PRAEROGATIVE RIGHT OF APPEAL.

Mr. Cameron's article on the Praerogative in relation to appeals to the Privy Council, published in the November number of the CANADIAN BAR REVIEW,[1] is timely and interesting. He questions the right of the Judicial Committee of the Privy Council to formulate rules to admit appeals by leave, on the ground that the exercise of that right, originally part of the praerogative, was parted with to Canada when the Constitutional Act was passed in 1791. He argues his point very ably, putting it first on the ground that the earlier cases in the Privy Council warrant his conclusion, and that the later decisions which seem at variance were given by less able men; and secondly, that principle as well as authority is in favour of his contention. It is a question which, like many others, is probably insoluble until the Committee itself has pronounced finally upon it.

But as I see it, the legislation and decisions discussed by Mr. Cameron do not afford any firm ground for going as far as he does. The utmost that can be asserted is, I think, that the Crown through legislation has enabled the Provincial Legislature to limit the right of its constituents to appeal direct to the Privy Council, or to deny it altogether. But in doing this, it has left untouched the right of the King in Council, on his part, to exercise his praerogative to give leave to appeal, notwithstanding that those who apply could not otherwise prosecute an appeal.

Nor can I agree with him in his estimate of the relative values of the judicial weight and wisdom of those who took the ground that the King's Praerogative had not been abandoned.

The cases relied on for the contrary view were decided in 1832, 1846, and 1847. In the case of *Cuvillier* v. *Aylwin*,[2] the composition of the Bench is not given, but the judgment was pronounced by Sir John Leach, M.R. In the *Byramjée* case,[3] the legal members present were V. C. Wigram and Dr. Lushington, with the Duke of Buccleugh, Lord President, and T. Pemberton Leigh, Chancellor of the Duchy of Cornwall, as lay members, and Sir E. H. East and Sir E. Ryan, each a former Chief Justice of Bengal, and Sir A. Johnston, previously Chief Justice of Ceylon, as assessors. The judgment pronounced by Dr. Lushington, who was then Judge in

[1] 3 C.B.R. 547.
[2] 2 Knapp, P.C. 72.
[3] 3 Moo. 468.

Admiralty, was upon the terms of a Bombay Royal Charter. The Judicial Committee in those years included such names as Lords Lyndhurst, Cottenham, Brougham, Denman, Abinger, Langdale, and Baron Parke. In *The Queen* v. *Stephenson*,[4] in the same year, Lords Brougham and Langdale, and Dr. Lushington sat, together with Mr. Pemberton Leigh and two assessors, who were retired Indian Judges. The later cases, which take a view contrary to these three earlier cases, were *Re Louis Marois*,[5] *Cushing* v. *Dupuy*,[6] *Goldring* v. *La Banque D'Hochelaga*,[7] and criticism is directed against the personnel of the Judicial Committees which sat and decided them. The allegation made is that in the eighties the Committee was composed of "the weakest material to be found in that body during the last century," principally because it was composed of Sir Robert Collier, Sir Montague Smith and East Indian Judges. This is a very pessimistic view to take, and the same complaint might be made against two at least of the earlier and commended authorities. But in neither case would the statement be justified, and this is peculiarly so in regard to the two members of the Committee particularly singled out. So far as Sir Montague Smith is concerned, he received from Lord Macnaghten the unique compliment that he and Blackburn, J. were "second only to Willes, J., if they were second." (See *Lloyd* v. *Grace*.)[8] And Willes, J., was, in the words of Sir Frederick Pollock, "a consummate lawyer."

Sir Robert Collier owed much of his notoriety to the peculiar method of his appointment. But that did not touch his qualification in a legal sense. The Law Journal at the time of his death, referred to him, by his later title of Lord Monkswell, in this way: "It was one of the commonplaces of the controversy, that on his merits, the appointment of Sir Robert Collier was unobjectionable, and the experience of 16 years proved the truth of the assumption." The Law Times remarked: "that he added greatly to the strength of that tribunal, (the Judicial Committee) need scarcely be said, and some of his judgments are admirable expositions of legal principles and they are generally expressed with a clearness not always to be met with on the Bench." Taking his record from first to last, he decided many important cases, sitting almost always with Sir Montague Smith, and often with Lord Justices Mellish, James and Sir Robert Phillimore. Of the two former, Lord Justice Bowen said:

[4] 3 Moo. P.C. Ind. 488.
[5] 15 Moo, P.C. 189.
[6] 5 A.C. 409.
[7] [1880] 5 A.C. 371.
[8] [1912] A.C. 716 at 732.

