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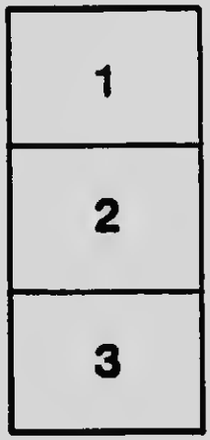

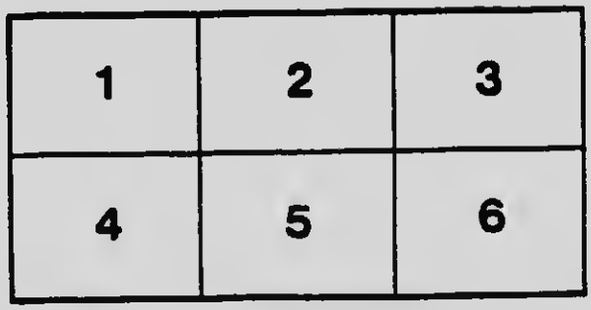

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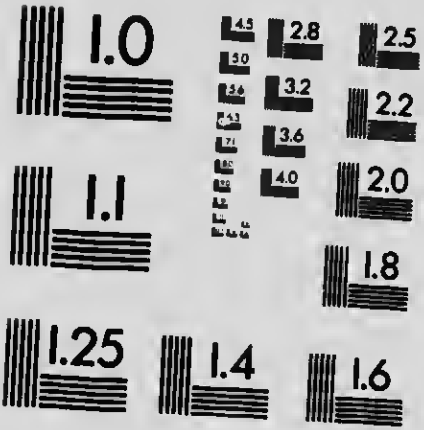

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THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

A PAPER PRESENTED
AT THE THIRTY-SECOND ANNUAL MEETING

OF THE

New York State Bar Association

HELD AT THE CITY OF BUFFALO, ON THE 28TH AND 29TH
OF JANUARY, 1909

BY

WALLACE NESBITT, K. C.
OF THE TORONTO BAR

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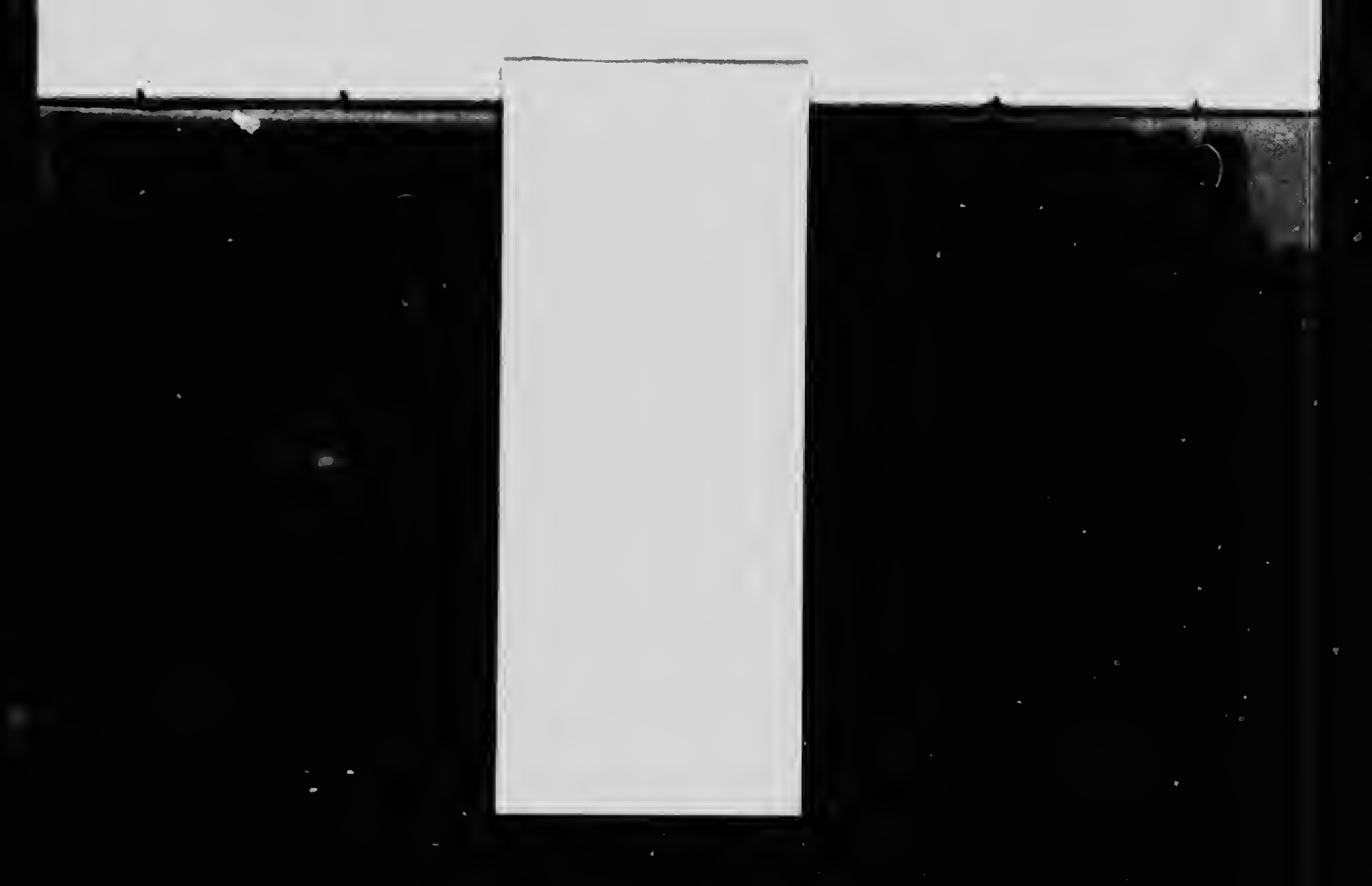

