SOME DATA RELATING TO THE APPEAL TO THE PRIVY COUNCIL.[1]

I confess that, while I felt honoured by the invitation from our worthy Vice-President, Mr. Justice Martin, to appear before you, I surmised then, and, after attempting the task, I am convinced of the truth of the saying of the writer of the Book of Ecclesiasticus "That the wisdom of the Scribe cometh of the opportunity of leisure." It is one of the many inconveniences of a busy professional life that however great one's interest in subjects concerning one's own profession may be, the time necessary to manifest it in a practical way is not available.

In common with all members of the profession, I have followed with interest the recent discussions concerning the appeal to the Judicial Committee of the Privy Council—which were precipitated by or culminated in a speech made before your Association in 1920 by the Honourable W. E. Raney, Attorney-General of the great Province of Ontario—who, amongst other things, referred to the correspondence of the Honourable Edward Blake with Lord Carnarvon over the jurisdiction to be given to the Supreme Court of Canada, and stated that this correspondence of fifty years ago could not be repeated in the twentieth year of the twentieth century.

Mr. Raney also stated that Englishmen and Canadians agreed on that point. In short, he said, the old colonial bottles will no longer hold the new national wine—and he concluded that although the Judicial Committee had rendered great service to the old order, and will continue for many years and perhaps for generations to carry the white man's burden of the "lesser breeds without the law"—they should no longer hear Canadian cases.

These grave words coming from a gentleman who was at the time the King's adviser for the Province of Ontario drew my earnest attention, and I determined to try and secure a copy of this famous correspondence to which reference has often been made, but whose text, at least to my knowledge, has never been given to the general public.

Those documents, although confidentially printed in 1876 for the use of our Canadian Privy Council, are now old enough—they were written before I was born—to be used by the students of Canadian history; and with the leave of a Right Honourable member of the

[1] Address to Canadian Bar Association at its tenth Annual Meeting, August, 1925, by L. A. Cannon, K.C., Batonnier of the Quebec Bar.

Privy Council, I will take the liberty of analysing them for your benefit, and review the evolution of thought on the question amongst English and Canadian statesmen since 1823.

I. Lord Brougham's Opinion—1823.

Let me first give you the opinion of Lord Brougham, then Mr. Brougham, to be found in a note discussing the judgment in *Cuvillier* v. *Aylwin*:[2]

"I am clearly of opinion that no such limitation is valid to bar an appeal to the King in Council. I should greatly doubt if any Colonial Act, though *allowed* by the Crown, if unconfirmed by Act of Parliament, has power to take from the subject this right. But a Colonial Act never allowed, can clearly have no effect. Now in cases where a limitation has been validly introduced by law, the Privy Council have been in the practice of allowing appeals almost as a matter of course. Such petitions are termed petitions of doleance, and, I believe, never refused, although the law may have excluded appeals under a certain amount or after a certain time."

II. The Blake-Carnarvon Controversy, 1875-76.

Under the authority given by section 101 of the B. N. A. Act, the Supreme Court of Canada was established in 1875 by the Dominion Act, 38 Vic. ch. 11.

In October of that year, the Minister of Justice, the Honourable Edward Blake, was informed by the Premier, the Honourable A. MacKenzie, that the Colonial Secretary was about to submit to the Law Officers of the Crown the question of the constitutional right of Parliament to pass the 47th clause of the Act with a view to considering whether the Act should be disallowed. Blake was requested to report confidentially upon the subject to the Premier and he did so on the 6th of October.

Clause 47 reads as follows:

"The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland by which appeals or petitions to Her Majesty in Council may be ordered to be heard, saving any right which Her Majesty may be graciously pleased to exercise by virtue of the Royal Prerogative."

[2] Stuart's Reports, p. 527.

Mr. Blake's Report to Mr. MacKenzie.

Mr. Blake points out that for a great number of years the Provincial Legislatures of the Province of Upper and Lower Canada, before the Union, by 34 Geo. III. ch. 2 and 6, have, without remonstrance, exercised the power of determining that the judgments of the Provincial Courts shall be final in all those cases (comprising the large majority of the whole number of the cases tried) in which they thought it was to the public advantage that there should be no appeal beyond the Provincial Courts.

He quotes *Cuvillier* v. *Aylwin*,[3] where the appellant, judgment having been obtained against him in the Court of Appeals for Lower Canada for a sum under £500 sterling presented a petition to the King in Council for leave to appeal from the judgment, and argued that there was a prerogative right of the King in Council to hear and determine appeals from the Colonial Courts from which the King could not himself derogate; that there was nothing in the Constitutional Act of Lower Canada taking away from the subject this right of appeal; that although the words of the Provincial Statute, 34th Geo. III., were more extensive, yet there was an express provision that nothing therein contained should derogate from the rights of the Crown; that it would be beyond the power of the Provincial Legislature to take away the right to receive the appeal, and that such a construction would be inconsistent with the Constitutional Charter of Canada. The judgment of the Committee was delivered by the Master of the Rolls without hearing counsel for the other side. He pointed out that while the King had no power to deprive the subject of any of his rights, he, acting with the other branches of the Legislature, as one of the branches of the Legislature has the power of depriving any of his subjects in any of the countries under his dominion of any of their rights, and that the petition must therefore be dismissed. No case could be more clearly in point.

Mr. Blake then says: "Now it is not pretended that any of the powers of self-government exercised by the Province were under the B. N. A. Act, 1867, taken away from Canada or its Provinces to be revested in the Imperial Parliament; on the contrary, while all the powers formerly belonging to the Provinces are retained, certain important additional powers which I need not detail are expressly conferred on the Dominion. By the recital it is declared that the constitution given to Canada is similar in principle to that of the United Kingdom. By one of the clauses an exclusive power is given to each Provincial Legislature to make laws in relation to the "administration

[3] *Supra*, and in 2 Knapp, 72.

of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including procedure in civil matters in those Courts."

"By another clause of the B. N. A. Act the exclusive legislative authority of the Parliament of Canada is declared to extend to (amongst other matters) the Criminal Law, except the constitution of the Courts of Criminal Jurisdiction, but including the procedure in criminal matters."

"By another clause the Parliament of Canada is authorized to make laws for the peace, order and good government of Canada; and by another clause (that under which the Supreme Court is established) it is provided that the Parliament of Canada may from time to time provide for the constitution, maintenance and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada."

"It is thus obvious that in carrying out the general principle recited in the preamble, the Imperial Parliament placed, or rather left, in the hands of the subjects of Her Majesty resident in Canada, control as well over the judicial enforcement of their laws as over the enactment and alteration of those laws."

