PREROGATIVE RIGHT OF APPEAL.

The very interesting article on the subject of appeals to the Privy Council contained in the October number of the CANADIAN BAR REVIEW by Mr. L. A. Cannon, K.C., of the Quebec Bar, raises again the question, which has been agitated at various times in the history of Canada, respecting the prerogative right of appeal to the King-in-Council. Privy Council Rule 2 which has been in force since 1908, and is reproduced in the Rules which take effect in January next, is badly expressed. It reads as follows:

"All appeals shall be brought either in pursuance of leave obtained from the court appealed from, or, in the absence of such 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 rule implies that there can be two and only two methods of appealing to the Privy Council, viz.:

1. By leave of the Court below, and
2. By special leave of the Privy Council.

This obviously is not the case, as in the provinces of Ontario and Quebec there has been an appeal *de plano* to the Privy Council for over 100 years; that right being conceded to the old province of Quebec by the Constitutional Act of 1791 which established the two new provinces of Upper and Lower Canada. Indeed a right of appeal without leave is given by the new Imperial Orders-in-Council passed subsequent to the Colonial Conference of 1907. In Quebec this right of appeal *de plano* is contained in Art. 68 of the Code of Civil Procedure which reads as follows:

"Art. 68. An appeal lies to His Majesty in his Privy Council from final judgments rendered in appeal by the Court of King's Bench:

1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue or any sum of money payable to His Majesty.

2. In cases concerning titles to lands or tenements, annual rents or other matters by which the rights in future of the parties may be affected.

3. In every other case where the amount or value of the thing demanded exceeds twelve thousand dollars."

In Ontario the provision is found in the Revised Statutes (1914) Chap. 54, sec. 2, which reads as follows:

"Where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council; And, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council."

The exercise of this prerogative right in the early days was always provided for in the "Royal Instructions" which was a secret and confidential communication from the King to his representative directing him with regard to the manner in which he should carry out the terms of his Commission. The "Royal Instructions" covered the right of appeal from local courts of justice to the Governor-in-Council as well as the further appeal to the King-in-Council and we find that in Quebec in 1777 Governor Carleton pursuant to the "Royal Instructions" given to him, passed an Ordinance which constituted the Governor and Council a Superior Court of Civil Jurisdiction, for hearing and determining all appeals from the inferior courts of civil jurisdiction within the province, in all cases where the matter in dispute exceeded £10 sterling, and declared that the judgment of the said Court of Appeal should be *final* in all cases where the matter in dispute did not exceed £500 sterling, but in all cases exceeding that amount an appeal should lie to His Majesty in His Privy Council. By the Constitutional Act passed by the Parliament of Great Britain and Ireland in 1791, which divided the old province of Quebec into the two new provinces of Upper and Lower Canada, it is provided by Art. 34 as follows:

"And whereas by an Ordinance passed in the province of Quebec, the Governor and Council of the said province were constituted a Court of Civil Jurisdiction, for hearing and determining appeals in certain cases therein specified, be it further enacted by the Authority aforesaid, that the Governor, or Lieutenant-Governor, or person administering the Government of each of the said provinces respectively, together with such Executive Council as shall be appointed by His Majesty for the affairs of such province, shall be a Court of Civil Jurisdiction within each of the said provinces respectively, for hearing and determining appeals within the same, in the like cases, and in the like manner and form, and subject to such appeal therefrom,

as such appeals might before the passing of this Act have been heard and determined by the Governor and Council of the province of Quebec; *but subject nevertheless to such further or other provisions as may be made in this behalf by any act of the Legislative Council and Assembly of either of the said provinces respectively, assented to by His Majesty, his Heirs or Successors.*

Pursuant to the powers conferred upon the new legislature of Lower Canada, an Act was passed in 1793, 34 Geo. III. c. 6, which by section 23 constituted the Governor and Executive Council a Superior Court of Civil Jurisdiction or Provincial Court of Appeal. Section 27 provided that an appeal should lie where the matter in dispute exceeded the sum of £20 sterling, and section 30 enacted that the judgment of the Court of Appeal should be final in all cases not exceeding £500 sterling, but in cases exceeding that sum an appeal should lie to His Majesty in his Privy Council providing the security as therein set out was given, any *law, custom, usage to the contrary notwithstanding.*

The effect of the Colonial Act of 34 Geo. III. came up for consideration before the Judicial Committee in the case of *Cuvillier* v. *Aylwin* in 1832.[1] Here an application was made to the Judicial Committee for leave to appeal in a case where the amount involved was less than £500 and as to which therefore there was no right of appeal by virtue of the Colonial Act. The Master of the Rolls speaking for the Committee[2] said: "The King has no power to deprive the subjects of any of their rights; but the King 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 his rights. This petition must therefor be dismissed."

