

DOMINION STATUS.*

PART III.

EXTRA-TERRITORIALITY.

The question whether or not the Dominions have power to legislate with extra-territorial effect has been discussed by the Privy Council. The Judicial Committee of the Privy Council have practically decided that the Dominion Legislatures have no power to legislate beyond their own territory. Take for instance, the case of *MacLeod v. Attorney-General for New South Wales*,¹ on appeal from the Supreme Court of New South Wales. Section 54 of the Criminal Law Amendment Act of that Colony passed in 1883 (46 Vict. No. 17) enacted that:

Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.

It was held by the Judicial Committee that these words must be intended to apply to those actually within the jurisdiction of Legislature and consequently there was no jurisdiction in the Colony to try the offence of bigamy alleged to have been committed in the United States of America. Lord Halsbury at page 457 in this report shows how limited he considers the jurisdiction of the Legislature of the Colony to be when he says:

Therefore, if their Lordships construe the statute as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony.

That seems to their Lordships to be an impossible construction on the Statute: the Colony can have no jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent to the powers committed to a colony.

Another case which goes to show the limited Legislative power of the Dominions is *The Peninsular & Oriental Steam Navigation Company v. Kingston*.² In this case it is clearly understood that Canada has no power to legislate extra-territorially but in order to

* The second part of this article appears on p. 112 *ante*.

¹ [1891] A.C. 455.

² [1903] A.C. 471.

arrive at the same result in this particular instance, it was suggested that if Canada could not punish its citizens for offences committed outside its boundaries a different result may have been arrived at if the offence had been made that of *entering* the Colony after the offence had been committed. Then the offence becomes that of *entering* within the territorial jurisdiction after the offence has been committed outside the jurisdiction.

Still another case which shows the limit of the Dominion's power in legislation is that of *Woodruff v. Attorney-General for Ontario*,³ which decided that Ontario could not levy duties on the estate of the testator in regard of bonds deposited in New York. The situs of the bonds in New York made them property out of Ontario.

There are other cases which show the limit of the Dominion's power to legislate extra-territorially.

There is one case which went from this Dominion to the Privy Council, *Attorney-General for the Dominion of Canada v. Cain*,⁴ which seems to show that the Dominions have power to legislate extra-territorially. The appellant had issued warrants under the Dominion of Canada Act, 60-61, Victoria, chapter 11, as amended to take the respondent from Ontario and return him to the United States of America. In the Canada Supreme Court, Anglin, J., had held that Canada had no power to pass section 6 of the Act referred to above which gives authority for warrants expelling persons from the country, but it was reversed by the Privy Council.

Lord Atkinson says, at p. 547:

If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the Statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statutes never been passed.

On the first examination of this case one would think that this case clearly recognises that the Dominions have power to legislate extra-territorially, but in this case it is clear from the words of Lord Atkinson that this power is considered as being given to them by the Imperial Parliament and it is also clear that unless it was considered to be particularly given to them by the Imperial Parliament and for a particular purpose, that they would not otherwise have the power.

³ [1908] A.C. 508.

⁴ [1906] A.C. 542.

PARAMOUNT POWER OF IMPERIAL LEGISLATION.

A case which illustrates the supremacy of the Imperial Legislation is that of *Callender, Sykes & Co. v. Colonial Secretary of Lagos*,⁵ on appeal from the Supreme Court of Lagos. Here the Privy Council decided that the English Bankruptcy Act of 1869 applied to all Her Majesty's Dominions and therefore an adjudication in bankruptcy under the English Act operates to vest in the trustee the bankrupt's title to real estate situated in Lagos subject to the local law to effect transfer. This appears to be clearly a case where Imperial law is supreme, and over-rides Colonial law whatever it might be. However, the tendency now seems to be to provide for reciprocal arrangements under bankruptcy laws.