"no greater authorities have in our time sat in Courts of law." In *Powell* v. *Apollo Candle Co.*,[9] Sir Robert Collier delivered a judgment in which he affirmed the important doctrine that "a colonial Legislature is not a delegate of the Imperial Parliament: it is restricted in the area of its powers, but within that area it is unrestricted." One of the last cases in which he sat was *Reg.* v. *Riel*,[10] where Lord Halsbury, L.C., Lords Fitzgerald, Esher and Hobhouse, were his companions.

The cases which come in for adverse criticism were not, however, all decided by the Judges named as the weakest material. In *Re Louis Marois* the judgment was delivered by Lord Chelmsford, with whom sat Lord Justices Knight-Bruce and Turner, as well as Sir E. Ryan.

In *Cushing* v. *Dupuy*, Sir Montague Smith, who wrote the judgment, sat with Sir R. Collier, as did also two retired Indian Judges (as provided by the then Statute Law). In it, however, are discussed and followed, two cases of great authority, not, I think, mentioned in the article I am discussing, one *Theberge* v. *Landry*,[11] the other *Johnston* v. *The Ministers and Trustees of St. Andrew's Church, Montreal*,[12] in each of which Lord Cairns presided and delivered the judgment. In both of them *Cuvillier* v. *Aylwin* and in *Re Marois* were cited. But apart from this, it cannot be said with any certainty that the matter of the Crown's praerogative was left to be dealt with by men of small talent. In England there is a Bench very keen, interested, and alert as to what transpires in legal matters, and it is not to be forgotten that many of them were members of the House of Lords, and to all of them the King's Praerogative would naturally be a matter of real interest. The membership of the Judicial Committee in Privy Council appeals is and was generally arranged by the Lord Chancellor, so that it is rather improbable that such an important matter as the Royal Praerogative, in its relation to the Dominions and India, was allowed to depend for its preservation or otherwise, on a Court of no importance, and that the Lord Chancellor of the day, and the Government to which he belonged, were completely indifferent to the consequences. Indeed, if the sittings of the Board are examined, the presence of not only the then Lord Chancellor and many former Lord Chancellors as well as eminent Law Lords, will be found to be very constant. I venture to think that this criticism might fairly

[9] 10 A.C. 282.
[10] 10 A.C. 675.
[11] [1876] 2 A.C. 102.
[12] [1877] 3 A.C. 159.

be considered as having no real weight in determining the value of the decisions which it questions.

But the real question remains: Has the King in Council no right to exercise his praerogative, where a Dominion or Provincial Legislature has enacted that the judgments of their Courts shall be final or when it has limited the right of appeal to certain classes of cases? In considering this, attention must be paid to the Statute, 3 & 4, Wm. IV, c. 41, passed on 14 August, 1833, which reconstituted the Judicial Committee, for it is no longer true that "they possess judicial power through the King in all cases in which an appeal in the *dernier resort* lies to the King."[13] It now derives its authority as an appellate tribunal, from this statute, and that of 7 & 8 Vic. c. 69.

The Royal Praerogative to admit and hear appeals is quite a different thing from the independent right of a subject to appeal to the King or to the King in Council. These rights are said to be correlative: See the argument of Coltman, K.C., in *Cuvillier* v. *Aylwin*: but they are, nevertheless, distinct and different; and Blackstone (p. 239) observes that "if once any one praerogative of the Crown could be held in common with the subject, it would cease to be praerogative any longer." In 1832, when *Cuvillier* v. *Alywin* was decided, only the right of the subject was considered. Sir John Leach, M.R., there said:

"The King has no power to deprive the subject of any of his rights; but the King, acting with the other 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."