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THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The Judicial Committee of the Privy Council is the court of last resort for all that portion of the British Empire situated outside the United Kingdom. It sits as a committee of advice to the Crown, and its jurisdiction is founded solely on the royal prerogative.

From the beginning of our national existence the King has been accustomed to act with the advice of the magnates or great men of the realm, and at an early period exercised legislative, executive, and judicial authority, especially of an appellate character, from the shire and hundred courts. I have been unable to ascertain when appeals to the Privy Council were first instituted, but there is no doubt that from the earliest times petitions for justice were presented to the King in Council, especially when the courts were liable to be intimidated by an influential suitor, it being an ancient rule of our Constitution that the subject who failed to obtain justice in the ordinary courts might in all cases petition to the King to exercise his royal prerogative in his behalf. As the Empire increased, this right has been gradually extended to all the King's subjects. Those residing in the United Kingdom have apparently found the custom of presenting their petitions to the King in Parliament the most convenient, and this practice is now confirmed by statute, the House of Lords being the court of last resort for the United Kingdom. The King's subjects beyond the seas, on the other hand, found that their petitions were more speedily heard if addressed to the King in Council, which has thus gradually become the tribunal of final appeal for India and the Colonies. The statutes which have been enacted from time to time regulating the power and pro-

cedure of the Council are of a most interesting character and clearly reflect the popular opinion of the day. One of the most interesting is that of 24 Henry VIII, passed in 1532, which provides

> "That appeals in such cases as have been used to be pursued to the See of Rome, shall not be from henceforth taken, but within this realm."

The power thus conferred upon the Council of hearing appeals in all cases was greatly abused, and by Statute I, Charles I, Chapter 10, passed in the year 1646, it is enacted that neither His Majesty or Privy Council have any jurisdiction or power to draw into question any matter of any of the subjects of this Kingdom, but that the same ought to be tried in ordinary courts of law, thus transferring the appellate authority of the King in the United Kingdom from the Council to the Parliament or House of Lords. It will be noticed that the words of this statute do not apply to the King's subjects outside the United Kingdom, and in the same year we find mention made in the records of the Council of proceedings in a matter from the Island of Guernsey. The Council was put on its present basis and the Judicial Committee formed by Statute 3 and 4, William IV, 1833, and by subsequent statutes jurisdiction has been given to the Judicial Committee in matters within the United Kingdom in Ecclesiastical, Admiralty and Patent cases.