Another case which better illustrates the supremacy of Imperial Legislation is that of *Richelieu and Ontario Navigation Company v. Owners of SS. Cape Breton*,⁶ on appeal from the Supreme Court of Canada. This case arose out of a collision on the St. Lawrence between the steamships and was tried by the local Admiralty Court and went to the Supreme Court of Canada and then to the Privy Council. A preliminary point was raised before the Privy Council. It was submitted that the judgment of the Supreme Court of Canada was final by virtue of the Canada Act of 1875, being 38 Victoria, chapter 11, section 47, which provides:

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.

This section was considered to be repugnant to the Imperial Colonial Courts of Admiralty Act, 1890, 53 and 54 Victoria, chapter 27, section 6, sub-section 1, of which reads:

The appeal from a judgment of any court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is as of right no local appeal or after a decision on local appeal lies to Her Majesty the Queen in Council.

The Canadian Act is considered by Sir J. Gorrell Barnes, repugnant to the Imperial Act for in the appeal case referred to above at page 115 in handing down judgment, he says:

Their Lordships are of the opinion that the express provisions of the said 6th Section of the Act of 1890 conferred the right of appeal to His

⁵ [1891] A.C. 460.

⁶ [1907] A.C. 112.

Majesty in Council from a judgment or decree of the Supreme Court of Canada pronounced in an appeal to that Court from the judgment ordered of the Colonial Court of Admiralty for Canada.

Thus it is a clear case of Imperial Legislation over-riding Dominion Legislation and the provision in the Canada Act means nothing because it is over-riden by Imperial Legislation in conflict with it.

Other cases which demand our attention are *Sniã Viscosa v. Yuri Maru*⁷ and *Canadian-American Shipping Company v. Woron*. In these cases there were writs *in rem* and warrants of arrest with a view to the trial at Victoria, B.C., of claims for charter parties made and alleged to have been broken outside the local area of jurisdiction by parties not resident in that area. It was decided that the Canadian Admiralty Court had no jurisdiction. What was the *ratio decidendi*? The judgment stated that our Admiralty Courts received their jurisdiction under the authority of the Imperial Colonial Courts of Admiralty Act, 1890, chapter 27, and that the jurisdiction given was the exact Admiralty jurisdiction of High Court of England as it was at that time and that anything additional to the jurisdiction of the Admiralty Courts in England does not extend to the jurisdiction of the Exchequer Court of Canada. What then is important for us in this case?

1. That our Admiralty jurisdiction is received from the Imperial Legislation and that outside that Legislation we have not under the British North America Act any jurisdiction in Admiralty cases.
2. That the Privy Council were loathe to add to and in fact did not add to, although they might have done so without departing from principles of law, the jurisdiction of our Exchequer Court when such jurisdiction would give it extra-territorial jurisdiction.

So powerful and so far-reaching has the Judicial Committee found the Imperial Legislation to be that even in a sphere in which the Colony is given power to legislate if it has not legislated, the Privy Council has no difficulty in finding that Imperial Legislation on the subject automatically applies to the Colony. Take for instance the case of *Attorney-General for New South Wales v. Emily Susannah Love*,⁸ on appeal from the Supreme Court of New South Wales. In this case it was held that the Imperial Nullum Tempus Act 9, of George III., c. 16, was in force in New South Wales and that it applied to land which had never been dealt with by the Crown. The Crown in this case of course being New South

⁷ [1927] A.C. 906.

⁸ [1898] A.C. 679.

Wales which was given jurisdiction over all Crown lands in this territory by the Imperial Act constituting the Colony.

In 1902 the Privy Council had occasion to consider the significance of the Colonial Laws Validity Act, and it did not hesitate to state that it was over-riding legislation in regard to Dominion Legislation. In the case of *The Queen v. Marais, Ex parte Marais*,⁹ on appeal from a special Court of Appeal in Natal, the Lord Chancellor said, at p. 53:

The obvious purpose and meaning of that statute (Colonial Laws Validity Act, 28 & 29 Vict. c. 63) was to preserve the right of the Imperial Legislature to legislate even for a Colony, although a local legislature had been given, and to make it impossible, when an Imperial statute had been passed expressly for the purpose of governing that Colony, for the Colonial legislature in that sense to enact anything repugnant to an express law applied to that Colony by the Imperial Legislature itself.

