they later testified – so there was at least some evidence that the conduct was in the course of employment).⁹ The defendants appeared to have no fall back argument; although evidence was lead from the attendants, it seems that defendant’s counsel admitted in summing up that the conduct could not be justified and that the question was one of damages.¹⁰ This was certainly the view of Darley CJ, who correctly noted there was no justification on file and that the question was solely one of damages. Nor was this a result forced on him by the course of proceedings; he pointed out that it was important that companies knew that they could not behave in this way.¹¹ Almost belatedly, after the jury had retired, counsel for the defendant asked that the jury be directed that the plaintiff was bound by the notice – rejected as the Chief Justice said that there was no evidence of knowledge of the notice – but it is not clear why this was thought important – an issue that arises a number of times in the future progress of the case.

Almost immediately thereafter the defendants sought to overturn the decision by seeking a rule nisi, which was granted on three grounds. The first related to the decision on vicarious liability, the latter two were directed to the failure of Darley CJ to direct as to the plaintiff being bound by the notice. Again, the pleadings are vague as to why the notice was thought important but it is clear from the report of the hearing in the banco court of the Supreme Court of New South Wales that the defendants saw it as relevant to the question of damages only.¹² This was also the view of the judges of the banco court.¹³ This approach suggests that no-one saw the existence of the contract or any obligation imposed by it as providing any justification for the defendant’s action, but there was good authority, with the imprimatur of Bullen & Leake’s *Precedents of Pleading*, that conduct that did not amount to a justification could be lead in evidence in mitigation of damages; conversely, if the conduct was in effect a justification it needed to be specially

⁹ Above, n 5, pg. 50 (evidence of Penson, one of the turnstile operators on the wharf).

¹⁰ Certainly Robertson states this in his petition to the Privy Council; the Judge’s Notebook is more equivocal, stating simply that Robin (defendant’s counsel) addressed the jury saying that: ‘The question is what damages should the defendant pay’. I have not found any authority on the point on whether the scope of authority question was one that could not be left to the jury; presumably if it could not then Robin’s approach simply reflects the limited question that could be determined by the jury.

¹¹ *Daily Telegraph*, December 2, 1905, pg. 18.

¹² *Robertson v Balmain New Ferry Company Ltd* (1906) 6 SR (NSW) 195, 197: ‘The second and third grounds are directed to the question of damages’.

¹³ *Ibid*, p 204 (Owen J), 205-208 (Cohen J), 213-214 (Pring J).

pleaded.¹⁴ By a majority the banco court held that there should be no new trial on the question of damages, effectively saying that the condition was of no importance at all in determining liability and quantum.¹⁵

The key change in the defendant's tack comes in oral argument before the High Court of Australia. The written application for special leave to appeal to the High Court focused on errors in the trial judge's directions to the jury; it argued that the plaintiff was bound by the notice and that the defendant had the right to demand payment of one penny. Nothing was said about detention. But before the High Court the defendant's counsel Rolin put the argument somewhat differently:

The meaning of the notice was clear, viz, that any person who entered the wharf, whether through the turnstile or from a boat, would be prevented from leaving through the turnstile unless he paid a penny. That was a reasonable condition to impose under the circumstances, because it would be impossible for the appellants to carry on their business if it were necessary to inquire of each person whether he had actually travelled by boat or not. The respondent, therefore, when he entered the wharf, knew, and accepted as an implied term of the contract of carriage, *that he would have to submit to such detention if he failed to carry out his part of the contract* (my italics).¹⁶

Contracts and False Imprisonment

I think it is now necessary to look at the two ways in which it might be said that the contract between the parties might affect liability in false imprisonment. First, it might operate as a justification – lawful authority – to detain a person who was in breach of its conditions. Secondly, and importantly in the context of false imprisonment, it might operate by implying that the plaintiff consented to any imprisonment. There are difficulties with each of these arguments. At the time of Robertson there was long standing authority that a person could not imprison another to enforce a breach of contract in the absence of some independent lawful authority (ie a statute or judicial process).¹⁷ Moreover, it is absolutely clear from looking at the leading tort

¹⁴ Above, n 8, p. 792, citing *Linford v Lake* (1858) 3 H & N 276157 ER 475. The case is cited by Cohen J in his judgment: (1906) 6 SRNSW 195, 206.

