APPEALS TO THE PRIVY COUNCIL.

By His Honour H. W. Newlands, K.C.,
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On the 4th July last I gave an address before the Saskatchewan Bar Association on the question of appeals to the Judicial Committee of the Privy Council. The executive committee of that association asked me to allow them to have it published in the Canadian Bar Review, and, on ascertaining that there would be no number of that Review published before the meeting of this association, suggested that I deliver it at your annual meeting. At their request your President very kindly asked me to deliver same on this occasion. In consenting to do so I felt that an address made before the Bar of Saskatchewan, containing as that Bar does a large number of young and inexperienced lawyers, would not be appropriate to deliver before this association where the question of such appeals had already been considered; so I am going to deal very briefly with my reasons for advocating the continuation of such appeals and more at length with the constitutional difficulties in the way of abolishing them.

Then, briefly for my reasons for the continuation of this appeal.

The Judicial Committee is, I think, the outstanding court in the world as to the territory and population over which it has jurisdiction, the systems of law which it expounds and the selection it has of judges. It has jurisdiction over a quarter of the earth's surface and its population. It expounds not only the common law of England as it has been amended by the dominions, provinces and crown colonies, but the French law as it is found in Quebec, the Roman Dutch law of South Africa and Ceylon, the Mohammedan law of the great Mohammedan countries of the Empire, the Hindu law

1 An address read before The Canadian Bar Association at its Annual Meeting in Montreal, September 5th, 1923.
of India and the Chinese law from Hong Kong, Shanghai and the consular courts of that country.

As to the selection of judges, the Lord Chancellor, the lords justices of appeal and the ex-Chancellors—of whom there are at present five, the youngest being the Earl of Birkenhead, our honoured guest—are members of the board, in addition to the six permanent law lords. In addition to these, there are two judges of the high courts of India, and the English and colonial judges or retired judges who are members of the Imperial Privy Council, amongst whom Canada has at present four:—Sir Charles Fitzpatrick, Sir Louis Davies, the Rt. Hon. Charles J. Doherty, and Mr. Justice Duff. Under the present Act the colonial judges who may act are confined to five, which while restricting the selection keeps the court from being unwieldy. To the distinction of these judges and their wide knowledge we must add the fact that they have the assistance not only of the ablest advocates practising at the metropolis of the Empire but of those from India, the dominions and the crown colonies.

And why are we asked to forego the advantage of having at our disposal a court of such distinction, knowledge and experience? Only, gentlemen, for a matter of sentiment. It affects our autonomy and hurts our national pride that we have not in Canada our own final court of appeal. But does it do either if we deliberately and of our own free will retain the Privy Council as our final court? On that point I will have something to say later. Others think that this court has not that local knowledge that our own judges possess. Very often I have thought that an advantage rather than an objection. If an objection it no longer has force because by 8 Edw. VII, Chapter 51, His Majesty may authorize any person who is or was a judge of the court appealed from or who is or was a judge of a court to which an appeal lies from the court from which the appeal is made, and whose services are for the time being available, to attend as an assessor of the Judicial Committee on the hearing of
the appeal. Such judge would, I have no doubt, supply all the local colour needed.

And now I will come to what I consider the most important part of the subject and what is purely a legal question. If you decide to abolish the appeal to the Privy Council, how are you going to do it? What I have to say on this subject I have put in positive form, but you will understand that I am only expressing my own opinion though based on high authority.

There are in Canada two kinds of appeal, an appeal by virtue of the prerogative and a statutory appeal; again there are appeals from the Dominion courts and also from provincial courts.

The Dominion Parliament can abolish the right of appeal from the courts constituted by it, but it cannot take away the right of appeal from the provincial courts,—only the provincial legislatures can do that; and neither the one nor the other can take away the statutory right of appeal; that lies within the power of the Imperial Parliament only.