The House of Lords' influence on Dominion Courts appears to be far-reaching and weight must be given to the argument that Colonial Courts are bound by the House of Lords' decisions where English Common Law is being interpreted. At least this is the view of the Privy Council in *Robins v. National Trust Co.*,¹⁰ where we find remarks (obiter dicta) as follows:

When an Appellate Court in a Colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it.

Some jurists are of the opposite opinion, nevertheless that is the view of the Judicial Committee and as long as the Judicial Committee is the final Appeal Court for the Dominions it necessarily follows that indirectly if not directly, our Courts are to no small degree bound by the decisions of the House of Lords in matters of English law. In passing it might be of interest, although it is not strictly within the ambit of our discussion, to contrast the view just given by the Judicial Committee of the authority of decisions of the House of Lords in Dominion Courts as compared with the view of Mr. Justice Martin of the British Columbia Court of Appeal in the recent case of *Georgia Construction Company v. Pacific Great Eastern Railway Company*,¹¹ where, after explaining that he did not think the law relating to this case as stated in the Supreme

⁹ [1902] A. C. 51.

¹⁰ [1927] A.C. 515 at p. 519.

¹¹ [1929] 1 D.L.R. 77.

Court of Canada conflicted with decisions of the House of Lords, he continues:

If it does then I shall follow the law as declared by our said national Court, because it is not bound by or subject to the decisions of the House of Lords unless and until the Parliament of Canada shall so declare that Parliament being now, as the result of the Imperial Conference of 1926, the only authority which has jurisdiction to make such a binding declaration upon the Courts of this nation, and though its Courts continue to be bound by the decisions of the Privy Council (so long as Canada thinks it best to continue that tribunal as the final Court of Appeal of our country, but no longer) yet no decision of the Privy Council has been cited to us as altering the views of our national Court on this question.

POWER OF PRIVY COUNCIL TO INTERPRET DOMINION CONSTITUTIONS.

Possibly the most fertile source of Appeals to the Privy Council has been in the field of interpretations of the British North America Act, settling the line of demarcation of powers between the Dominion and the Provinces and in this regard it has been said that Lord Watson is the father of the Canadian Constitution. Without examining in detail cases, suffice it to say that Constitutional usages and rules relating to Canada's Federal Constitution have been largely determined by this outside tribunal, the Judicial Committee of the Privy Council. With this state of affairs existing, it is hard to reconcile the Dominion's position as an equal partner with Great Britain as set forth in the report of the 1926 Imperial Conference.

But it may be argued that these cases have little to do with the Dominion's actual Constitutional Status, and that the cases by the consent of both parties are sent on to this impartial tribunal when the question of the field of power is in dispute between the Dominions and the Provinces.

There are however, two or three cases arising out of the British North America Act, which appear to strike at the status of the Dominion of Canada more than the cases which have particularly to do with drawing the line of demarcation of powers between the Provinces and Dominions and one of these cases is *In re The Initiative and Referendum Act*,¹² on appeal from the Court of Appeal of Manitoba. Under the British North America Act, section 92, the Provincial Legislature have power to amend their Constitutions "except as regards the office of Lieutenant-Governor." The Judicial Committee in this case held that the Initiative and Referendum Act was *ultra vires* because it took away a prerogative which the

¹² [1919] A.C. 935.

Lieutenant-Governor had of preventing any act from becoming law, as under the above Act laws might become effective without the consent of the Lieutenant-Governor or the Crown at all. This strikes at the Status of the Dominion because Legislation by Initiative or Referendum is a domestic or local affair and does not affect other Dominions or the Mother country. To be within his proper province, the Lieutenant-Governor could have refused to sign the Initiative and Referendum Act, but when it was consented to, it is hard to see how it should be held *ultra vires* because it is said to destroy the prerogative of the Crown, a prerogative which the Crown had already consented to have taken away by consenting to the Act itself.