¹⁵ Cohen J dissented only on the ground that a new trial limited to damages should be ordered.

¹⁶ *The Balmain New Ferry Company Ltd v Robertson* (1906) 4 CLR 379, 383. Perhaps conscious of the implications of such an argument, Rolin immediately added: 'There was no imprisonment because he could have left the wharf by water: *Bird v Jones*'; see below.

¹⁷ *Sunbolf v Alford* (1838) 3 M & W 248; 150 ER 1135.

texts of the time – Clerk & Lindsell, Pollock, Salmond, Addison – that these justifications went to making that lawful which was otherwise unlawful¹⁸; thus they were defences which, under pre-Judicature Act civil procedure, needed to be specially pleaded. No such defence had in fact been pleaded by the company. Superficially, the ‘consent’ argument was more appealing. In particular, this defence – which was alternatively described in some texts by its old pleading name of leave and licence¹⁹ – could in certain cases be put forward under the general issue; in modern terms it went to the commission of the tort rather than to excuse. Even here though the matter was not free from doubt; it was clear that the appropriate plea for a leave and licence in assault and battery was the general issue; it was equally clear that it needed to be specially pleaded in trespass to land.²⁰ The view was expressed in *Bullen & Leake* that it should be raised under the general issue in false imprisonment.²¹

Assuming that this was correct, there was a more fundamental problem in applying the defence. As Robertson pointed out in a letter to the *Daily Telegraph* after the High Court decision²² (more convincingly than was argued in the High Court) any argument of leave and licence had to contend with the leading case of *Wood v Leadbitter*²³, where it was made clear that any such licence could be revoked, and if wrongfully revoked, the innocent party was left to his remedy in damages. Of course, *Wood v Leadbitter* was a case involving a licence to be on land. Indeed, from a review of the leading texts it is clear that consent or volenti non fit injuria or leave and licence, however it was described, was considered primarily relevant in the context of assault and battery (at least in the intentional torts).²⁴ There is no reference to consent and false

¹⁸ Wyatt Paine, *Clerk & Lindsell on Torts* (London: Sweet & Maxwell Ltd, 4th ed 1906) pp. 204-5; William Gordon & Walter Griffith, *Addison on Torts* (London: Stevens & Sons, 8th ed 1906) pp. 171-187; Pollock, *The Law of Torts* (London: Stevens & Sons, 8th ed 1908) p. 221; Salmond, *The Law of Torts* (London: Stevens & Haynes, 1907) p. 344.

¹⁹ Eg. Pollock, *The Law of Torts* (London: Stevens & Sons, 8th ed 1908) p. 159.

²⁰ Above, n 8, p. 699, 740 (general issue correct plea for leave and licence in assault and battery), 740 (specially pleaded for trespass to land and realty).

²¹ *Ibid.* But this was based on *obiter* in *Christopherson v Bare* (1848) 11 QBD 473; 116 ER 554 and in this field drawing analogies was fraught with uncertainty (eg the distinction between conversion and trespass to chattels; in the former even pleas that look like justification could be raised under the general issue (execution levied under a writ of fieri facias for example) whereas in trespass to goods they needed to be specially pleaded (thus execution under fieri facias needed to be specially pleaded in trespass to chattels); see *Bullen & Leake*, pp. 699, 716.

²² *Daily Telegraph*, December 28, 1906, pg. 5 (Letters to the Editor).

²³ (1845) 13 M & W 837; 153 ER 351. For a discussion of the case in its historical context see Patrick Polden, “A Day at the Races: *Wood v Leadbitter* in Context” (1993) 14 JLH 28.