"But if it was competent to Provincial authority, and is competent to Canada, to make the judgment of Local Courts final in the vast majority of cases, it must surely be, by the same process of reasoning, within its competence to make that judgment final in all cases. There can be no pretence for saying that while the prohibition of all appeals in criminal cases, and the limitation of appeals in civil cases, to questions involving over £500 sterling or $4,000 are lawful, the extension of that limitation to $20,000 or $100,000 or the application to all civil cases of the principle of prohibition appeals already applied to most civil and all criminal cases is unlawful. Unless therefore it should be intended to reverse the settled current of Local Legislation, to assume a power which has never before been used in like case, and to withdraw by the exercise of executive authority the rights and liberties of Canada and the Provinces, conferred by the Imperial Parliament and established by the usage of so many years, it would seem to be impossible to disallow the Act in question."

Lord Carnarvon's Letter Raising the Question of Loyalty to the Crown.

Lord Carnarvon, Colonial Secretary, on the 9th March, 1876, wrote to the Governor-General, Lord Dufferin, that he was much gratified by the intimation received that Mr. Blake would visit England for

the purpose of conferring with him on the subject, and transmits for his information copies of a memorandum prepared in the Privy Council office by the direction of the Lord President and of a second one revised and settled by the Lord Chancellor.

The last part of his letter should be quoted in full:

"At the present moment and, indeed as I firmly believe, in any consideration of so serious and delicate a constitutional question, the more statesmanlike course is to inquire, not whether the Dominion Legislature has or has not had vested in it the power of terminating appeals to this country from the local Courts, nor whether the queen is able, or may be advised to give up, directly or indirectly, any part of her prerogative, but whether it is expedient for the Dominion Parliament, by its Legislation, to bring such questions to an issue."

"The assurance of your advisers (and I may particularize the very loyal speeches recently made by Mr. MacKenzie) would preclude all doubt if it had been possible for me to entertain any, as to their determination to uphold the close union of Canada with Great Britain."

"But those who are less able to form a correct opinion on such subjects have, as you are aware, supposed, or at least stated, that the proposal to prohibit all appeals from the Supreme Court of the Dominion to this country is referable to a feeling of indifference as to the value of that union."

"While undoubtedly there are many who, though desiring to do full justice to the reasons which have led to the present enactment, sincerely believe that it will have the effect of severing one of the principal ties by which Canada is united to this country."

"I have the honour to be,
My Lord,
Your Lordship's most obedient humble servant,
(Signed) CARNARVON."

The memorandum of the Privy Council says, *inter alia:*

"The right of appeal to Her Majesty in Council is no creation of Parliament. It is essentially a part of the prerogative, and has existed ever since England had any foreign plantations or dependencies. The appeal lies to Her Majesty in Council, to the Judicial Committee of the Privy Council, and though the Privy Council Act of 1833 regulated and improved the structure of that Committee, it left the old prerogative character of the jurisdiction untouched and unimpaired and expressly provided that the constitution and duties of the Privy Council were to remain unaltered. The Colonial Legislatures and Judicatures have constantly recognized this jurisdiction of the Crown exercised in and by the Privy Council. Even in this Act it is acknow-

ledged by the proviso annexed to the 47th clause; and it would scarcely be contended that the Parliament of Canada has authority to abolish one of the most ancient prerogatives of the Crown confirmed as it is by several Imperial Statutes."

"The proposal to alter the supreme appellate jurisdiction seems, therefore, to have been suggested by the appellate clauses in the British Judicature Act, but as those clauses have now dropped and may possibly never be revived, this motive for the proposed change has disappeared."

Prerogative Link of Empire for Benefit of Colonies.

"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 the part of the prerogative which has been exercised for the benefit of the Colonies from the date of the earliest settlements of this Country, and it is still a powerful link between the Colonies and the Crown of Great Britain. It secures to every subject of Her Majesty throughout the Empire, the right to claim redress from the Throne; it provides a remedy in certain cases not falling within the jurisdiction of ordinary Courts of Justice; it removes causes from the influence of local prepossessions; it affords the means of maintaining the uniformity of the law of England in those Colonies which derive the great body of their law from Great Britain; and it enables suitors, if they think fit, to obtain a decision, in the last resort, from the highest judicial authority and legal capacity existing in the Metropolis."

Favourable Influence on Colonial Courts.

"It is undoubtedly desirable that the Colonial Courts of Justice should be so constituted as to inspire confidence in their decisions, and to give rise to very few ulterior appeals. But the controlling power of the highest Court of Appeal is not without influence and value, even when it is not directly resorted to. Its power, though dormant, is not unfelt by any judge in the Empire, because he knows that his proceedings may be made the subject of appeal to it."

"The 'Supreme and Exchequer Court Act of Canada' is directly opposed to these principles and traditions; and if Her Majesty were advised to confirm all the provisions of that Act, and establish a Final Court of Appeal in Canada, it is obvious that the same concession must be made, when demanded to all other parts of the Empire."

Authority of the Crown in Danger.

"The Supreme Appellate authority of the Empire or the realm is unquestionably one of the highest functions and duties of sover-

eignty. The power of construing, determining, and enforcing the law in the last resort is, in truth, a power which overrides all other powers; since there is no Act which may not in some form or other become the subject of a decision by the Supreme Appellate Tribunal and that Tribunal can alone determine the limits of its own jurisdiction."

"This power has been exercised for centuries, as regards all the dependencies of the Empire, by the sovereigns of this Country in Council; that is to say, the Sovereign to whom the prayer for relief is addressed, affords that relief, with and by the advice of a certain number of the most eminent judicial officers and jurists of the realm, who are sworn of the Privy Council for this purpose. The final order made on each appeal is the direct act of the Queen in person. So that by this institution, common to all parts of the Empire beyond the seas, all matters whatsoever, requiring a judicial solution, may be brought under the cognizance of one Court, in which all the chief judicial authorities of this country have a voice. To abolish this controlling power, and to abandon each Colonial dependency to a separate Final Court of Appeal of its own, is obviously to destroy one of the most important ties which still connect all parts of the Empire in common obedience to the source of law, and to renounce the last and most essential mode of exercising the authority of the Crown over its possessions abroad."

Interest of Colonial Suitors.