Then there is the case of Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919, which went to the Judicial Committee on appeal from the Supreme Court of Canada. The Parliament of Canada wanted to constitute a Board to fix fair prices and regulate combines, but it was held by the Privy Council that it interfered with the property and civil rights of the province and could not be said to be for the Peace, Order and Good Government of Canada. What does all this mean in a Constitutional way to Canada? It means that if an outside tribunal's ideas as to what is for the Peace, Order and Good Government of Canada as a whole, differ from the views of our Supreme Court and the views of the Parliament of Canada, then they must give way to the outside tribunal's view. In this case the Parliament of Canada by passing the Legislation actually considered it *intra vires* from the point of view of Peace, Order and Good Government of the country and expected that it would be sustained on those very grounds. Surely the representatives of the Canadian people expressing themselves as members of Parliament are entitled, without outside interference, to say what they consider to be for the Peace, Order and Good Government of the Country and the Provinces are powerful enough to safeguard their field of Legislative Power from being encroached upon by the Dominion under this Peace, Order and Good Government clause.

Another case which must receive our attention is the case of the *Toronto Electric Commissioners v. Snider et al Attorneys-General for Canada and Ontario, Interveners*.¹² The Industrial Disputes Act, a Statute in force in Canada for many years previous to the hearing of this case, was suddenly decided by the Privy Council to be *ultra vires*. It had been passed by the Dominion Parliament and under

¹² [1925] A.C. 396.

it, many industrial disputes had been settled and now the Judicial Committee says: "In our opinion this Act cannot be construed as being for the Peace, Order and Good Government of Canada;" and Canada finds herself in the humiliating position after some years of successful enforcement of an Act found to be beneficial to her industrial life and which her Parliament had deemed to be for the Peace, Order and Good Government of the country, of having the Act suddenly swept away because in the opinion of an outside tribunal it is not considered to be for the Peace, Order and Good Government of the country. This power which the Judicial Committee has of interpreting our constitution especially in the particular instances under the Peace, Order and Good Government section of the Act, seem to be totally out of accord with the conception of equality of Status which has been laid down recently in the Imperial Conference report of 1926.

Another case which would have had a very far-reaching effect on our whole domestic life if the Privy Council had held contrary to our Supreme Court, is that of *Roman Catholic Separate School v. The King*,¹⁴ in which it was claimed that the British North America Act provided for separate grants to Roman Catholic High Schools. The claim was not upheld by either our Supreme Court or the Judicial Committee but if it had been, the whole educational system of the Province of Ontario would have been changed. Surely as long as it lies within the power of a tribunal in Great Britain to change such a purely internal question as our school system, we cannot read the full content into that part of the Imperial Conference report of 1926, which has to do with equality of Status.

As has been noticed above, the prerogative right of the Privy Council to hear appeals in Constitutional matters from the Supreme Court of Australia is limited by the Commonwealth Act. Appeals from the Australian Supreme Court in Constitutional matters lie only to the Judicial Committee with the consent of the Australian Supreme Court itself. It seems quite clear that the intention at the time the Commonwealth Act was drawn up, was to allow Australia to decide all its own Constitutional cases and not as in the case of Canada, have the powers of the local and federal government interpreted by the Privy Council. Yet has not the Privy Council usurped the power and is not the Privy Council really the final authority upon the interpretation of the Australian Constitution? It seems that this is the result of the case of *Webb v. Outrim*.¹⁵

¹⁴ [1928] A.C. 363.

¹⁵ [1907] A.C. 81.

This was a case in which a federal official objected to pay income tax to a State and as it had been heard by the Supreme Court of Victoria that State applied to the Privy Council for leave to appeal. It was objected that the Board had no power to entertain the appeal on the ground that it was a Constitutional question and should have come to the Supreme Court of Australia and then if the Supreme Court wished, they may have allowed the right to appeal to the Privy Council. Lord Halsbury, at page 91 said:

The only basis upon which the objection can be suggested to be founded is the Commonwealth Act, and no direct authority under that Act has been shewn.