²⁴ Wyatt Paine, *Clerk & Lindsell on Torts* (London: Sweet & Maxwell Ltd, 4th ed 1906) p. 189; William Gordon & Walter Griffith, *Addison on Torts* (London: Stevens & Sons, 8th ed 1906) pp. 160; Pollock, *The Law of Torts*

imprisonment in any of the texts of the period. I suggest that the uncertainty over the scope of leave and licence/consent in false imprisonment is reflected in the company's pleadings on the effect of the notice; they thought it was important but were not sure why this was so or how it related to an argument of commercial necessity. It is not until oral argument in the High Court that an embryonic version of the defendant's final case appears. The plaintiff had entered into a contract to leave the wharf by the ferry, and the defendant's asserted that, as the plaintiff had entered on the wharf knowing of the condition upon which entry was granted, he was obliged to pay one penny and, crucially, that he could be restrained if he did not. But this was not the end of the story: for the first time the defendant argues – presumably as a result of this contract of carriage - that the plaintiff had not actually been imprisoned, the ground on which many modern writers justify the result. Whatever one thinks of the merits of this latter argument, it certainly needed contemporary explanation as the question of how long one must be imprisoned for the tort to be committed, and whether imprisonment occurred if the means of escape involved placing the plaintiff in peril, remained relatively unexplored.²⁵

On analysis the defendant's argument before the High Court is a strange mix of consent and lawful authority; consent because the original basis for the restraint came from the plaintiff's voluntary agreement, but perhaps also lawful authority as it seemed clear that the plaintiff had revoked the agreement so some other ground for the detention needed to be found. These nice distinctions however found no favour in the High Court; the plaintiff had entered onto the wharf on condition that he would leave by another exit and could not complain if immediate freedom was not granted when that contract was repudiated.²⁶ The notice was now considered irrelevant; it mattered not that the plaintiff did not know of the precise terms on which he entered the wharf;

(London: Stevens & Sons, 8th ed 1908) p. 218; Salmond, *The Law of Torts* (London: Stevens & Haynes, 1907) p. 46. Pollock and Salmond also mention leave and licence in the context of trespass to land.

²⁵ A Underhill & J Gerald Pease, *Underhill's Law of Torts: A Summary of the Law of Torts* (London: Butterworths, 9th ed 1911) pg. 253 states that 'Actual restraint for however short a time constitutes false imprisonment', and through various editions Pollock noted – picking up on comments made in dissent by Denman CJ in *Bird v Jones* (1845) 7 QB 742 - that there would be no imprisonment only where the alternative means of escape could be used by a man of ordinary ability could use without peril of life or limb (eg, 7th ed 1904, pg. 217 to 12th ed 1923, pg. 220).

²⁶ (1906) 4 CLR 379, 386 (Griffith CJ), 389-391 (O'Connor J).

what was important was that he knew that there would be some charge or condition to exit the wharf.²⁷

In my view the decision of the High Court raised an important point about the relationship between consent and lawful authority in false imprisonment, a novel point that contemporary discussions simply did not consider. The defence that was recognized was a strange hybrid and very fact specific: it was either a form of lawful authority deriving from an initially implied contractual consent to a deprivation of liberty, or a limited irrevocable contractual consent, the irrevocable nature flowing from the nature of the original agreement. Why this consent should be irrevocable on legal, as opposed to commercial, grounds was not clear²⁸; perhaps it was only where there was the possibility of exit through the ferry but this is certainly not explicit in the judgments. Moreover, the analogies drawn by O'Connor J as to the inconvenience to railway operators if Robertson's case succeeded (ie if passengers could demand immediate release from contracted railway journeys at points where the train was not scheduled to stop) are entirely unconvincing. Robertson was not asking for the ferry company to delay its boats or change its routes and it would have presented no practical difficulty to let Robertson go immediately; he managed it himself in the end by doing something he could have done immediately (i.e. squeezing between the turnstile and bulkhead).²⁹

Whatever one thinks of the ultimate merits of these arguments, we can surely sympathise with Mr Robertson. Throughout the trial and appeal, the defendant's arguments changed fundamentally whilst remaining vague; the contract was legally relevant and important but we are not sure exactly why. Moreover, although both parties played by the rules of the pleading game in the lower courts, the High Court was simply not interested in pleading issues; O'Connor

²⁷ Ibid, 390 (O'Connor J).