"If, however, it be important for the Crown to retain the uncontrolled power of admitting and deciding the Colonial Appeals for the sake of justice, public order and Sovereignty, it is much more important to the suitors in Colonial Courts to have access to this supreme jurisdiction; for Courts of Justice exist not for the interest of the Judge but of the suitor. This Act would deprive suitors in Canada of a right and a remedy, which they have not been slow to use. Here many considerations arise. The Dominion of Canada has recently been erected on a federal basis, including several provinces. Questions of great nicety must arise under such a constitution between the federal and provincial legislatures and judicatures. These are precisely questions upon which the decision of a Court of Final Appeal, not included within the Confederation, would be most impartial and valuable. Again, in Canada strong divisions of race, religion, and party are known to exist. The policy and the duty of the British Government, and especially of the last Court of Appeal, has been to secure absolute impartiality to the rights or claims of the minority of the population. Laws passed by a strong political majority, and

administered by Judges and Courts appointed by the representatives of the same majority, are less likely to ensure an entire respect for the rights of all classes than the decisions of a perfectly impartial and independent tribunal."

"It may be said that the Canadians are the best judges of their wants, and are entitled to place the administration of justice to themselves in whatever hands they please. But here it must be remarked that the allegation of extreme expense and delay in the prosecution of appeals to England is unfounded."

All British Subjects Interested.

"The Canadians, however, are by no means the only parties to suits in Canadian Courts; every British subject or other person who has invested money or bought property in Canada is equally interested in the administration of Justice in those Provinces; and these investments have been made in the belief that the rights of British subjects in Canada are protected not only by the Courts of Canada, but by an ultimate appeal to the Queen in Council. To abandon this appeal would be to place these rights in entire dependence on the authority of a Canadian judicature."

The Crown Must be Protected.

"But this is not all. The Crown itself has numerous rights or obligations which are daily discussed and enforced in Courts of Justice. These suits may, and frequently do, raise issues of the gravest importance to the power and dignity of the Crown, as well as to the interests of the public which it represents. Are such rights as these to be determined absolutely and finally by any Colonial Court of Justice, however eminent? Is the Crown to be debarred from having such matters argued in the last resort by its own Law Officers at the Bar of the Privy Council, and decided by the highest legal authorities of England? Such questions may very possibly involve some conflict between the Imperial and Colonial laws and interests; can it be contended that these are to be left to the exclusive decision of a Canadian Court? Such an admission would be a virtual abdication of Sovereignty itself."

"On all these grounds it would seem that the traditional policy and interests, both of the Crown and of the Colonies, require that a right of final appeal to the Queen in Council from the Supreme and Exchequer Courts of Canada should be distinctly reserved and expressed and that the undoubted right of Her Majesty, her heirs and successors, to admit all appeals whatsoever on special application, should be plainly declared."

"But as there is no disposition on the part of the Privy Council to favour frivolous or vexatious appeals, there seems to be no objection to Lord Carnarvon's suggestion that the limit of appealable value may be raised. It could be fixed, as in India at £1,000 sterling instead of £500."

The Lord Chancellor's Memorandum.

The memorandum approved by the Lord Chancellor, prepared by the Law Officers of the Crown, answers Mr. Blake's memorandum to his Prime Minister of the 6th of October as follows:—

Agrees to Limitation but not to Abolition of Appeal.

"Mr. Blake argues that, as the right of appeal to Her Majesty in Council has already been denied in many cases, the section in question, by denying it in all cases, is to be considered as simply carrying out to its fullest extent a policy which has been to a very large extent, and for very many years, pursued in Canada and recognized in England. But there is a very important difference between making such a provision as that a great number, even practically the large majority, of cases, shall not be brought before Her Majesty in Council, and *enacting that in no case shall such an appeal be brought.*"

Power of Disallowance Protects Crown.

"Mr. Blake further argued that the effect of the grant of legislative powers to the provinces of the Dominion is to give absolute power to them to cut off the right of appeal to Her Majesty in Council, and that the powers of the Dominion can not be less than those of the old provinces."

"In reply to this part of his argument it may briefly be observed that while, in regard to local matters the provinces have had, and the Dominion has, as Mr. Blake says, practically absolute legislative powers, these powers exist under the supervision and subject to the disallowance of the Crown, in order that, if the exercise of these powers should appear likely to affect the relations of the Provinces, or of the Dominion, to the Crown, or to the Empire generally, the manner and degree in which it would so operate may be fully ascertained before legislation is permitted to become permanently effective. As the power of the legislative body and the right of supervision and disallowance exist side-by-side, and may easily, but should not unnecessarily, be brought into conflict, it becomes a question of public policy as much as of law whether, on the one hand, a Colonial Parliament, however important, should adopt or whether, on the other hand, the

Crown should interfere with an enactment such as that under consideration. If the reasonable requirements of the Dominion can be secured without legislation tending to raise such a question, it will, of course, be agreed that it is not expedient to raise it. And it is for this reason, principally that a modification of the terms of the 47th section has been desired by Her Majesty's Government."

"In the provincial cases to which Mr. Blake refers the assent of the Crown was given and maintained, but in the present case the whole gist of the matter is whether or not the Crown shall withdraw the sanction which has been previously given and this point being undetermined destroys the analogy which Mr. Blake seeks to set up."

"Another point of difficulty arises from the paragraph of the 47th section, which purports to save the prerogative of Her Majesty. Upon this Mr. Blake observes that he is not called upon to consider what may be the nature and extent of Her Majesty's prerogative rights in this connection, or how far they may be affected by the clause."

"The consideration of these rights is, however, most material in their bearing upon the point with which Her Majesty's Government is especially called upon to deal, namely, the advice to be tendered to the Queen as to the allowance of this Act, and the more so as some misapprehension as to their nature and extent seems to have existed among the promoters of the Supreme Court Act. The promoters appear, while admitting, of course, that no enactments of the Canadian Parliament could override Her Majesty's prerogative rights, to have drawn a distinction between an appeal to the Sovereignty in Council as a species of prerogative remedy in peculiar cases, and an appeal in the regular course leading to a reference to the Judicial Committee. This distinction, however, cannot be maintained. The appeal to the Sovereign in Council is one and indivisible. Every hearing of a case and every judgment delivered in the name of the Queen in Council is an exercise of the prerogative, and, as is stated in the memorandum from the Privy Council Office, in all the Colonial Acts and other instruments relating to appeal from the Colonies, words have been invariably introduced reserving the undoubted right of Her Majesty, her heirs and successors, to admit appeals from all judgments whatsoever of the Colonial Courts."

"A sincere wish and a well-grounded hope may be entertained that the Supreme Court of the Dominion will be so strong in its own power and in the confidence of all persons appearing before it, that but very few cases will ever be brought home to this country. And it would be impossible to be otherwise than well satisfied if the exercise of the right to appeal should in this way fall to a great extent into disuse;

but, though Her Majesty's subjects may thus be able practically to renounce in a great measure their rights in this respect, this would scarcely justify a Minister in advising the Queen to consent that they should be absolutely deprived of them."

The Opinion of Quebec Lawyers.