The distinction I have adverted to runs through the subsequent cases and its effect must be considered. It appears most clearly in the judgment of Lord Cairns in *Johnston* v. *The Ministers and Trustees of St. Andrew's Church, Montreal,*[14] later referred to. For if the King's praerogative to admit and hear appeals is not affected, the result of a statute making the decisions of Dominion or Provincial Courts final, is only effective so far as it bars the subject's right to appeal to the King in Council, leaving it to that authority to grant as a favour what is no longer a right. Access to the local Courts has been dealt with as a civil right in this Province, where the praerogative was not in question, though its classification as such has not yet been finally settled. *Electrical Development Company of Ontario* v. *Attorney-General for Ontario et al.*[15]

[13] Chitty's Prerog. 411.
[14] (*supra*).
[15] [1919] A.C. 687.

To refer again to the cases relied on as showing the abandonment of the praerogative: in *The Queen* v. *Byramjee* (*supra*), a criminal case, the Privy Council held (1) that the reservation of the King's Praerogative in the charter of Bombay did not apply to criminal cases, and (2) that if it did, it was not a proper case in which to admit an appeal. The Committee there did, however, consider that the *Cuvillier* case decided that the King's Praerogative had been taken away pursuant to the Canada Act (31 Geo. III., c. 31), which provided that the Court of Appeal should be subject to such appeal as previous to the passing of the Act was provided for, " and also to such further and other provisions as might be made in that behalf by any Act of the Colonial Legislature." The proposition stated as the result of the *Cuvillier* case is not decided by it, as is evident from Sir John Leach's words, nor was this statement of its effect necessary to the decision.

In *The Queen* v. *Stephenson*, (*supra*)—also a criminal case—Lord Brougham bases his judgment wholly upon the fact that the Crown had by a Royal Charter, issued pursuant to Statute, expressly conferred on the Court of Appeal in Bombay the right to " allow *or to deny*" an appeal. He says:

" It might be reasonably contended that the Crown may point out the manner in which *the general common law right of appeal* to it from colonial sentences shall be exercised by a particular mode of enactment in the charter. It may say, there is a right of appeal to the Crown generally. That appeal shall be in civil cases at all times, but that appeal shall be in criminal cases only in a certain manner and form, and I shall delegate to my Judges below the right (the Crown may say) to refuse or to grant it, as they see fit. I see nothing contrary to the praerogative. I see nothing contrary *to the right of the subject*, as involved in the exercise of that praerogative of the Crown, having even independently of the Statute, laid down the right in that particular form. . . . This is the case of the execution of a power granted by Statute, to which undoubtedly the case of *Cuvillier* v. *Aylwin* would almost in terms apply. . . . There is no ground whatever for holding that the Crown has *reserved its power* of receiving an application of this kind against the decision of the Court below, and that the Court below alone has the power of granting or refusing an appeal in such cases."

In this Lord Brougham is discussing the wording of the clause in the charter dealing with criminal appeals, which in the preceding case had been held to delegate to the Court below in such cases alone,

the absolute power to admit or deny an appeal. He holds, as did the case mentioned, that the reservation, in the Charter, to the Privy Council of full power and authority to refuse or to admit an appeal did not apply to criminal but only to civil cases. In the *Byramjee* case, the head note says that the reserved power is confined to civil cases only, and the *Stephenson* case does not question that statement. Neither Dr. Lushington in the first case, nor Lord Brougham in the second, refers to the provisions of the statute, 31 Vic. c. 31, nor to 34 Vic. c. 3, s. 43, which section contains the express reservation mentioned below.

I now turn to those cases which uphold the contrary view.

In *Re Louis Marois* (*supra*), Lord Chelmsford, speaking with the concurrence of Lords Justices Knight-Bruce and Turner, and Sir E. Ryan, said, referring to the *Cuvillier* case:

"'. . . upon turning to the report of the case their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd section of the Act on the prerogative of the Crown.

"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 questions which it involves."

The 43rd section referred to in the above extract reads as follows:

"That nothing herein contained shall be construed in any manner to derogate from the rights of the Crown to erect, constitute and appoint courts of civil or criminal jurisdiction within this Province and to appoint from time to time the Judges and officers thereof, as His Majesty, his heirs or successors, shall think necessary or proper for the circumstances of this Province or to derogate from any other right or praerogative of the Crown whatsoever."