This means,

Firstly: That as seen in other cases the prerogative right of the Judicial Committee to hear appeals from the Dominions can be barred only by Imperial Statute in express words, and

Secondly: That the Australian Constitution is not interpreted by the Supreme Court of Australia but is really interpreted by the Judicial Committee.

Before the case above, in the cases of *D'Emden v. Pedder*¹⁶ and *Deakin v. Webb*,¹⁷ the Supreme Court of Australia applied the doctrine of 'Immunity of Instrumentalities' but as in *Webb v. Outrim* (*supra*) the Privy Council proceeded to effectively over-ride these cases and interpret the constitution in the way it thought best. The result is as we have just said, that the Privy Council really interprets the Australian Constitution.

Another case which has received great publicity and which is said to have far-reaching effect is *Nadan v. The King*,¹⁸ on appeal from the Supreme Court of Alberta, the Appellate Division. For forty years the Canadian Criminal Code, section 1025, has read:

Notwithstanding any royal prerogative, or anything contained in the Interpretation Act of the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

This section has been effectively in force during all that period now, after this case it is simply a dead letter. What has happened? By virtue of authority given the Judicial Committee under the Act of 1844, the Imperial Government by order in council laid down certain conditions under which Courts could grant leave to

¹⁶ [1904] 1 C.L.R. 91.

¹⁷ [1904] 1 C.L.R. 585.

¹⁸ [1926] A.C. 482.

appeal to the Privy Council. The Alberta Court granted leave to appeal and nothing was said in the judgment whether the Dominion Statute barring appeals would over-rulé the granting of leave to appeal by the Alberta Court under the authority of an Imperial Order in Council regarding Appeals made almost one hundred years ago. But the Judicial Committee did take great care to declare that the prerogative right to hear any appeal it desired was still very much in force and it declared that Section 1025 of the Canadian Criminal Code as and so far as it is intended to do away with the prerogative right of appeals to the Privy Council in criminal cases is invalid. The Legislative power of the Dominion of Canada as to Criminal Laws and Procedure under Section 91 of the British North America Act is confined to action to be taken *in Canada*, such was the decision of the Privy Council and Viscount Cave at page 492, after reciting the power given the Dominion to legislate for the Peace, Order and Good Government of Canada, said:

But however widely these powers are construed, they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorise the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal.

Part of the Act was also declared invalid under Section 2 of the Colonial Laws Validity Act which was passed after the right of the Privy Council to hear Appeals from all Colonies was definitely set out in the Judicial Committee Acts of 1833 and 1844. What then does this case mean? The only way the royal prerogative can be barred is by an Imperial Statute in express words. It means that the Imperial Acts are Paramount and Supreme in Canada, where intended to apply to Canada. It means that even if Section 1025 of the Canadian Criminal Code were not repugnant to certain Imperial Acts, the Section could not affect the King's prerogative and it seems to strongly suggest especially in the part of the judgment of Viscount Cave which we have quoted above, that Canada has no extra territorial jurisdiction. This case, then coming as it does about the time of the 1926 Imperial Conference, is somewhat jarring to the exponents of equality of Status and shows to what a great degree our Parliament and our laws are yet subject to external control and that the Legislative power of the Imperial Parliament is still paramount and that where Canadian Legislation is at variance with Imperial Legislation, the Canadian Legislation is null and void. As the Constitutional practice governing the relations of the Irish Free State and Great Britain is to be governed

by the Constitutional practice governing the relations of Canada and Great Britain, the Privy Council still maintains its prerogative right to hear appeals from the Irish Free State. Thus this case also affects Ireland.

THE CROWN IN ITS IMPERIAL ASPECT PARAMOUNT TO THE CROWN IN
ITS DOMINION ASPECT.