A definition of prerogative might be useful here. It is a part of the common law, a residuary power which still remains in the hands of the Crown, which parliament has not taken to itself, and I might add, in the language used by Lord Haldane in the argument before the Privy Council in the Great West Saddlery case, "There is only one Crown and the question is by which set of Ministers he is to be advised, Imperial, Dominion or provincial."

The B. N. A. Act, Section 101, gives the Dominion Parliament the right to establish a general court of appeal for Canada and to establish any additional courts for the better administration of the laws of Canada. I would lay it down as a general proposition that where a parliament has the power to deal with a subject it may pass legislation touching any prerogative rights the Crown has in that subject, bearing in mind, of course, that if the prerogative right is to be taken away it can only be taken away by express words and that the Act must be assented to by the King.
When Parliament passed the Supreme Court of Canada Act it did not take away the prerogative right of appeal to the Privy Council. It is said in Cameron’s “Canadian Constitution” that it was intended to do so but on the Ministry being informed that the Act would be disallowed they withdrew the clause. If the Act with such a clause had been assented to by the Governor-General and had not been disallowed by the Crown under the provisions of the B. N. A. Act, it would, of course, have done away with the prerogative right of appeal because the Act would have been assented to by the King on the advice of his proper Ministers. Since those days the Imperial Government has ceased to interfere with Canadian affairs. “Take the advice of your constitutional Ministers” is now the only advice the Governor-General gets from them, and by usage it has become one of the conventions of the constitution of the Empire that the Governor-General acts in Canada only on the advice of his Canadian ministers, and like the King’s veto in England his veto in Canada may also be said to be lost. In exercise of its right to take away the appeal to the Privy Council the Dominion Parliament put a clause in the Criminal Code, (s. 1025) making the judgment of the Supreme Court of Canada final and conclusive, “notwithstanding any royal prerogative,” and doing away with an appeal to, “any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.”

Having done it in criminal cases parliament has the same right to do it in civil cases. Lord Haldane, in an article in the July Number of the Empire Review on the Judicial Committee, says: “The Governments of Canada, of Australia and New Zealand, of South Africa, know that at any moment they can stop the system of appeal to the King in Council, and of this they are kept reminded.”

In the proceedings of the Colonial Conference of 1907 and 1911 the following appears:—

“Dr. Jameson: ‘The point I wanted to know about
is this question of our depriving ourselves of the right of appeal to the Privy Council. Do I understand we could only do that by Imperial legislation or an Imperial Order-in-Council?

*The Lord Chancellor:* ‘You could not do it by Imperial Order-in-Council because it would be interfering with your own affairs. By the Imperial Parliament it could be done, if the colony asked that it should be done—and it would be done. It is rather a novel point. My present impression—and I am sure you will not tie me to it if I am wrong—is that the Parliament of a self-governing colony with the Royal assent could regulate that as well as anything else.’

*Mr. Deacon:* ‘Is not there power by Order-in-Council to restrict the conditions of appeal?’

*The Lord Chancellor:* ‘When the constitution is set up the King has no power whatever to interfere with or derogate from it.’

With the exception of such Dominion Courts and the practice and procedure in criminal cases, the provinces have exclusive jurisdiction in “the administration of justice,” and, as there is an appeal from the courts of appeal in the provinces direct to the Privy Council instead of to the Supreme Court of Canada, they have the same right as the Dominion Parliament to deal with the prerogative right of appeal as far as it affects those courts.

Therefore, before the prerogative right of appeal could be done away with in Canada we would require to have legislation for the purpose from the Dominion Parliament and from the legislature of each of the nine provinces of Canada, and at present there is no sign of any such unanimity of opinion.

But, you will say, the Imperial Parliament could pass such legislation. I doubt it. This right of appeal is a prerogative of the King and not of the Imperial Parliament, and, if the proper Ministers to advise such an Act are either his Dominion or provincial Ministers, then he could not do so on the advice of his Ministers in England.
When the Imperial Parliament passed the B. N. A. Act it gave up all authority over the internal affairs of Canada and over such external affairs as were necessary to carry out our laws over our internal affairs.