Owing to the great expansion of our Empire, which is mainly due to the acquisition of [redacted] territory, the laws administered by this Council are of the most diverse and complex character, and the judicial enquiry entered into by it, of the most cosmopolitan description. It is laid down by most eminent authority that all territory which is newly acquired, whether by conquest, colonisation, or

peaceful annexation, is acquired for the benefit of the Crown. If an uninhabited country is discovered and peopled by English subjects, they are supposed to possess themselves of it for the benefit of their sovereign, and carry with them such portions of the English common law as are necessary and applicable to their situation. In the case of possessions acquired by conquest or annexation, the sovereign, unless he has limited his prerogative by the articles of capitulation or treaty, has the inherent power to make new laws for the conquered country, but until he sees fit to do so the laws in force in the newly acquired territory at the time of the capitulation or annexation, remain in force and equally affect all persons and property. It has been the almost universal custom of our Empire to refrain from interfering with the laws and institution which have been in force in those countries which have been added to it. As an illustration of the extent of jurisdiction, Sir Frederick Pollock, when in Toronto in 1905, stated that, whilst proceeding on the tour which he was then completing, he had left Liverpool and had visited Gibraltar, Minorca, South Africa, India and Canada, all countries under the rule of the British Empire, and all, with scarcely an exception, under laws which differed. Go into the Judicial Committee of the Privy Council for a single week and watch its operations. You will see it deciding on one day a question according to the Roman Dutch law; on another a question according to the French law as it prevailed before the Revolution, modified by subsequent Canadian statutes; and on another day according to the common law of England, as modified by Australian or New Zealand legislation; and at the end of the week according to the customs of the Hindu or Mohammedan law. The truth of these observations may be readily understood by perusing a

list of the different territories from which appeals may be taken to this court. The number is upwards of 150, and occupies in one work on the subject over seven printed pages. If Europe is taken as an example, appeals lie from six different principalities, and the laws administered range from the ancient customs of the Isle of Man to those in force in the Island of Cyprus. Other interesting examples may be given in the Leeward Islands, composed of Montserrat, Saint Kitts, and Ben Nevis, where it administers the common law introduced by Royal Proclamation in 1764, and Newfoundland, which is our oldest colony. In Asia, besides India, appeals lie from the courts of twenty-four separate principalities, differing from the Bombay High Court to the Consular Court in China and Corea.

If we should now examine the actual working of this Council, we find that the governments of the various dependencies as a general rule have the power to legislate and limit the right of the subject to carry his case to the foot of the Crown. They cannot, however, legislate with regard to the right of the Sovereign to hear those appeals. As a general rule, legislation has been passed restricting the right of appeal to cases when the matter in controversy exceeds a certain value. If the matter is not of sufficient importance to comply with the regulation in force in the particular territory in which the suit is instituted, an application may be made to the Council itself for special leave to appeal. The application is made by way of petition, which must set out the facts of the case, the portion of the judgments in the courts below which are said to be erroneous, and the reasons upon which counsel base the application. The statements contained in the petition must be characterized by the utmost frankness and good faith, and a *prima facie* case must be

made out. The committee in granting the petition will be greatly influenced by the wishes of the colony as expressed by its legislation. The exercise of the prerogative will not be recommended except in cases of general importance, and will only be granted (1) where constitutional questions are in controversy, (2) where there is an important point of law involved and the amount in controversy is large. The Privy Council, in deference to the wishes of our government, have laid down the rule in criminal cases that they will not interfere to grant special leave unless the clearest injustice has been done. Two cases of recent years excited great interest. In Riel's case, where, following the North-West Rebellion, Riel was convicted of high treason, leave to appeal was refused. In Gaynor and Green's case, where the United States were petitioners, leave to appeal was granted, and upon the argument being heard an order was made favourable to your government.

Where, however, the local legislature does not prohibit the appeal, the appellant proceeds to the Privy Council as of right, and no leave is necessary.

The first step in the appeal is the printing of the record, which contains the pleadings, the judgments delivered by the courts below, and such parts of the evidence as may be necessary for the determination of the matters in dispute. Each counsel then prepares his case, which should contain a short statement of the facts relied on by counsel in support of his contentions, and a memorandum of the points to be argued. It is not customary to cite authorities in the case. Indeed, it is not considered to be in good taste, as owing to the great learning and vast experience of the members of the Board, they are usually familiar with such as have a bearing on the matters in question. The Privy Council does not sit as a court, but