On the 29th June, 1877, Mr. Blake, after discussing the average costs of appeals in Quebec and Ontario, and reserving his answer to these memorandums, wrote as follows to Lord Carnarvon as to the views held by members of the profession in Quebec as to the practical working of the Appeal in the Province:—

"It has been publicly stated by men of prominence in the profession, and I have myself been informed by professional men of the highest standing, both on the Bench and at the Bar, that there is no doubt that the right of appeal is used vexatiously in many of the applications composing the large aggregate above referred to, merely with the view of forcing, from the apprehensions of expense and delay, a reduction in the amount awarded by the Court to the successful party below, and that it is not uncommon for the successful litigant, though it is believed that he would eventually succeed in dismissing the appeal, to forego under such circumstances a part of his demand rather than run the disproportionate risk of costs and experience the certainty of a considerable loss, and also of the law's delay. It is stated that practical experience shows that it takes between two and three years from the delivery of a final judgment in a Local Court to reach the ultimate conclusion of a case appealed to the Privy Council, in many of which cases, it is remembered, the Appellant is anxious to protract rather than to expedite the proceedings."

"I may add further, that it has been stated upon like authority that the practical effect of the existing state of things is to give a remedy or a means of oppression to the wealthy or reckless litigant not available to proper suitors."

Mr. Blake's Answer.

After several verbal discussions with Lord Carnarvon and his officials, Mr. Blake sent observations—private and confidential—on the memoranda transmitted on the 9th March, 1876.

This production is characteristic of the man. It covers fifteen closely printed pages and I cannot give you, without quotations, an exact idea of the strong dialectic backed by the energy and patriotism of a great man who had made an exhaustive study of his subject.

Let me quote the following:—

Prerogative as Affecting Canadian People.

"I defer for the moment any remark as to the history of this prerogative, but I am obliged to differ from the statement that 'it would scarcely be contended that the Parliament of Canada has authority to abolish one of the most ancient prerogatives of the Crown, confirmed as it is by several Imperial Statutes.' Without enlarging upon the argument, my contention is that the Parliament of Canada, which is composed of the Queen, the Senate and the House of Commons, has power to abolish any prerogative of the Crown affecting the Canadian people, within the range of subjects on which that Parliament is authorized to legislate. The Legislatures of the old Provinces were constantly interfering with the prerogative; the Parliament of Canada has constantly been interfering with the prerogative. Its right to do so is unquestionable, the Imperial interests being guarded by the power of disallowance, and also by the power of reserving Bills. The instructions of the Governors-General expressly direct them to reserve any Bill of extraordinary nature and importance whereby Her Majesty's prerogative may be prejudiced,' thus clearly indicating that, subject to the checks referred to, there exists the power of affecting the prerogative."

Australia Differs from Canada in this Respect.

"The paper quotes an opinion given by the Department some years ago upon a proposal by some of the Australian Colonies to establish a Colonial Court of Final Appeal. It adds that the principles set out were adopted by Her Majesty's Government, quoted before the Select Committee of the House of Lords, and assented to as sound and just by the Governors of the Australian Colonies, and that they may therefore be taken as conveying the grounds of a policy applicable to the whole Empire, and that they are equally applicable to the present enquiry, adding that the Supreme Court Act is directly opposed to these principles and traditions, and that if a Final Court of Appeal be established in Canada, it is obvious that the same concession must be made when demanded to all other parts of the Empire. To these propositions, I cannot accede. The status of the several Australian Colonies at the time referred to, whether we regard the numbers and character of their population, the period during which they had enjoyed constitutional rights, the nature and extent of those rights or the powers conferred upon them in reference to the Administration of Justice and Judicial establishments, was entirely different from that of the Dominion of Canada. The late Provinces of Upper and Lower Canada freely exercised since 1791 an unlimited power of

making such provision as they thought expedient upon the subject of the appeal to the Queen in Council, and the Dominion stands in a still higher rank that the late Provinces. The circumstances of the various British Colonies differ very greatly; the argument of the paper would put them all upon the same level, and would determine that whatever is conceded to the greatest must be conceded to the least. This view cannot be maintained with reference either to the question in hand or to any other question. Whether in any particular Colony the time has arrived at which its inhabitants desire that their own Judges shall in the last resort decide their own cases, whether, in case they so desire, they have been given the constitutional right to legislate in that sense, whether in case they avail themselves of that right, the circumstances are so exceptional and extraordinary as to induce the exercise of the power of disallowance, these are questions which must be answered in each case with reference to its own circumstances, and I contend that a Canadian Act making final the judgments of the Supreme Court of Canada might well be left to its operation, without thereby concluding that the same course should be taken with reference to similar legislation in all the other Colonies of the Empire.

"Turning with these general observations to the quotation referred to, it commences by an acknowledgment that the Appellate Jurisdiction of the Queen in Council exists for the benefit of the Colonies, and not for that of the Mother Country; but adds that it is impossible to overlook the fact that the Jurisdiction is a part of the prerogative which has been exercised for the benefit of the Colonies from the date of the earliest settlement of the country, and that it is still a powerful link between the Colonies and Crown of Great Britain. The jurisdiction existing for the benefit of the Colonies, and not for that of the Mother Country, Canada should be permitted, in this aspect of the case, to judge for herself, as there is no doubt she is the best judge; and to decline what she may conceive to be no longer an advantage."

No Appeal to Privy Council for Subjects in Great Britain and Ireland.

"It is presumed that the statement that the appeal is a powerful link between the Colonies and the Crown is thought to be supported by the observations immediately following. No aspect occurs to me under which the jurisdiction can fairly be considered such a link. It is said to secure to every subject of Her Majesty throughout the Empire, the right to claim redress from the Throne. Not so. *The subjects of Her Majesty in Great Britain and Ireland* do not possess this *supposed privilege which is thought to be so valuable.* In English history is recorded the patriotic and successful struggles of Englishmen against the interference directly by the Crown in the adminis-

tration of justice. The long contest which terminated by securing to the Judges the tenure of office during good behaviour, is one long protest against the continuance of the wrong which is said to be to Her Majesty's subjects beyond the seas a blessing. If the redress granted were in fact, as it may be said to be in form, the personal act of the Crown, the system would be an intolerable grievance; but it is not in fact the personal act of the Crown. The redress is not in this instance from the Throne in any further sense than that it is administered according to the opinion of Judicial Officers of the Queen. But the Canadian Judges are Her Majesty's Judges just as much as Her Judicial Officers who reside in England. It is true that the Judicial Officers advise in these matters as Privy Councillors, and that in form, both in this particular and in the precise mode in which the decision is made, the system differs from that ordinarily adopted; but these differences are not advantages."

Impartial Justice in Canada.