This case was decided on the same day as *Macfarlane* v. *Leclaire*,[16] and by the same Board, in which case it was affirmed that where leave was granted by the Court of Appeal in Quebec, the Judicial Committee had the right to hear a petition to dismiss the appeal for want of jurisdiction, on the ground that it could review the construction put on 34 Vic. c. 6, s. 30, by the Provincial Court.

[16] 15 Moo. P.C. 181.

In *Théberge* v. *Landry* (*supra*) the Privy Council decided, in a judgment delivered by Lord Cairns, L.C., that the peculiar character of the statute (the Quebec Election Act) was such that it could not have been in the contemplation of the Quebec Legislature to annex to the tribunal created by it the incident of its judgment being reviewed by the Crown under its praerogative. He also expressed his adherence to the "general principle that the praerogative of the Crown, once established, cannot be taken away except by express words."

In mentioning the *Cuvillier* case, Lord Cairns said that he did not understand it to be overruled, though often referred to.

In *Sauvageau* v. *Gauthier*[17] the Privy Council, in a case which, under the Quebec Code, Art. 1178, was not appealable, intimated that they would in all probability have granted leave to appeal if the case warranted it.

In the *Johnston* v. *St. Andrew's Church case* (*supra*) Lord Cairns had again before him the *Cuvillier* and later cases where leave to appeal from the Supreme Court of Canada was involved. The judgment of that Court was, by Statute, to be "final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Praerogative," 38 Vic. c. 38, s. 47 (Dom.). In dealing with this Lord Cairns refers to the difference between the rights of the Sovereign and the subject. He says:

"Now their Lordships have no doubt whatever that assuming, as the Petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prærogative to allow an appeal if so advised, is left entirely untouched and preserved by this section. Therefore their Lordships would have no hesitation, in a proper case, in advising Her Majesty to allow an appeal upon a judgment of this Court."

In *Goldring* v. *La Banque D'Hochelaga* (supra), the decision was that the order of the Court of Queen's Bench in question was not a final judgment, and therefore not appealable by leave of that Court, but that the Privy Council had unquestionable power to grant special leave to appeal.

In *Cushing* v. *Dupuy* (*supra*), decided by the same Board shortly after the preceding case, the question came up squarely for decision and the cases already mentioned were relied on. The Board, whose judgment was delivered by Sir Montague Smith, was of opinion that the Insolvency Act passed by the Dominion (38 Vic.

[17] [1874] L.R. 5 P.C. 494.

c. 16) which provided that the judgment of the Court of Queens Bench in appeal should be final, did not affect the praerogative. The case of *Cuvillier* is then examined in the light of the later cases (already mentioned), and it is pointed out that the judgments of the Privy Council delivered by Lord Chelmsford and by Lord Cairns, are to the effect that the *Cuvillier* case has been regarded not only as open to review (*Re Louis Marois*) but as virtually opposed to the later opinion in *Johnston* v. *St. Andrew's Church.* As Sir Montague Smith and Sir R. Collier sat with Lord Cairns in the last named case (as did Sir R. Collier in the *Théberge* case), it can hardly be contended that in *Cushing* v. *Dupuy,* Sir Montague Smith was merely expressing his own opinion or that of Sir R. Collier or of the retired Indian Judges. On the contrary, both he and Sir Robert Collier were fully aware of the views entertained by the then Lord Chancellor and the late Lord Chancellor and by the Lord Justices, on this important subject.

Nor does the fact that Sir Montague Smith delivered the judgment in *Russell* v. *Reg.*[18] justify any greater reflection than that Judges sometimes go wrong. The Board in that case, in addition to Sir Montague Smith, comprised Sir James Hannen, Sir R. Collier and the retired Indian Judges. That judgment was in accord with the prevailing ideas of the day and carried with it the implication that because the Parliament of Canada legislated on a subject, it, *prima facie,* was of nation-wide importance. The change of sentiment as shown by the present Provincial laws throughout Canada on the liquor question, is reflected in the overruling of the *Russell* case after 42 years. It was because it seemed to involve the power of the Dominion to draw to itself all subjects of public consequence by merely legislating upon them, rather than because it touched the liquor question, that it was set aside. Lord Haldane explained how unreasonable that situation was when he graphically pictured an impossible situation in Canada as being the only logical support for the decision, and mightily astonished some people.