as a committee, and the argument takes place in a chamber in the Colonial Office in Downing street. Only the other day Viscount Wolverhampton, a solicitor who for many years was head of the I .corporated Law Society, and who has been elevated to the peerage and made a member of the committee, sat along with the law lords. He would not have heen entitled to appear as an advocate or to don the wig and gown in any court in the United Kingdom, and yet he was sitting as a judge in this committee. I fancy it was the only occasion when such a thing has happened. Of course, many of the solicitors in England are probably as great lawyers as are to be found anywhere in the world, but they cannot, under the English system, appear in court or be created judges. The lords appear in their ordinary street attire, and are seated round a table at one end of the room. When the court opens, the doors are unbarred, counsel are allowed to enter and take their places in a small railed enclosure at the other end of the room. They are expected to wear the ordinary court attire, which includes a wig and gown. There is a small reading desk on which the counsel addressing the court may place his documents and other papers. If an authority is cited to their Lordships, usually an attendant of the court is directed to obtain the report, which is perused by their Lordships at the time. Judgment is delivered, or counsel may be requested to withdraw while their Lordships deliherate. Counsel are then admitted and judgment is delivered, or judgment may be reserved.

The Council is not a court, and the judgment is delivered by one of the judges on behalf of the whole committee, no dissenting view being expressed, it being the duty of each Privy Councillor not to disclose any advice he may have given to the Crown.

During a recent stay in London I more than once visited the council rooms, and was astonished by the

variety and magnitude of the business transacted. On one day their Lordships were engaged in a reference from the Colonial Office as to the conduct of the Chief Justice of Grenada. On the next day their Lordships heard argument in a case from Ceylon, where two native ladies of high rank were appealing in an endeavour to quash a conviction for the alleged crime of beating a servant to death. The next case concerned the question of the pedigree of an Indian Rajah, and the right of succession to his vast estate, in which Sir Robert Finlay, ex-Attorney-General of England, was opposed to distinguished members of the Indian Bar, several Parsee lawyers acting as junior counsel on either side. On the next day, a dispute involving the title to a Cobalt mining claim was heard, and in the afternoon a question as to the title to a piece of foreshore in the eastern part of Quebec was disposed of. I have seen their Lordships dispose of five petitions for special leave to appeal one morning in less than an hour, and these petitions originated from places as distant from one another as Gibraltar, India, the Straits Settlements, and Canada, and apparently with a full appreciation of the law and facts involved in each case. I supposed the petitions had been carefully perused before the committee met.

There has been some discussion looking towards abolishing the Judicial Committee, or amending its constitution. Objection has been taken that the highest appellate courts of the great federated and self-governing colonies should be the courts of last resort for such colonies, and suggesting that the existence of the court is a reflection on the ability and learning of their own judges; also objections based upon the delay and expense. The subject was so fully discussed on the occasion of the debate in the House of Commons of England on the

Commonwealth of Australia Constitution Bill, that I cannot do better than quote one or two passages. The first is from Mr. Faber, who has been Registrar of the Privy Council for nine years. He said, in part:

"But the proposed limitation of the appeal to the Privy Council falls altogether into a different category. That is a matter which concerns not Australia alone, but Australia in relation to this country; and, more than that, concerns our whole empire. The Privy Council appeal is the right, in the last resort, of every subject of Her Majesty's Dominions beyond the seas to petition the Sovereign for justice; it is the prerogative right of the Sovereign to hear all such matters of complaint, and to grant such redress as the Sovereign may think fit. The Sovereign delegates the hearing to the Judicial Committee of the Privy Council, who report their opinion to the Sovereign; the Sovereign confirms their report by an Order in Council; until so confirmed the report has no validity whatever. It has been found necessary, from time to time, to cut down and modify the right of appeal of the subject. Throughout our Empire abroad, speaking generally, the subject has no right of appeal, unless the value of the matter in issue is £500 or over. Otherwise special leave to appeal must be obtained from the Privy Council before an appeal can be brought. In the case of the Supreme Court of Canada, the subject has no right of appeal to the Privy Council at all. Special leave to appeal must in every case be obtained, and until that is obtained the subject is precluded from any appeal so far as the Privy Council is concerned.

"Then there is the free, unrestricted prerogative of the Sovereign to admit any appeal to the Privy

Council she may think fit. In 1867 the British North American Act was passed, which incorporated the various provinces of Canada into one dominion. That Act ascribed certain topics of legislation to the Dominion Legislature, and certain topics to the Legislatures of the Provinces. Questions constantly arose, between the Dominion and the Provinces, as to whether a particular topic of legislation fell within the powers of the Dominion or of a Province; large questions, in which the people of Canada were deeply interested — questions of education, of liquor license, of boundaries, of the rights of the Indians, among many others. These questions came, in the last resort, before the Privy Council, and I think the people of Canada were glad that they did, and were well satisfied with the decisions given. I should confidently appeal to the people of Canada to-day, to say whether or no they would prefer to keep the Privy Council appeal. I feel certain that their answer would be in the affirmative.