"The quotation states that the appeal removes cases from the influence of local prepossessions. This can only mean that the impartial administration of justice is not accomplished in consequence of these so-called local prepossessions. That I must deny, believing, as I do, that justice is impartially administered in Canada. It is true that cases are, by this appeal, removed beyond the influence of local knowledge, of local experience, of local habits of thought and feeling, of much of that learning and training, not strictly legal, which is yet essential to the formation of a sound judgment. These are unquestionably very great disadvantages. As Lord Brougham said 'The jurisdiction extends over various countries, peopled by various castes, differing widely in habits, still more widely in privileges, great in numbers,' . . . and 'from the mere distance of the Colonies, and the immense variety of matters arising in them, foreign to our habits and beyond the scope of our knowledge, any Judicial Tribunal in this country must of necessity be an extremely inadequate Court of Review. But what adds incredibly to the difficulty is that hardly any two of the Colonies can be named which have the same law; and in the greater number, the law is wholly unlike our own.' These difficulties certainly far more than counter-balance the alleged advantage of a freedom from local prepossessions."

Highest Legal Capacity and Local Knowledge.

"The paper states that the appeal enables suitors, if they think fit, to obtain a decision in the last resort from 'the highest judicial auth-

ority and legal capacity in the metropolis.' The lives, liberty and property of the Canadian people are practically subject to their own laws; these laws they make, unmake and alter at pleasure. If they *are fit to make, they should be fit to expound the law.* If they are unfit to expound the law, its creation also should by the same process of reasoning be the work of the highest judicial authority and legal capacity existing in the metropolis. Without presuming to contradict the implication that neither the legislative nor the judicial bodies of the Colony are to be placed on the same level with those of the United Kingdom in point of capacity, it is to be remembered that they possess that local *knowledge* and *experience* to which I have referred, advantages of the last importance, but not attainable by persons resident elsewhere, no matter how transcendent their capacity; and that at any rate, such as they are, *they are our own.*"

Constitutional Questions.

"It is pointed out that the Dominion of Canada has recently been erected on a Federal basis, including several Provinces, and that questions of much nicety must arise under such a constitution between the Federal and Provincial Legislatures and Judicatures. These it is said are precisely the questions upon which the decision of a court of final appeal, not included with the Confederation, would be most impartial and valuable. To this argument I must demur. Upon the question of partiality, if the Canadian Judges be partial that is a reason why they should not decide at all; it is not a reason for simply giving an appeal from their decisions; nor can I conceive anything calculated more deeply to wound the feelings of Canadians than an insinuation that impartial decisions are not to be expected from their Judges. With reference to the alleged value of decision of a Court 'not included in the Confederation,' I would observe that with the practical operation of the Federal Constitution of Canada, with the customs and systems which they may have grown out of its working, with many of the elements which have been found most valuable if not absolutely necessary to a sound decision in that class of cases, a Court composed of English Judges cannot possibly be thoroughly acquainted. They may indeed learn from the argument in an isolated case the view of a particular Counsel upon the matter; but the daily learning and experience which Canadians living under the Canadian Constitution acquire, is not theirs, nor can it be effectively instilled into them for the purpose of a particular appeal. I maintain that this training and learning, which can be given only by residence upon the spot, is of such vital consequence as to overbalance the advantages

flowing from the probably superior mental capacity of the Judges of the London Tribunal."

Canada Can Protect Minorities as well as England.

"It is said that in Canada strong divisions of race, religion and party are known to exist; that the policy and duty of the British Government and especially of the last Court of Appeal, has been to secure absolute impartiality to the rights or claims of the minority of the population; that laws passed by a strong political majority, and administered by Judges and Courts appointed by the representatives of the same majority, are less likely to ensure an entire respect for the rights of all classes than the decisions of a perfectly impartial and independent tribunal. No doubt there do exist in Canada differences of race, religion and party; these are not unknown in the United Kingdom. It has been the policy and the duty of the Canadian Government and Legislature (and they are able to refer with pride to the success of their efforts) to secure equal rights to all classes of the community. They may point to results in the pursuit of that policy which have not yet been attained in the United Kingdom. It is to be hoped that the earnest and successful efforts of the Canadian Government and Legislature in this direction will be deemed a sufficient answer to the suggestion that the action of their Judiciary would be in the other sense. Our political system, is in the particulars referred to, much the same as that of the United Kingdom. In both countries the laws are passed by a strong political majority; in the United Kingdom all the laws, but in Canada only a small proportion of the laws, are administered by Judges appointed by the representatives of the same majority; in both countries the judicial decisions, it is believed, are impartial and independent, nor can any Canadian assent to the view that in order to find an impartial and independent Judge he must look beyond his own country for the exposition and administration of its laws. I have alluded above to the distinction between the situation of the two countries, which, it will be observed, is entirely in favour of Canada. The laws affecting property and civil rights are passed by the various Local Legislatures, while the Judges are appointed and paid by the Federal authorities."

Right of Disallowance.

"In answer to my argument as to the extent of the grant of legislative powers, it is pointed out that these powers are not absolutely final, since there remains the Imperial right of disallowance. Upon this, two observations are to be made. First, there is no *Imperial right of disallowance in reference to Provincial Acts as distin-*

guished from Canadian Statutes. To the Provinces is entrusted the legislation upon property, civil rights and the administration of justice; therefore their power is, so far as the United Kingdom is concerned, not only technically, but absolutely uncontrolled. The appellate jurisdiction almost entirely arises in cases growing out of the exercise of these legislative powers, and therefore the argument seeking to establish an analogy between the supervisory power of the Queen in Council over the judicial decisions of the Provincial Courts does not stand upon a foundation so solid as might at first sight be supposed. But apart from this consideration, the power of disallowance is very different from the power of reversing judicial decisions by a judicial tribunal. The former power is political, its exercise is controlled by various considerations; it is with reference to Canada very rarely used, and its exercise may perhaps become as phenomenal as would that of Her Majesty's power of not assenting to a Bill passed by both Houses of the Imperial Parliament. Besides it has, as the paper itself concedes, recognized limitations; in the words of the paper 'the power of disallowance exists in order that if the exercise of Canadian legislative powers should appear likely to affect the relations of the Provinces or of the Dominion to the Crown or to the Empire generally, the manner and degree in which it would so operate may be fully ascertained before legislation is permitted to become permanently effective.' But this admitted limitation of the political power of disallowance would by analogy limit the judicial power of interfering with Colonial judicial decisions to cases in which the decision of the matters in question would be likely to affect the interests of the Crown or of the Empire, and would completely free from any such external supervision the decision of all other matters. I need hardly observe that this would be practically equivalent to cutting off the appeal to the Queen in Council."