This decision which is conclusive in its terms as to the right of the legislature of Lower Canada to limit the power of the King to grant leave to appeal was affirmed in 1846 in the case of *Queen* v. *Eduljee Byramjee,*[3] where it is said: "It was therefore held (in *Cuvillier* v. *Aylwin*) that though there was a reservation of the right of the Crown, yet as the Act in Canada was made in pursuance of an Act of Parliament of Great Britain, the powers contained in that Act did take away the prerogative of the Crown."

In 1847, in the case of *The Queen* v. *Stevenson,*[4] Lord Brougham, speaking for the Committee and dealing with the same Bombay charter in issue in the preceding case held that the discretionary

[1] 2 Knapp, 72.
[2] At this time the Judicial Committee included such distinguished names as Lord Brougham, Lord Eldon, Lord Lyndhurst, Lord Denman.
[3] 3 Moo. Ind. App. at p. 468.
[4] 3 Moo. Ind. App. 488.

powers vested in the Supreme Court to allow or deny an appeal was an express renunciation by the Crown of its right to grant leave to appeal, and he controverts a note of Peere Williams to the case of *Christian* v. *Corren,* in which it is said that "even if there be express words in the charter excluding the right of the subject, these words shall not be held to deprive the subject of his common law right of appeal to the Crown, in order that justice may not fail"; and he further says: "The Crown may abandon a prerogative, however high an essential to public justice and valuable to the subject, if it is authorised by statute to abandon it; and here it is in the execution of a power conferred by statute, that this abandonment, if any abandonment has been made, has taken place." It is clear, therefore, if the law respecting the Royal Prerogative is correctly stated in these cases, that where the colonial legislature has had conferred upon it the right, and exercises it, to legislate with respect to appeals to the King in Council, the royal prerogative right of granting leave to appeal in such cases no longer subsists.

How far, then, has this case been impeached? The first criticism of it is to be found in the report of the case of *re Louis Marois.*[5] Here the Committee stated that section 43 of the Colonial Act above mentioned, which preserved the prerogative of the Crown, had not been referred to, and the report says that "their Lordships must not be considered as intimating any opinion whether this decision can be sustained or not, but they desire not to be precluded by it from a further consideration of the serious and important question which it involves."

This criticism of *Cuvillier* v. *Aylwin* was scarcely warranted, because the head note of the report refers to section 43 of the Colonial Act which saved the rights and prerogatives of the Crown, and this section is also referred to in the argument of counsel.[6] In addition to this the existence of a clause preserving the royal prerogative in the Act of Lower Canada is expressly referred to and forms the basis of the judgments in the two cases from India above cited.

Cuvillier v. *Aylwin* was reviewed in *Cushing* v. *Dupuy.*[7] In that case a Dominion Act provided that in insolvency cases, the judgment delivered by the Provincial Court should be final. A party dissatisfied with the judgment of the Court of Queen's Bench of the Province of Quebec, first applied to that Court for leave to appeal, which was refused, on the ground that under the Insolvency Act its judgment was final. The appellant then presented a petition to His Majesty for special leave to appeal, and the question for determina-

[5] 15 Moo., P.C. 189.

[6] 2 Knapp at p. 78.

[7] 5 App. Cas. 409.

tion was whether the power of the Crown by virtue of its prerogative to admit an appeal, was affected by the Dominion legislation. Discussing the earlier question, the Committee, referring to *Cuvillier* v. *Aylwin,* says, "in that case no allusion was made to the principle that express words are necessary to take away the prerogative rights of the Crown, nor to the provision contained in the statute itself that nothing therein contained shall derogate from any right or prerogative of the Crown. This case, however, if not expressly overruled, has not been followed, and later decisions are opposed to it." The judgment concludes by holding that "as it (the legislation) contains no words which purport to derogate from the prerogative of the Queen, to allow, as an act of grace, appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect is unaffected by it."