In *Hodge v. The Queen*, 9 A. C. 117, Sir Barnes Peacock, in delivering the judgment of the court, said the B. N. A. Act gave the provinces "authority as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme." Lord Watson cites this clause in the Liquidator's case, 1892 A. C. 443, and says that within the limits assigned by section 92 the powers of the legislature are exclusive and supreme.

In *Attorney-General v. Cain* (1906), A. C. 542, Lord Atkinson, in speaking of the Dominion Parliament's powers under the B. N. A. Act, used the same quotation to show how the powers of Parliament had been construed and said, "If therefore power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statute never been passed."

In both these cases it will be noticed they spoke of the powers of the Imperial Parliament or Government at a time anterior to the time they were speaking, "powers as ample as the Imperial Parliament in the plenitude, (that is, when it had full power) possessed," and in the other case as the Imperial Government could have imposed if the B. N. A. Act had never been passed.

However, it is not necessary for my argument to insist upon this position. Since the B. N. A. Act was passed several amendments have been made to it, but I think I am safe in saying that no amendment has been
passed by the Imperial Parliament excepting on the petition of the Senate and House of Commons of Canada, (no amendments have been made to the Provincial constitutions because they have power to amend their own constitutions), and after fifty years of acting on that principle it too has become a convention of the constitution of the Empire for the Imperial Parliament to act only on such a petition. As the constitutions of all the Provinces are supposed to be the same, I have no doubt that the Imperial Parliament would not legislate to do away with the appeal from Provincial courts to the Privy Council excepting on a petition from the legislatures of all the Provinces. So that no matter which way you look at it, it would require the united consent of the Dominion and the nine Provinces to do away throughout Canada with the prerogative right of appeal to the Privy Council.

Now as to the statutory right of appeal which is quite distinct from the prerogative right.

In 1844 an Act was passed, 7 and 8 Vict., Chapter 69, the preamble of which is in part as follows: "Whereas by the laws now in force in certain of Her Majesty's colonies and possessions abroad no appeal can be brought to Her Majesty in Council for the reversal of the judgments, sentences, decrees and orders of any courts of justice within such colonies, save only the courts of error or courts of appeal within the same, and it is expedient that Her Majesty in Council should be authorized to provide for the admission of appeals from other courts of justice within such colonies or possessions." It then goes on to provide: "That it shall be competent to Her Majesty by any order or orders to be from time to time for that purpose made with the advice of Her Privy Council to provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any court of justice within any British colony or possession abroad although such court shall not be a court of errors or a court of appeal within such colony or possession," and it further provides that they
may make a general order to cover all cases. Inci-
dentially this statute shows that I have the Imperial
Parliament with me in the statement that a self-govern-
ing colony could take away the prerogative right of
appeal.

This statutory right of appeal is the one I have
stated we have no power either in the Dominion or the
Provinces to take away, and that by reason of a pro-
vision in our constitution, the B. N. A. Act. Section
129 of that Act provides for all laws to remain in force
subject to be repealed, amended, etc., by either the Do-
minion Parliament or a provincial legislature as the
case may be, "(except with respect to such as are en-
acted by or exist under Acts of the Parliament of Great
Britain or the Parliament of the United Kingdom of
Great Britain and Ireland)."

The Act providing for appeals from courts other
than courts of appeal was passed by the Parliament of
Great Britain and Ireland and was in force in what is
now Canada before the passing of the B. N. A. Act, and
therefore we have no power either in the Provinces
or the Dominion to repeal the same.

This exception only applies to Acts specially men-
tioning the colonies, among which is included the one
I am discussing.

We, therefore, as I have mentioned, require joint
action from the Imperial and Dominion Parliaments
and the legislatures of the nine Provinces in order to
do away in Canada with all the right of appeal to the
Privy Council, and I am of the opinion that it will be a
long time before we can expect to get such joint action.