²⁸ Perhaps an analogy could be drawn with the cases dealing with contractual licences held to be irrevocable for a certain period (see *Hurst v Picture Theatres Limited* [1915] 1 KB 1) where the consent was given for a particular purpose. The context was quite different, however; the question there was whether the licence could not be revoked so as to make the licensee a trespasser, and *Wood v Leadbitter* (above, n 23) was distinguished by creating some kind of limited proprietary right to be on the land for the particular purpose for which the licence to enter had been granted (in *Hurst*, the right to view a moving picture). It was clear that *Robertson* had no proprietary interest, even as broadly as that was defined in *Hurst*, to which the 'licence' to restrain him related. Nor would a court of equity specifically enforce the contract of carriage in *Robertson*, the other ground on which *Hurst* was decided.

²⁹ The 'commercial convenience' argument surfaces in O'Connor J's dismissal of the suggestion that Robertson had the right to force his way out: '... it was a necessary part of their system of collecting fares on entry and exit that the turnstile should be an effective barrier against entry and exit of any person except on the company's conditions ((1906) 4 CLR 379, 392).

J said simply that the case had not been conducted on the basis of any pleading point³⁰; to the extent that this was true it was because such a point had not been raised previously. Not that any such arguments were to bother the High Court; both Griffiths CJ and O'Connor J thought any pleading deficiencies could be rectified by amendment³¹, an unusual course to take by the time the case had reached the highest appellate court in the jurisdiction. And to cap it off the High Court went further than the plaintiff's notice of appeal, which had only asked for a retrial, by directing a verdict for the defendant.³²

One reason for the reluctance of the court to engage in any discussion of the pleading issues may reflect the fact that the New South Wales procedure was already seen as archaic; Pollock, after commenting on the cases dealing with how to plead leave and licence, noted with evident satisfaction, that this had long ceased to be of any importance in England.³³ The commercial context of the decision is also clearly important. But I want to stress one, less obvious, context of the decision: the federation context.

Archibald Nugent Robertson had been an opponent of federation in the late 1890's, culminating in a pamphlet he wrote in 1897.³⁴ It is an interesting piece, written from the view of a fictitious professor in 1915 detailing the economic decline and ultimate revolt of the state of New South Wales after federation before being crushed by the forces of the Commonwealth, dominated by Victoria. In fact, Robertson stood as an anti-federation candidate in New South Wales in the convention elections, running, if the Bulletin is to be believed, last out of 49 candidates.³⁵ This seemed to have dampened his enthusiasm as I have found no record of him playing an active role in the later anti-federation movement, and he himself says in his evidence at the trial that he was

³⁰ (1906) 4 CLR 379, 392.

³¹ Ibid, 387 (Griffith CJ), 392 (O'Connor J).

³² Robertson raised this issue after the judgment was handed down, pointing out that he had not dealt with the issue of whether a verdict should be entered as it was outside the notice of appeal; Griffith CJ held that the case had already been fully argued and that the order for leave could be extended now if necessary (see *Australian Star*, December 18, 1906, p. 1, *Evening News*, December 18, 1906, pg. 5, *Sydney Morning Herald*, December 19, 1906, pg. 7). I discuss the context of this exchange in more detail below.

³³ Pollock, *The Law of Torts* (London: Stevens & Sons, 8th ed 1908) p. 218.