In the same year the Privy Council in the case of *Goldring* v. *La Banque d'Hochelaga*[8] heard an application to rescind an order of the Court of Queen's Bench for Lower Canada granting leave to appeal. In the course of his judgment Sir James Colville makes use of the following language: "It has been suggested that their Lordships may now recommend Her Majesty to grant, as they have unquestionably power to do, special leave to appeal."

As in these later cases the Privy Council undertook to criticise the judgment pronounced by Lord Brougham in the earlier cases, one cannot refrain from considering the weight to be attached to decisions of the Privy Council where they disagree and where they must be viewed from the standpoint of the personnel of the Committee that pronounces judgment. In 1880, when *Cushing* v. *Dupuy* and *Goldring* v. *La Banque d'Hochelaga* were decided, the Committee was composed of the weakest material to be found in that body during the last century. Its principal members were Sir Robert Collier, Sir Montague Smith and the East Indies Judges, Sir James Colville, Sir Robert Couch, Sir Barnes Peacock and Sir Arthur Hobhouse. This is the more unfortunate because at that very time when some of the most important constitutional cases affecting Canada were determined, and when it was of the highest importance from a national standpoint that the best judicial talent in the Empire should interpret the constitution, the House of Lords was filled with as brilliant a galaxy of judges as can be found in its history. Cairns, Selborne, Blackburn, Jessell, Watson and many others, well known to fame, were available, had they been summoned to hear these appeals. Yet we find that Sir Robert Collier when appointed by the Lord Chancellor, was not a judge and therefore not qualified

[8] 5 App. Cas. 371.

under the Privy Council Act, and that later on when this obstacle was discovered, he was appointed to a vacant judgeship in the Common Pleas for three days and then elevated to the Judicial Committee. This job nearly proved fatal to the Government when later on it was a subject of debate in Parliament.[9] Sir Montague Smith was a Puisne judge of the Court of Common Pleas and when the two new judges from the East Indies were appointed, the Committee was so discredited that the fourth vacancy was refused by three English judges to whom it was offered.

As the Judicial Committee is the final court of appeal for the British Dominions, it has always been deemed an inviolable rule, fundamental to its very nature and character, that, however much it may be criticised or explained, no judgment of the tribunal should be overruled by a later Committee differently constituted as to its members.

My contention that the judgment in *Cushing* v. *Dupuy* should not be upheld as against *Curillier* v. *Aylwin* in view of the discredit attached to the judicial capacity of a majority of the members of the Privy Council who took part in that case, is supported by the criticism levelled at the judgment of the Privy Council in *Russell* v. *The Queen.* The judges above mentioned, Collier, Peacock, Couch and Sir Montague Smith along with Lord Hannen constituted the Committee that decided the case of *Russell* v. *The Queen,*[10] a constitutional decision which has given endless trouble to the Canadian Courts and the Privy Council. During the argument of *John Deere Plow Co.* v. *Wharton*[11] Viscount Haldane, Lord Chancellor, is reported to have said:[12]

"It is plain that Lord Watson did not believe in the judgment of the Board in *Russell* v. *The Queen,* and you will see right through this case (*Attorney-General of Ontario* v. *Attorney-General of Canada*)[13] and you will see it in earlier cases he was endeavouring to find a foundation for the decision in the Canada Temperance Act of another kind, and he takes the initial words of section 91 (of the British North America Act), and he will not treat the words 'the regulation of trade and commerce' as in itself sufficient justification for *Russell* v. *The Queen.*" Lord Watson's disapproval of *Russell* v. *The Queen* is also indicated in his judgment, where he observes quite unnecessarily, and as if compelled to explain its weakness (*Attorney-General of Ontario* v. *Attorney-General of Canada*).

"The controversy (in *Russell* v. *The Queen*) related to the valid-

[9] Parliamentary Debates (Hansard) 1872, vol. 209, p. 398. Lords Papers 1872, vol. 18, p. 137.