Mr. Blake's arguments prevailed, and the Supreme Court Act was not disallowed.

Let me quote the secret communication from the Colonial Secretary to the Governor-General.

The Earl of Carnarvon to the Earl of Dufferin.

"Canada. Downing Street,
29th August, 1876.

Secret.

"My Lord,

"With reference to my despatch No. 240 of this day's date acquainting you that Her Majesty will not be advised to exercise her

power of disallowance with respect to the Act intituled 'An Act to establish a Supreme Court and a Court of Exchequer for the Dominion of Canada,' I have the honour to acquaint you that Her Majesty's Government have given the most careful consideration to this question, and have had the advantage of conferring very fully with the Minister of Justice of the Dominion on the subject."

"2. Her Majesty's Government observe that the Act does not purport to take away any right of appeal to Her Majesty in Council from any judgment of a Court in any Province of Canada, as to which a right of appeal at present exists. If from any such judgment there is at present a right of appeal to Her Majesty in Council, that appeal may still be brought. But the Act, while it creates a new Supreme Court of Appeal for the Dominion, gives an appeal to that Court, under certain limits, from all final judgments of the highest court of final resort in every Province."

"3. With regard to the judgment of this Supreme Court, the 47th section of the Act provides as follows:—'The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard, saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal prerogative.'"

"4. It is to be observed that in this section the affirmative words 'the judgment shall be in all cases final and conclusive,' appear to be introductory and correlative to the negative words which follow:—'No appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland by which appeals or petitions to Her Majesty in Council may be ordered to be heard,' and inasmuch as the Parliament of the United Kingdom has not established, and is not likely to establish any such Court of Appeal, this portion of the clause would seem to be altogether inoperative."

"5. Supposing, however, that the affirmative words 'The judgment of the Supreme Court shall in all cases be final and exclusive,' were to be looked upon as operative, they must now be read in connection with the saving which is made of 'any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal prerogative,' and the clause would in effect read thus: 'The judgment of the Supreme Court shall be final and conclusive, saving the Royal Prerogative of Her Majesty to review the judgment if she is pleased to exercise it.'"

"6. Viewing the enactment in this way Her Majesty's Government are glad to be able to arrive at the conclusion that there is no reason why I should advise Her Majesty to disallow the Act."

"7. It is not, perhaps, probable that there will be many occasions on which the suitors before the new Supreme Court will be desirous of appealing to Her Majesty in Council from its decisions. I have, however, to suggest that some regulations should be made as to the value for which, and the conditions under which, appeals ought to be permitted to Her Majesty in Council. I will not enter upon any question as to the shape which these regulations ought to assume, inasmuch as I have no doubt that your Ministers will consider the expediency of bringing the subject at a fitting opportunity before the Parliament of the Dominion with whom, in the first instance at least, the consideration of these regulations ought to rest.

"I have, etc.,

"(Signed) CARNARVON."

Governor-General,

The Right Honourable

The Earl of Dufferin, K.P., G.C.M.G., K.C.B., etc., etc.

Those interested may compare the analysis of article 47 by Lord Carnarvon with the judgment of the Lord Chancellor in *Johnston* v. *St. Andrew's Church*.[5]

III. BLAKE'S OPINION IN 1900.

We must now make a jump of twenty-five years and find Mr. Blake a member of the Imperial House of Commons when the Australian Constitution was discussed on the 21st of May, 1900. He gave, after a quarter of a century, what constitutes, to my mind, coming from such a man, a great tribute to the Judicial Committee of the Privy Council; this differs from some of his views of 1876 but it is the final judgment of a man in a position to know and give a good verdict:—

"I speak from experience, because I know that in the country whence I come, while a different set of circumstances obtains and there are different provisions, there is yet a written Federal constitution; and it was found with us that where bitter controversies had been excited, where political passions had been engendered, where considerable disputations had prevailed, where men eminent in power and politics had ranged themselves on opposite sides, *it was a great advantage* to have an opportunity of appealing to an external tribunal

[5] (1887), 3 A. C. 159.

such as the Judicial Committee, for the interpretation of the Constitution on such matters." [6]

IV. The British View in 1901.

Lord Carnarvon stated that the British was not likely to establish an Imperial Final Court of Appeals.

In 1901, however, Mr. Joseph Chamberlain called a conference which was held in London to discuss the suggestion of the Australian Delegates that the whole question of Colonial Appeals to the Privy Council should be considered, by the following letter:—

Mr. Chamberlain to the Governors-General of Canada and Australia and the Governors of New Zealand, Newfoundland, Cape of Good Hope, and Natal.

Downing Street, February 15th, 1901.

"My Lord, [Sir]

"You are, no doubt, aware that during the discussion in the House of Commons on the Australian Commonwealth Bill, I stated, on behalf of Her Majesty's Government, that it was intended to bring in a measure to provide for strengthening the representation of the self-governing Colonies on the Judicial Committee of the Privy Council by the creation of four additional Law Lords with seats in the House of Lords as well as on the Judicial Committee."

"This proposed measure was regarded by Her Majesty's Government as affording a way of meeting the legitimate desire of the Colonies for more effective and continuous representation on the Judicial Committee than that afforded by the arrangement embodied in the Act of 1895."

"During the Conferences with the Premiers in 1897 I called attention to the unsatisfactory nature of the representation, but the many other calls on the Premier's time on that occasion rendered any discussion of the question impracticable, and in view of the near approach of the Federation of the Australian Colonies, Her Majesty's Government did not consider it desirable to press the matter."

"The difficulties which arose in connection with the appeal clauses in the Commonwealth Bill satisfied Her Majesty's Government that the question should not be further postponed, so far, at any rate, as the improvement of the Colonial representation was concerned."

"The Delegates, however, who had been deputed by the Australian Colonies to represent them in this country in connection with the Commonwealth Bill, gave me to understand that those whom they

[6] Compare Blake, 26th Feb. 1880, in Canadian House of Commons, Hansard, 1880, p. 253.

represented would prefer that the proposed measure should not at that time be proceeded with, and that Her Majesty's Government should, as soon as possible, in consultation with the Colonies, consider the whole question. The view of the Delegates was confirmed by the Governments of their Colonies, and, under the circumstances, Her Majesty's Government decided not to proceed with the Bill providing for the appointment of four additional Judges, but to take an early opportunity of consulting with the Colonies upon the subject."

"The two existing Courts, the House of Lords and the Privy Council, have their origin far back in history. Their traditions and procedure and the form in which their decisions are conveyed are widely different. These differences, which may be traced directly to the different sources from which the Courts originated and derived their authority, are of great historical interest, and reveal the persistence and at the same time the growth and vitality of English institutions."