"Then there is a different objection which has been taken to the Privy Council appeal, and I allude to it because the subject has come within my own experience. It has been said that there are long delays in the Privy Council. My memory tells me that, so far as delay is concerned, in bringing a case before the Privy Council, that criticism is scarcely justified by the facts. I know there have been long delays in cases from Australia and elsewhere, but they have generally taken place in the colony from which the appeal has come, and before the record of the proceedings has reached the Privy Council office. It frequently takes a long time to prepare the record in the colony, and that is where the real delay, as a

rule, occurs. But when the record has arrived at the Privy Council office there is no delay in bringing the matter on for hearing, unless the parties themselves delay it. If the criticism means that there is a delay in delivering judgment, then I must confess that there have been delays. But I do not think that fault is confined to the Privy Council alone. I think that many of our courts in this country, and perhaps in the colonies, are equally open to that criticism. I venture to doubt whether judges are sufficiently alive to the serious inconvenience which is caused to suitors by delaying judgment in an appeal for sometimes many months after the hearing. Another objection which has been made to the Privy Council appeal is its expense. I know that all litigation is expensive, and that law is a luxury of the most expensive nature. I do not think, however, that an appeal to the Privy Council is any more expensive than an appeal to the House of Lords, and I venture to doubt whether it is any more expensive than an appeal will be to the High Court of Australia. Another objection taken — and the most serious one of all — is, that the Privy Council is not a strong enough tribunal; that, in the words of one of the delegates, the Privy Council is not a tribunal that this country would be satisfied with. In answer to the latter part of that criticism I may say that for years past the Privy Council has been a stronger tribunal than the House of Lords, which is the final court in this country. To-day the Privy Council consists not only of all the Lords who sit judicially in House of Lords cases, but of many members besides, including three distinguished judges from Canada, Australia, and South Africa. The real trouble does not lie there,

but it lies in the fact that when the Privy Council and the House of Lords sit at the same time, as they frequently do, it is very difficult to make up two strong courts, with the result that one is apt to be sacrificed to the other. There is only one remedy for this, and that is that there ought to be more paid judges. We have relied far too much in the past upon gratuitous assistance, which has been nobly given, and which nobody desires to criticise. But when you have paid judges you have, of course, a right to call for their services, which you have not when they are unpaid. The right honourable gentleman, the Secretary of State for the Colonies, who introduced this bill, has foreshadowed the change that is going to be made. I myself hope the Privy Council will not be incorporated in the House of Lords. I am sure such a scheme would not be agreeable to India. The natives of India set great store by the fact that their appeals are made to the Queen Empress. Nor do I think it would be agreeable to the colonies. There are many Parliaments in the British Empire, but there is only one Crown, and I think the colonies, if they had to choose between the two, would prefer a strong Privy Council, which is the court of the Sovereign, to the House of Lords, which is a court of our Parliament. In my view the time has now come for the establishment of a new court altogether, which would be neither the Privy Council nor the House of Lords. What I should like to see established would be a court entitled 'Her Majesty's Supreme Court of the British Empire.' Such a court would satisfy both the colonies and India."

The court, of course, is only human, and, like all other things, must sometimes make mistakes, but as a general rule its decisions disclose a depth of learning and breadth of character which are not surpassed by those of any other forum in the world. Being far removed from the cause of the litigation, their judgments are not affected or tainted with local spirit or prejudice. It is unfortunate that it sometimes happens that they are misunderstood by even learned members of our legal profession. Their Lordships do not, as a rule, cite authorities in their written decisions, which sometimes lead one to suppose that they have been overlooked. As they constantly decide matters of the very greatest importance, it occasionally happens that their decisions do not commend themselves to popular opinion, but it cannot be otherwise in any court of last resort. The Council's most vehement detractors have never denied the undoubted ability and eminence of those brilliant statesmen and lawyers who have taken part in its decisions and dispensed justice for the entire Empire. Among these I may mention Lord Brougham, Lord Westbury, the late Lord St. Leonards, Lord Selborne, Lord Cairns, Lord Watson, Lord Herschell, Lord Halsbury, the present Chancellor Lord Loreburn, Lord Macnaghten, and Lord Lindley.