The English Statute 3 & 4 Wm. IV., c. 41, which reconstituted the Judicial Committee, begins by reciting the earlier legislation under which the Judicial Committee had been evolved, and that from the decisions of various Courts in His Majesty's dominions an appeal lay to His Majesty in Council, and then proceeds to give "such power and jurisdiction to His Majesty in Council as is hereinafter mentioned." The Statute then provides:—

[18] [1882] 7 A.C. 829.

"III. And be it further enacted, That all Appeals or Complaints in the Nature of Appeals whatever, which, either by virtue of this Act, or of any Law, Statute, or Custom, may be brought before His Majesty or His Majesty in Council from or in respect of the Determination, Sentence, Rule, or Order of any Court, Judge, or judicial Officer, and all such Appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of His Privy Council, and that such Appeals, Causes, and Matters shall be heard by the said Judicial Committee, and a Report or Recommendation thereon shall be made to His Majesty in Council for His Decision thereon as heretofore, in the same Manner and Form as has been heretofore the Custom with respect to Matters referred by His Majesty to the whole of His Privy Council or a Committee thereof (the Nature of such Report or Recommendation being always stated in open Court)."

Section 21 is in part as follows:

"Provided always, that nothing in this Act contained shall impeach or abridge the Powers, Jurisdiction, or Authority of His Majesty's Privy Council as heretofore exercised by such Council, or in anywise alter the Constitution or Duties of the said Privy Council, except so far as the same are expressly altered by this Act, and for the Purposes aforesaid."

By a later Statute, 7 & 8 Vic., c. 69, enacted in 1844, the right was given to the Judicial Committee to admit appeals from Courts other than those of appellate jurisdiction and to make rules for their institution and hearing. By sec. 9 when a petition of appeal is lodged it is provided that the Committee may proceed to hear and report on the appeal without any special order in council referring it to them.

Under these Statutes it is clear that the King's Praerogative in this respect had devolved upon, and was thereafter to be exercised by the Judicial Committee.

In the *De Keyser* case[19] Lord Parmoor says:

"The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control and directly regulated by Statute, the Executive no longer derives its authority from the Royal Praerogative of the Crown but from Parliament."

It is in pursuance of these Statutes that the recent rules to which Mr. Cameron refers were passed.

[19] [1920] A.C. 508.

They no doubt came into being in view of the extraordinary number of Indian appeals which of late have almost swamped the Judicial Committee. They will naturally be enforced in regard to Canadian appeals in the spirit with which that body have always dealt with them.

While no one should attempt to prophecy what the Privy Council will decide, the result to my mind is that the three cases on which reliance is placed as affirming the abolition of the Royal Praerogative to admit an appeal in Ontario and Quebec, are not conclusive nor are they in point, as they leave out of consideration the reservation in sec. 43 of 34 Geo. III., c. 3, and accept Sir John Leach's judgment as covering more than he said or probably intended.

The later cases dealing with Provincial Statutes, which made certain judgments final, show this clearly and practically overrule *Cuvillier* v. *Aylwin,* and carry with them disagreement with Lord Brougham's *obiter dicta,* unless the words which I have underlined in his judgment are to be taken as recognizing the difference between the rights of the Crown and those of the subject.

The statutes 3 & 4 Wm. IV., c. 41, and 7 & 8 Vic., c. 69, are a distinct affirmance of the retention of the Royal Praerogative, and the devolution of its exercise to the Judicial Committee, and the decided cases show that the words "final and conclusive" do not operate to do more than restrict the civil right of litigants subject to the provincial jurisdiction to appeal beyond the local courts.

But whether this is right or wrong, we in Ontario and Quebec have little reason to complain. The Court appealed from, where there is by Statute a right to appeal direct, can always give formal leave when approving the bond, and in the other cases the new rules only cover a right to admit appeals involving less than the statutory limit. The Judicial Committee are not likely to encourage such appeals, and so this very interesting matter may well turn out to be in practice only a commotion in a teapot.

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