

AN IMPERIAL COURT OF FINAL APPEAL.

(Communicated.)

The first practical step towards the federation of the Empire will, in all probability, be taken in the near future. For it is one as to the advisableness of which there will hardly be any difference of opinion either in the United Kingdom or in the colonies. That step will be the creation in London of such a court of final appeal as will give satisfaction throughout the colonies—that is to say, throughout the Empire at large.

The objections to the present system are tersely and pointedly stated in an article on this subject in the "Nineteenth Century," by Mr. Justice Hodges, of Melbourne, Australia. There are at present two tribunals of final appeal in the Empire—the House of Lords and the Judicial Committee of the Privy Council. The former is the court of final appeal for the United Kingdom, the latter is the court of final appeal for India and the colonies. Each tribunal is independent of the other. Each states authoritatively, and, as a court of last resort, what the law is and the decision of each is final. It follows that a proposition which may be affirmed as law by the Judicial Committee may be negatively by the House of Lords, and thus we have the legal and logical absurdity that, theoretically, the affirmative and the negative of the same proposition are each true for different parts of the Empire. A dispute between a British merchant resident in Canada or Australia and one resident in England may, therefore, be determined in favour of the plaintiff if the case be originally tried in a Canadian or an Australian court; whereas the same case, if it had been originally tried in a court in England, and so had gone to the House of Lords, might have been decided in favour of the defendant. This is an eminently unsatisfactory state of affairs.

Another objection is that, the Privy Council being the ultimate Court of Appeal from the Colonies, if that tribunal has decided the principle upon which a case turns, such decision, in theory, puts an end to all doubt; and it might consequently be supposed that lawyers would be able with confidence to give their clients an advice based upon that decision. But, as matters stand, the lawyers cannot do anything of the kind. If colonial suitors and their counsel could be sure that the Judicial Committee would be composed of the same members as when the previous decision was given, they might act with some feeling of certainty. But there are persons who are members of both courts. When the later comes to be heard, some members who were not present at the previous decision of the Judicial Committee may take part in this later determination, and may not approve of the previous decision of the Judicial Committee, but may approve of the

previous decision of the House of Lords to which they may have been parties; and these, by their number, their arguments, or their influence, may bring about a decision in accordance with that previously given by the House of Lords, and, while not expressly overruling the previous decision in the Privy Council, may have recourse to the process known to lawyers as "distinguishing" it—which, in some instances, is little other than a polite way of indicating that it is overruled.

But there are other and perhaps stronger objections still. There is a general feeling that the *Judicial Committee is inferior* as a legal tribunal to the House of Lords. The statute which has been called the Constitution Act of the Judicial Committee says: "And be it enacted that two members of His Majesty's Privy Council who shall have held the office of Judge in the East Indies or any of his Majesty's dominions beyond the sea, and who, being appointed by that purpose, shall attend the sittings of the Judicial Committee, shall severally be entitled to receive, over and above any annuity granted to them in respect of having held such office as aforesaid, the sum of four hundred pounds for every year during which they shall so attend." But at that time—1833—appeals from India and the crown colonies were practically the only appeals heard by the Judicial Committee, and what was an adequate provision then may be insufficient and unsatisfactory now, when the self-governing colonies have come into existence and have rapidly risen in magnitude and importance. The qualifications mentioned in the section quoted do not seem to be exactly those that specially qualify to adjudicate upon a Canadian, an Australian or a South African appeal, nor does it appear that persons appointed under this section are likely to possess the freshness and vigour of intellect necessary to grapple with decisions dealing with the policy of a whole series of acts passed for the purpose of meeting the circumstances of a new British community under new conditions. Some colonial judges have been appointed to the Judicial Committee, but as they are actively engaged in or have hitherto been actively engaged in, the discharge of their official duties in the colonies, they may find the Judicial Committee engaged in hearing appeals from their own decisions.

The remedy suggested by Mr. Justice Hodges for this unsatisfactory state of things is the creation of a new court of final for all his Majesty's subjects, whether in the United Kingdom or in India and in the colonies. What reason, he asks, is there for keeping in existence two courts of final appeal? We have one King and one supreme parliament that legislates for the whole Empire. It would be impossible to carry on the business of the Empire with two supreme parliaments. Why, then, should we not have but one supreme court of final appeal?