So much for the criticisms referred to. On the question of its political importance the Privy Council itself, in 1871, in a memorandum, said:

> "The appellate jurisdiction of Her Majesty in Council exists for the benefit of the colonies, and not for that of the mother country; but it is impossible to overlook the fact that this jurisdiction is part of Her Majesty's prerogative, and which has been exercised for the benefit of the colonies since the date of their settlement. It is still a powerful

link between the colonies and the Crown of Great Britain, and secures to every subject throughout the Empire the right to claim · dress from the Throne. It provides a remedy in many cases not falling within the jurisdiction of the ordinary courts of justice. It removes causes from the influence of local prepossession; it affords the means of maintaining the uniformity of the law of England and her colonies which derive a great body of their laws from Great Britain, and enables them, if they think fit, to obtain a decision in the last resort, from the highest judicial authority, composed of men of the greatest legal capacity existing in the metropolis."

And again in 1875 the Privy Council pointed out that

"this power has been exercised for centuries over all the dependencies of the Empire by the Sovereign of the mother country sitting in Council. By this institution, common to all parts of the Empire beyond the seas, all matters whatever requiring a judicial solution may be brought to the cognisance of one court in which all have a voice. To abolish this controlling power and abandon each colony and dependency to a separate Court of Appeal of its own, would obviously destroy one of the most important ties connecting all parts of the Empire in common obedience to the courts of law, and to renounce the last and most essential mode of exercising the authority of the Crown over its possessions abroad."

At the date of the Australian debate, the Government of New Zealand said that,

"in the best interests of the Empire, the right of appeal on constitutional grounds is one of the strongest links binding us to the mother country."

And Western Australia was of opinion

> "that by the possession of one Court of Appeal for the whole British race, whose decisions are final and binding on all the courts of the Empire, there is constituted a bond between all British people which should be maintained inviolate as the keystone of imperial unity."

Canada has given many recent evidences that she has no reason to regret the absence of absolute finality in the decisions of her own courts, and has many times shown that together with all other portions of the British Empire, her people look to the advisers of the Sovereign in Council in matters of the highest moment for a breadth of decision not surpassed by that of any other tribunal in the whole world.

To appreciate our view of this tribunal, you have to enter into the difference of spirit prevalent under the English Constitution and others.

> "One of the great glories of the Roman Empire was that the system of jurisprudence which we know as the Roman Law extended in its application practically throughout the Empire. Napoleon will be remembered by the only beneficent act of his life which remains, and which still influences the lives and the actions of the vast continent of Europe over which his dominion was once overspread. Napoleon, by sweeping away all the separate systems of local law which prevailed in Europe, and substituting the Code Napoleon, with its comparative simplicity and reasonableness, did undoubtedly introduce a uniformity of law throughout his empire. That has not been the method of the British Empire. Our method has been totally contrary. We have always proceeded on the principle of jealously preserving and maintaining local laws and usages."

The veneration in which the Council is held is afforded in the well-known story which is, I believe, founded on fact, of the conduct of some poor villagers in an obscure corner of Rajputana, who had for years been struggling for their rights against the oppression of the powerful Rajah of that district. An appeal was finally taken upon the question in dispute to the Privy Council and a judgment being obtained in their favour, they conceived that any institution possessing such great powers must be of Divine origin They erected an altar to this great unknown being, the Privy Council.

It cannot be doubted that it is one of the strongest links which binds the Empire together.

The fire of patriotism burns in our colonies with a pure, clear flame which is the wonder of the world. In South Africa, men from Canada, New Zealand and Australia fought side by side with men from England, Ireland, and Scotland, under one flag. With the copious outpouring of their blood they sealed our Empire together. In the words of a great orator:

> "Their blood has flowed in the same stream and drenched the same field; when the chill morning dawned their dead lay cold and stark together; in the same deep pit their bodies were deposited; the green corn of spring breaks from their commingled dust; the dew falls from heaven upon their union in the grave."

While they in their lives and their deaths joined our Empire together, I trust that we shall not put it asunder by striking at the Privy Council appeal. The Privy Council, one of the most unique tribunals in the world, is the keystone upon which, if we work wisely, we may build up the great edifice of Imperial Federation.