[10] 7 App. Cas. 829.

[11] (1915) App. Cas. 330.

[12] Cameron, Canadian Companies and the Judicial Committee, Carswell & Co., publishers, 1922, p. xix.

[13] [1896] App. Cas. 362.

ity of the Canada Temperance Act of 1878. Neither the Dominion nor the provinces were represented on the argument. It arose between a private prosecutor and a person who had been convicted."

During the argument of the *Great West Saddlery Co.* v. *The King*,[14] Lord Haldane, referring to his experience before the Judicial Committee in the early days, says:

"I think I may say—I had a long experience at the Bar in these cases in those days—that it was a tacit rule, a convention between judges and counsel, that *Russell* v. *The Queen* was not to be cited, and we did not cite *Russell* v. *The Queen.*"

It remained for Lord Haldane to give the quietus to the authority of *Russell* v. *The Queen* in *Toronto Electric Commissioners* v. *Snyder*,[15] where he says at pp. 410, 411, 412:

"Still more difficult is it to reconcile *Russell* v. *The Queen* with the decision given later by the Judicial Committee that the Dominion licensing statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout the Dominion, was *ultra vires* of the Dominion Parliament. As to this last decision it is not without significance that the strong Board which delivered it abstained from giving any reasons for their conclusion. They did not in terms dissent from the reasons given in *Russell* v. *The Queen*. They may have thought that the case was binding on them as deciding that the particular Canada Temperance Act of 1886 had been conclusively held valid, on the ground of fact that at the period of the passing of the Act the circumstances of the time required it in an emergency affecting Canada as a whole. The McCarthy Act, already referred to, which was decided to have been *ultra vires* of the Dominion Parliament, was dealt with in the end of 1885. Ten years subsequently another powerful Board decided *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, known as the Distillers' and Brewers' case. Lord Herschell and Lord Davey, who had been the leading counsel in the McCarthy case, sat on that Board, along with Lord Halsbury, who had presided at it. In delivering the judgment, Lord Watson used in the latter case significant language: 'The judgment of this Board in *Russell* v. *The Queen*, has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament.' That decision, he said, must be accepted as an authority to the extent to which it goes—namely, that 'the restrictive provisions of the Act of 1886, when they have been duly brought into operation

[14] [1921] 2 App. Cas. 91. Cameron, Canadian Companies and the Judicial Committee, p. 61.

[15] 1925, A. C. 396.

in any Provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order and good government of Canada.'

The Board held that, on that occasion, they could, not inconsistently with *Russell* v. *The Queen,* declare a statute of the Ontario Legislature establishing Provincial liquor prohibitions, to be within the competence of a Provincial Legislature, provided that the locality had not already adopted the provisions of the Dominion Act of 1886.

It appears to their Lordships that it is not now open to them to treat *Russell* v. *The Queen* as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. Unless this is so, if the subject matter falls within any of the enumerated heads in s. 92, such legislation belongs exclusively to Provincial competency.

In view of the above are we not justified in accepting the opinion as to our constitutional rights expressed in the earlier cases by Lord Brougham and other distinguished members of the Committee rather than that of a Committee of the Privy Council composed of the members who sat in the cases of *Cushing* v. *Dupuy* and *Goldring* v. *Banque d'Hochelaga?*

In conclusion it only remains to say that after the Colonial Conference of 1907 communications passed between the Colonial Office and the Government of Canada with the object of obtaining the assent of the different provinces as well as the Dominion, to the issue of Imperial Orders-in-Council providing for appeals to the King in Council according to a standard form. After correspondence extending over a number of years, the consent of all the provinces of Canada was obtained, except from Ontario and Quebec. The Dominion Government also refused its approval. The form submitted to the Government of Canada did not attempt to confer a right of appeal as it did in the forms submitted to the provinces, but only simplified the practice, and was not, in fact, objectionable, as its clauses were substantially the same as those of the new rules of practice promulgated by the Judicial Committee in 1907, and which applied to appeals from all the colonies of the Empire. Ontario and Quebec wisely refused, as the acceptance of an Imperial Order-in-Council would have been a recognition of the right of the King in Council to interfere with their constitutional right to regulate appeals to the Privy Council.

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