"From the point of view of sentiment, therefore, it would be desirable to endeavour to preserve, as far as possible, the associations of the two existing Courts."

"Colonial suitors and their agents, moreover, are accustomed to the procedure of the one, while suitors in this country are accustomed to the other, and there is reason to believe that in the colonies there is a considerable body of public feeling in favour of retaining the present practice under which the final decision on Colonial appeals is the direct act of the Sovereign on the advice of the Judicial Committee."

"The many problems which arise in connection with the proposal to recast the Supreme Court of Appeal for the Empire are of such a nature that they can only be decided with the assistance of the best expert advice, and His Majesty's Government have no doubt that the Colonies will gladly co-operate with them in the matter by sending as their delegates to confer with the Lord Chancellor and the Law Officers of the Crown, gentlemen representing the feelings and wishes of the Colonies and also fully qualified by their legal knowledge and experience to assist in the solution of a question so vitally affecting the common interests.

(Sgd.) J. CHAMBERLAIN."

V. VIEWS OF CANADA IN 1901.

What were in 1901 the views of the Canadian Government concerning the abolition or retention of this right of appeal to the Privy Council?

The answer is found in the following Order-in-Council deputing the Honourable David Mills to the conference:—

> "Extract from a report of the Committee of the Honourable the Privy Council approved by His Excellency on the 3rd June, 1901.

"The Committee of the Privy Council have had under consideration a despatch hereto annexed, dated the 15th February, 1901, from the Right Honourable Mr. Chamberlain, Secretary of State for the Colonies, referring to a contemplated measure 'to provide for strengthening the representation of the self-governing colonies on the Judicial Committee of the Privy Council by the creation of four additional Law Lords with seats in the House of Lords as well as on the Judicial Committee,' and requesting the appointment by Your Excellency's Government of a delegate qualified by his legal knowledge to represent it at a proposed Conference with the Lord Chancellor and the Law Officers of the Crown, having for its object the solution of a question vitally affecting the common interests of the Empire."

"The Committee recommend that Your Excellency's Government do co-operate with His Majesty's Government by deputing the Honourable David Mills, the Minister of Justice, to attend such Conference, and represent Your Excellency's Government thereat."

"The Committee would at the *same time observe that Your Excellency's Government is not dissatisfied with the manner in which the Board of the Judicial Committee of the Privy Council is at present constituted, and as now advised they do not see any advantage to be gained by the creation of four additional Law Lords,* to be chosen from the self-governing Colonies with seats in the House of Lords as well as on the Judicial Committee."

"Of late years, and since it has become almost the settled practice to summon to the sittings of the Board the most distinguished jurists at the centre of the Empire whose services were available, the people of Canada *have been generally satisfied with this condition of things.*"

"The Committee is desirous that Your Excellency's delegate should thoroughly discuss with the Lord Chancellor, the Law Officers of the Crown, and the other delegates the many problems which would necessarily follow any attempt to change the existing Appeal Courts of the Empire, and they will be prepared carefully to consider any recommendations which may be made as the outcome of the proposed Conference. They repeat, however, their opinion that with the information they at present possess, the creation of the Four Colonial

Law Lords suggested would not inspire any additional confidence in the Judicial Committee."

"(Sgd.) JOHN J. MCGEE,
"Clerk of the Privy Council."

The result of the Conference was to retain the existing order of things as fully explained in the following communication:

Mr. Chamberlain, to the Governors-General of Canada and Australia, and the Governors of Newfoundland, the Cape of Good Hope, Natal and New Zealand.

"Downing Street, August 10, 1901.

"My Lord, [Sir]—

"With reference to my despatch of the 15th February, 1901, I have the honour to state, for the information of your Government, that the delegates who, in reply to the invitation contained in that despatch were selected by the Governments of the Colonies to which that despatch was addressed, have duly met and considered the question of the more effective and continuous representation of the Colonies in the final Court of Colonial Appeal."

"2. It is unnecessary for me to recapitulate the recent history of this question. His Majesty's Government were strongly of opinion that it was very desirable to ascertain the view of the Colonies upon the question, and inviting your Government to send a delegate, they had no wish to suggest, still less to press upon the Colonies, any views of their own, but were anxious to clearly ascertain what the views of the Colonies might be upon the question. Had it proved to be the case that the Colonies unanimously, or by a great majority, desired that changes of importance should be made in the Constitution of the Final Colonial Court of Appeal, which in their view would add strength, influence and authority to that Court in the Colonies, His Majesty's Government were anxious to do all in their power to meet the views at which, after full consideration, the Colonies might with practical unanimity arrive; but it was entirely contrary to the wish of His Majesty's Government to press any change upon the Colonies which would not be in accordance with their desires."

"3. The Conference held its first meeting at the Colonial Office on the 26th June last, the Lord Chancellor presiding, and, in addition to the Earl of Onslow and myself, the following gentlemen attended:—

Sir R. B. Finlay, K.C., M.P. (His Majesty's Attorney-General), Sir Edward Carson, K.C., M.P. (His Majesty's Solicitor-General), The Honourable David Mills, Minister of Justice in the Dominion Cabinet (representing the Dominion of Canada)."

"His Honour Mr. Justice Henry Edward Agincourt Hodges, of the Supreme Court of Victoria (representing the Commonwealth of Australia)."

"The Honourable James Ross Innes, K.C., the Attorney-General of the Cape of Good Hope (representing Cape Colony)."

"Sir James Prendergast, late Chief Justice of New Zealand (representing New Zealand).

"His Honour Mr. Justice George Henry Emerson, Judge of the Supreme Court of Newfoundland (representing Newfoundland)."

"Mr. William Boase Morcom, K.C., M.L.A. (representing the Colony of Natal)."

"Sir William James Smith, Chief Justice of British Guiana (appointed by the Secretary for the Colonies as Representative of the other Colonies at the Conference)."

"Sir John Edge, member of the Council of the Secretary of State for India (appointed by him to attend the Conference on behalf of the Government of India)."

"Mr. Bertram Cox, Legal Assistant Under-Secretary to the Colonial Office."

"After considerable discussion, it was agreed that the delegates should meet privately, and after full deliberation amongst themselves, submit for further consideration any Resolutions at which they might arrive, and formulate proposals which would give expression to their joint views on the various issues raised. As a result of their deliberations the Resolutions, of which a copy is enclosed here, were arrived at. It will be seen that the majority of the delegates were of opinion that appeals should continue to lie from the Colonies and from India to His Majesty in Council; that appointments to the Judicial Committee should be, from time to time, made in such numbers as might be considered necessary from the Colonies and from India; that the persons appointed should, if Judges, vacate any judicial appointment held at the time of their appointment to the Privy Council; but that the selection of persons as appointees should not be limited to Judges and ex-Judges. The delegates were further of opinion that the Colonial members to be appointed should be appointed for life or for a term of years, and the suggestion was also put forward that sufficiently ample salaries should be provided; that arrangements should be made for securing a larger attendance of Lords of Appeal to sit on the Judicial Committee, and that with a view to avoidance of delay the Colonies should suggest any alterations and amendments which they considered desirable in the various Orders in Council regulating appeals to the Privy Council."