There is a case which went to the Judicial Committee from New South Wales which seems to challenge the very autonomy of the Dominions and seems to decide that the Crown in the Local or Dominion aspect may be over-ridden in its advice to the Crown in its Imperial aspect, and this seems to be quite contrary to the tenor if not the exact words of the Report of the Imperial Conference of 1926. The case I refer to is *Williams v. Howarth*,¹⁹ on appeal from the Appeal Court of New South Wales. A soldier hired under contract with the local government of New South Wales, fought in the South African War and claimed in this action his full ten shillings a day from the local government, he having already been paid four shillings and ten pence a day by the Imperial Government. The claim of Williams was that he was looking to the Crown in its Local aspect to pay him for his services. He made his contract with the Local Government and his services were for the Local Government and it seems a proper submission that the payment of four shillings and ten pence from the Imperial Government was in the nature of a bonus. If this amount had been paid to the Colony direct and then the Colony paid the soldier, nothing could have been rightfully claimed, but the soldier really only received ten shillings less four shillings and ten pence a day from his own Local Government. The finding of the Court seems to imply that the Crown in its Imperial aspect included the Crown in its Local aspect, and if there is a conflict within the same sphere, the Imperial aspect would govern. The Lord Chancellor said, at p. 554:

The Government in relation to this contract is the King himself. The soldier is his soldier, and the supplies granted to His Majesty for the purpose of paying his soldiers, whether they be granted by the Imperial or the Colonial Legislature. . . . Under these circumstances, the money paid was money paid for the service rendered to the King, and no other payment could possibly be due upon the contract declared on.

This can only mean that the Privy Council does not recognise any division of the Imperial Crown and that the advice given to

¹⁹ [1905] A.C. 551.

it by the Imperial Government over-rules any advice given to the Crown in its Local aspect. If we are to hold that the Crown must accept advice from its Local Legislatures in so far as they have power to advise in their field of Government, then this payment by the Imperial Government of four shillings and six pence is really a payment by an outside party not a party to the contract itself, and therefore under municipal laws the contract could be enforced against the Local Government. If this case now holds good, and it has not been decided anywhere to the contrary, then none of the Dominions can make any contract whatsoever that the Government of Great Britain is not a party to in the capacity of principal, and the Colony being the agent. If the Judicial Committee did not mean to be taken this way, then as the Privy Council says, a soldier is the King's soldier and payment by any Government of the King is payment to the soldier. In that case, then, if the Imperial Government makes a contract with the soldier, say, for service in South Africa and the South African Government made a payment to him, the Privy Council would have to find that the payment made by the Crown in South Africa was the same as payment by the Crown in Great Britain, which it would hardly do.

POSITION OF GOVERNOR OR GOVERNOR-GENERAL IN THE DOMINIONS.

If the 1926 Imperial Conference Reports are to be read literally, it means that the King can on the advice of his ministers from his Dominions confer honours and dignities on his subjects in the Dominions. In other words, the right to confer Dominion honours is implied in the Report. It would almost seem that the willingness of the Prime Ministers of Canada to have the resolution concerning honours introduced in the House of Commons in February last, referred to a committee implied that he wished to have it understood that the King would create honours in Canada on the advice of his Canadian Ministers.

Let us examine the case of *Attorney-General for the Dominion of Canada v. Attorney-General of Ontario*.²⁰ In this case it was decided that the Lieutenant-Governor-in-Council might create Queen's Counsel among the legal profession who would be afforded certain precedents in Provincial Courts, and this can be done by delegating the right to do it to the Lieutenant-Governor-in-Council. But Lord Watson considers this quite a different matter from the case of a proper honour or dignity which can only be effected by

²⁰ [1898] A.C. 247.

the direct personal act of the Sovereign. In other words, the prerogative of honour can only be exercised by the King and it, upon the advice of his Privy Council of Great Britain and not upon the advice of his Privy Council for the Dominion of Canada.

The case of *Musgrave v. Pulido*.²¹ It is clearly laid down in the case that a Governor is not a Viceroy, and is not exempt from the laws of the land where he is acting in the capacity of Governor. The prerogative expressed in the terms, "The King can do no wrong." does not apply to the Governor or Governor-General.

IRISH CIVIL SERVANTS' CASES.