Therefore those of us who are in favour of retain-
ing such right may safely leave our opponents to
worry with this question, feeling assured that they have
a task of some magnitude before them and one which
they are not likely to accomplish within any time which
we can now foresee.

Now, if we are going to retain the Judicial Commit-
tee as our final court of appeal, should it be retained
in its present form or should it be altered to give the
Dominions representation amongst the permanent members of that Committee? At present there are six law lords, two from England, two from Scotland and two from Ireland, as well as those who having held high judicial position in England are permanently resident in London. Ireland having ceased to be a part of the United Kingdom is no longer entitled to have two members on that Committee; she is now a Dominion and entitled to no more consideration than the other Dominions. Scottish cases do not go before the Judicial Committee but to the House of Lords. We in this country know very little about Scottish law and I have no doubt Scotch judges know as little about our law when first appointed. I might give you an illustration to show you how little we in the West know about Scottish law. In the old territorial days we re-enacted for the sake of convenience the Sale of Goods Act. There was one section in that Act that I never understood nor could I find any of our lawyers or judges who could make sense of it. Upon one occasion, being appointed a commissioner to revise the statutes, I felt it my duty to follow this section back to its original home in the English Act and I found that when the North West Assembly enacted the Sale of Goods Act they had made only one change in the original which was to leave out the first two words of this section, "In Scotland." When we found that the section was Scotch law we cut it out of our statutes, well content to let the Scotch have it if they could understand its meaning because we could not. It is a well-known fact to lawyers that when our Scotch ancestors left their homes and settled in the Dominions they did not bring with them their Scotch law but annexed the common law of England and brought that with them, and I think that if they had so little pride in their own law as to leave it at home when they emigrated, their descendants should not be asked now to have the laws of their new homes construed by judges trained in the civil law of Scotland.

In saying this I mean no disrespect to those distin-
guished judges, Lords Shaw and Dunedin; it is the principle I object to, that Scottish judges should be appointed to construe our laws when they are neither trained in the common law nor will permit their own cases to be decided by a court of which these judges are members.

As to the two English members of the Judicial Committee, they too might be done away with as England is well represented on the Committee by the Lord Chancellor, the ex-Chancellors, and the other members of the Committee who have held high judicial position.

That would leave six vacancies to be filled by a judge to be appointed from each of the six Dominions, Canada, Australia, New Zealand, South Africa, Newfoundland and Ireland. These members should permanently reside in London where they would have the great experience of hearing appeals from all parts of the Empire with the assistance of the foremost advocates of not only Great Britain but the whole Empire. We have men in the Dominions who have the ability, and who only need the experience they would get as the members of a permanent court sitting in London, to make them the equals of the finest judicial minds that our mother country has produced.

It might be well on the English side of such a court to restrict the members to the Lord Chancellor and ex-Chancellors with a limit of ex-Chancellors to five, which would give a well-balanced court of twelve members; and such a court composed of six judges who had occupied the highest legal office in the Empire with six of our most experienced Dominion judges would form a court entitled to the highest respect.

My only reason for limiting the number of ex-Chancellors is that I notice that during the last twenty-four years only one has died and he at a very advanced age, and I am happy to say he still lives in the legal world through Halsbury’s Laws of England. Ex-Chancellors being such a long-lived race might get to be too numerous and make the court unwieldy unless their number was limited.
As each Dominion would pay the salary of its representative on the Judicial Committee the above suggestion would not prevent Great Britain from appointing as many Law Lords as she required to hear cases in the House of Lords, and if the suggestion of Lord Haldane in the article I have referred to was taken and the Judicial Committee became the final court of appeal for England and Scotland these Law Lords would still be needed as three divisions of five judges each would be required, as at present, one division to hear English and Scotch cases, the second for Indian appeals, and the third for appeals from the Dominions and colonies.