"4. Mr. Justice Emerson, while concurring in the recommenda-

tions above summarized, did so subject to the proposal (hereafter referred to) which has been made for the establishment of an Imperial Court of Appeal for the Empire."

"5. Sir James Prendergast was of opinion that while, for the present, appeal should continue to lie from the Colonies and from India to His Majesty in Council, the time might soon arrive when a new Final Court of Appeal for the whole British Dominions would be practically possible. He was unable to agree with the Resolution of the majority of the delegates as to appointments from the Colonies to the Judicial Committee, because he considered that the Resolution did not indicate a satisfactory scheme of Colonial representation; and he further stated that, in Colonies where the legal systems were substantially the same as that of England, he failed to find sufficient reason for any Colonial representation."

"6. Mr. Justice Hodges, who represented the Commonwealth of Australia, while agreeing with the majority of the delegates that the selection of members of the Judicial Committee of the Privy Council should not be confined to Judges and ex-Judges and that any Judge appointed should vacate any Judicial office held at the time of his appointment to the Judicial Committee, was unable to concur in the Resolutions arrived at by the majority of the delegates. It will be seen from a letter from him, dated the 9th July (a copy of which is enclosed), that in his opinion, it was desirable that there should be only one Court of Final Appeal, which should have vested in it the appellate jurisdiction of the House of Lords and of His Majesty in Council; that this Court should contain representatives from India, Canada, South Africa and Australia, and should ordinarily sit in two divisions, though, in cases of exceptional difficulty, both divisions might sit together. He was of opinion that it was desirable that an entirely new Court should be formed which he considered would command the admiration and respect not only of the whole British race, but of every race in the British Dominions, and would be a powerful factor in the development of a closer union between all parts of the Empire."

"7. The Resolutions of the delegates were considered at a further meeting of all the members engaged in the Conference on the 11th July, and, after further discussion, the proceedings of the Conference were brought to a close."

"8. As I have previously stated, it would be impossible should the Colonies not be practically unanimous in their recommendations to make any drastic changes in the constitution or procedure of the existing Courts of Appeal. Moreover, it is apparent that the majority of the delegates are in substance satisfied with the existing system,

though they offer suggestions which will have the careful consideration of His Majesty's Government for the amendment of the present system of Colonial Appeal on matters of detail."

"9. The result of the Conference has been to shew that no far-reaching alteration in the present Tribunal is desired, or would be considered satisfactory by the Colonies generally, and so long as the Colonies are of that opinion, His Majesty's Government do not propose to make any material changes for the establishment of an Imperial Court of Appeal."

"10. In conclusion I have to thank your Government for the readiness with which they complied with the desire of His Majesty's Government that they should send to this country a delegate to confer with His Majesty's Government upon this very important question; and I would ask your Ministers to consider the point suggested by the delegates—namely, whether any, and if so what amendments are desirable in the present procedure under which appeals lie from your Colony to His Majesty in Council which will tend to simplicity, the avoidance of unnecessary delay, and the reduction of the cost of appeal."

"(Sgd.) Jos. CHAMBERLAIN."

VI. Sir Charles Fitzpatrick's Opinion in 1914.

An ex-minister of Justice, then Chief Justice of Canada, Sir Charles Fitzpatrick, on October 21st, 1914, addressed the American Bar Association on "The Constitution of Canada," and gave his opinion as follows:—"In no part of the King's Dominions has greater service been rendered by the Judicial Committee than in Canada, particularly since Confederation. . . . . Since 1867, the Judicial Committee has been called upon in scores of cases to trace out the line of demarcation between Federal and Provincial Jurisdiction, and it must be truthfully said that the result has been eminently satisfactory. Removed, as the majority of Judges are, from all local strifes, desirous as they are to distribute the most impartial Justice, it is not surprising that the right of appeal to the King in His Privy Council is one of the privileges most highly prized by the people of the Dominion. I do not mean to say that there has not been exception taken to the freedom with which appeals may be carried to the Privy Council in ordinary civil matters, but whatever view may obtain in other parts of the Empire, so far as Canada is concerned, I think I may safely say that, amongst lawyers and Judges competent to speak on the subject, there is but one opinion, that where constitutional questions are concerned an appeal to the Judicial Committee must always be retained."

VII. The New Rules of Practice—1925.

What is the position in 1925?

Experience, the interchange of views through personal contact of English and Canadian Judges, lawyers and statesmen, have brought this remarkable result that His Majesty the King, on the 2nd May, 1925, on the recommendation of the Lords of the Judicial Committee, was pleased to approve new Rules of Practice and Procedure in accordance with which the general appellate jurisdiction of His Majesty is to be exercised from the 1st of January, 1926.

Rule 2 reads as follows:—

"*All appeals* shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of said leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a Petition in that behalf presented by the intending appellant."

This indeed is more than evolution, it nearly amounts to a revolution! What a contrast with the British attitude of 1876! Even, where, as in Quebec, an appeal exists *de plano* to the Privy Council in certain cases, it will now be necessary to obtain, in all such cases, leave to appeal from the Colonial Court appealed from. It is to be hoped that our Courts will discourage such applications, and, by their decisions, will help the Privy Council to adopt a policy restricting the exercise of the prerogative to very important constitutional cases. They should consider as final the judgments of our Supreme Court in all cases where the interest of the general public is not concerned, or at least, follow strictly the rule laid by Lord Fitzgerald in *Prince* v. *Gagnon*[7] and limit the exercise of the prerogative to cases involving matters of public interest, or some important question of law, or one affecting property of considerable amount, or when the case is otherwise of some public importance or of a very substantial character. In private litigation leave to appeal should be curtailed, as the costs are so high that even the successful party considers a favourable judgment of the Privy Council an expensive luxury.

This would be a final vindication of the views of Edward Blake and prove again the intelligence, the great and skilfull diplomacy of those who preside over the destinies of the British Commonwealth. We can well repeat to-day what was said by an American editor: "There is not at the present moment any more effective institution in the whole world of political fabrics than the British Empire. Whatever its machinery lacks appears to be supplied by its spirit. The defects of its body are made up for by the unity of its soul."

[7] (1882) 8 A. C. 103.