³⁴ *Federation and afterwards: a fragment of history AD 1898-1912, which briefly set forth some of the causes of the late abortive revolt of the state of New South Wales against the Commonwealth of Australia* (Sydney: Angus & Robertson, 1897).

³⁵ 'Again, HEYDON, of the Prudent Federation crowd, obtained 16000 votes, while his colleague NUGENT ROBERTSON, who upheld the same banner, and who should have got the same votes if they were given to Heydon for his opinions only, comes ignominiously at the end with 2000', *The Bulletin*, March 13, 1897, pg. 6.

chosen as one of five people to pick the best Ode to federation.³⁶ But his past deeds remained with him; when the verdict in his favour was given the Bulletin commented that he did better in court than he did when standing on the anti-federation ticket.³⁷ When his case reached the High Court, for reasons unexplained, Robertson had to argue the case himself (he had counsel before the Supreme Court), before a panel of judges that comprised Griffith CJ, Barton and O'Connor, three leading proponents of federation, the latter two of which he had stood against in the 1897 convention elections.³⁸ An exchange at the conclusion of giving the judgments in the High Court, (whereby Robertson queried the order given by the court) which might simply be explained as a disappointed party in other circumstances, takes on a different meaning:

Robertson: I am speaking on the question of jurisdiction. I submit that the Court has gone beyond the order of leave. The order of leave is only on the question of a new trial, and that is all I came to meet. The notice of appeal as served upon us was that a new trial should have been granted on certain grounds. I did not come to meet the question that has been decided. I did not come to meet the question of whether the verdict should be entered or not. If your Honors think you should enlarge the order of leave, then I submit the case should be reargued.

Griffith CJ: Leave can be extended now if necessary.

Robertson : I submit that I should be allowed to argue upon the question of the pleadings.

Griffith CJ: The question has already been fully argued, Mr Robertson.

Robertson : The question of the verdict has not been argued at all.

Griffith CJ : This was all argued, Mr Robertson.

Robertson : Your Honor has for the first time raised the question of leave and licence – a question never raised in any Court before. The Supreme Court rule was not put before you at all. I trust your Honor is not going to overrule the laws of this State. The law of pleading is of as important as the law of manslaughter.

Griffith CJ: Mr Robertson, the Court is treating you with great indulgence in hearing you so long.

³⁶ Above, n 5, 42. Robertson indicated that he had been engaged in literary work and although I have not conducted a detailed search there is evidence of him contributing a number of stories to the *Centennial Magazine* in the late 1890's. He later wrote a book, *Her Last Appearance*, published by Mills & Boon in London in 1914. Certainly parts of his address to the High Court contain rhetorical flourishes redolent of the age; thus he was fighting 'a public battle' as the 'public liberty' was involved, and was standing upon the wharf 'clothed with all the liberties of a British subject': *Sydney Morning Herald*, October 12, 1906, pg. 7. These words do not appear in the Commonwealth Law Reports version of oral argument.

³⁷ *The Bulletin*, December 7, 1905, pg. 5.

³⁸ Barton and O'Connor were both elected.

Robertson: I don't think so, your Honor. I have as much right in this court as your Honor.

Griffith CJ: If you do not behave yourself, Mr Robertson, you will find that you have not as much right here as we have.

Robertson: Your Honor will take such steps as you please. I am not to be silenced when I am putting forward a legitimate objection. Am I to understand that your Honors extend the order of leave after argument, and judgment, and after all is over?

Mr Ferguson then rose and asked the Court upon the subject of costs, and the incident ended.³⁹

The press reaction to the High Court decision is also instructive; the *Sydney Morning Herald* paid it virtually no attention but there was extensive correspondence in the *Daily Telegraph* and the *Evening News*, papers which in the end opposed federation.⁴⁰ One of the editorials clearly casts aspersions on the quality of the High Court⁴¹, a federal institution which was only three years old when it gave the decision in *Robertson*. Robertson's petition for leave to appeal to the Privy Council, whilst being something of a rant, expressly raised the issue of the High Court's competence under the Judiciary Act 1903 to deal with questions of jury verdicts and pleadings of state courts.⁴² Viewed in this light Robertson's exchange with Griffith at the end of the case has at least some element of federal authority exercising its muscle over states' rights. Added to this brew was the fact that, when special leave was granted in May 1907, the Privy Council was itself under attack as the appellate court from the High Court; the colonial or Imperial Conference of the previous month contained a thinly veiled criticism of the court from Alfred Deakin albeit in the context of constitutional cases.⁴³ I do not want to push this point too far but it is easy to forget from a distance the precarious authority of both the High Court within the Australian federation, and the Privy Council as the supreme appellate court of the empire. It would not have

³⁹ *Sydney Morning Herald*, December 19, 1906, pg. 7. A similar version is reported in the *Australian Star*, December 18, 1906, pg. 1, but it adds that, when Robertson said he had been given no opportunity to argue the point, Griffith CJ told him that his memory deceived him, and also that the law of pleading was as important as the law of manslaughter and murder, and that 'your Honor cannot overrule the laws of this State'. Moreover, the tone of the exchange is noted; Robertson is said to excitedly say in a loud voice that he had as much right in the court as Griffith, and the *The Evening News*, December 18, 1906, pg. 5, refers to 'An Excited Litigant' and its report of the exchange says that Robertson's last words were said 'defiantly', before sitting down and nervously fingering some documents before the Chief Justice ignored him and asked if there were any motions at the Bar.

⁴⁰ The press reaction to the decision will form the gist of a paper to be given at the 26th Annual Conference of the Australia and New Zealand Law and History Society, at the University of New England, Armidale, 21-23 September 2007.

⁴¹ *Evening News*, December 20, 1906, pg. 4, 'The Public and the Law'.

⁴² *Printed Papers on Appeal*, 1909 (Vol 17), Judgments Nos. 55-60 (Privy Council).

⁴³ See the comments in (1907) 42 *Law Journal* 289, 301, 323 and 340.

been a propitious time for the Privy Council to vindicate the appellant's view that the High Court had gone beyond its constitutional limits, especially for a litigant who had some history of opposing the federal idea as a whole. Certainly the opinion of the Judicial Committee in the *Robertson* case is little more than an acquiescence in the judgment of the High Court⁴⁴; it is short, spends no time at all on any constitutional or pleading question, and for good measure condemns Robertson's actions as unreasonable.⁴⁵ The anxiety to dismiss the case as without merit is evident from the statement that the trial judge should have granted the non-suit asked for the defendant a trial⁴⁶; as the nonsuit related to the course of employment point it clearly would have been wrong to have done so, and to have expected Darley CJ to nonsuit on matters not raised in argument was unrealistic. Perhaps the best example of the fall from grace of Mr Robertson was the headnote in the Law Journal reports; whereas Darley CJ had instructed the jury that 'it was not a case of cheating'⁴⁷, the headnote now read 'Toll – Evasion'.⁴⁸

The result was that Robertson eventually lost but he had the last, no doubt bitter, laugh; the House of Lords applied his case to a miner stuck down a mine as a result of his breach of contract⁴⁹; even the *Solicitors Journal* thought the *Robertson* principle was somewhat dangerous⁵⁰, and, writing in the *Law Quarterly Review* in 1928, Amos explained compellingly why the general ground for the Privy Council decision was untenable.⁵¹ I hope I have gone a little way to explaining how that untenable result was reached.

⁴⁴ [1910] AC 295.

⁴⁵ *Ibid*, 300.

⁴⁶ *Ibid*.

⁴⁷ *Daily Telegraph*, December 2, 1905, pg. 18.

⁴⁸ (1910) LJR (NS)(PC) 84.

⁴⁹ *Herd v Weardale Steel, Coal & Coke Co* [1915] AC 67.

⁵⁰ (1914) 58 So J 702.

⁵¹ (1928) 46 LQR 464.