There are certain recent cases which have come before the Judicial Committee which must be considered, although at the time of writing they are not entirely fully reported in the Appeal Cases. From the Irish Free State there are no Appeals as of right to the Privy Council, but the Judicial Committee may exercise its prerogative right to hear Appeals from the Supreme Court, and Appeals to the Supreme Court from the High Court may be by Irish Legislation barred save in Constitutional cases. The Irish Civil Servants case is that of *Wigg v. Attorney-General for the Irish Free State*²²

Civil servants of the Government, before it became the Irish Free State, appealed against the decision of the Irish Supreme Court regarding certain pensions which they claimed they should have, under the Irish Treaty, and the Irish Supreme Court decided that the pensions they were receiving were in accordance with Act 10, of the Treaty constituting the Irish Free State, but the Privy Council reversed the decision and ordered the servants to be paid on a basis other than that which the Irish Government were paying them. The Irish Government was totally dissatisfied with the judgment and Legislation was proposed to get around the judgment. Whether it was from fear that the Free State would ignore the Privy Council's decision, or whether it was a mere coincidence that at the very time the Irish were threatening to make the decision ineffective that Lord Cave announced in the House of Lords that possibly the decision of the Judicial Committee that the Civil Servants' claim for more pension had been established, had been under a mistake of fact, will have to be left for conjecture. At any rate, the case was referred back to the Judicial Committee, under power given by the Act of 1833. But the original judgment was not varied and now, according to a report appearing in the

²¹ [1879] 5 A.C. 102.

²² [1927] A.C. 674.

London Times under date of December 14th, 1928, Mr. Blythe, Irish Finance Minister, says that judgment or no judgment, no more money would be paid to the Irish Civil Servants, and the London Times of the same date editorially says:

If they (the Irish Free State) change the law by legislation, that is clearly saying that the existing law is not recognised and that it would not be recognised.

Apparently the Irish Government are not willing to leave the matter of Appeals to the Judicial Committee to the next Imperial Conference to decide what should be done about it. It will be recalled that the 1926 Imperial Conference Report contains a clause in which the Irish have especially reserved for discussion at the approaching Conference the question of Appeals. Here then, is a case in which the Privy Council seeks to interpret the Irish Free State Law and Constitution, and its decisions are challenged. The Government of Great Britain and the Judicial Committee have law and precedent on their side, but the general tenor and meaning of the 1926 Imperial Conference Report is that the decisions of the Judicial Committee will not be forced upon Dominions or the Free State where they are not welcome. This, then, is a real challenge, and it is in a sense too bad that it has arisen before the matter could be dealt with by the Imperial Conference in Session. However, if the Irish continue to ignore the judgment, there is not very much that the Government of Great Britain can do but unwillingly concede them the right to ignore the judgment, because Great Britain will never attempt to enforce the judgment of the Privy Council upon the Irish Free State, and if this judgment is ignored, then the King is no longer the Supreme Tribunal and the Judicial Committee will become no more than a voluntary judicial tribunal similar to International Courts, whose decisions will only be followed when it suits the Dominions from which they come to enforce them and another so-called unifying link of Empire has been broken.

Even the Judicial Committee itself has recognised that the prerogative right to hear Appeals has become a very weak link in the chain of Empire, because Lord Haldane, in dealing with the Irish Petition of *Hull v. McKenna*,²³ said:

I need not observe that the growth of the Empire, and particularly of the Dominions, has led to very substantial restriction of the exercise of the prerogative by the Sovereign on the advice of the Judicial Committee. It is obviously proper that the Dominions should more and more dispose of their own cases, and in criminal cases it has been laid down so strictly that

²³ 1922-23 Solicitor's Journal 807.

it is only in most exceptional cases that the Sovereign is advised to intervene. In other cases the practice which has grown up or the unwritten usage which has grown up, is that the Judicial Committee is to look closely into the nature of the case, and if in their Lordships' opinion the question is one that can best be determined on the spot then the Sovereign is not as a rule advised to intervene . . . unless the case is involving some great principle or is of some very wide public interest. . . . It becomes, with the Dominion, more and more, or less and less, as they please. We go on the principle of autonomy on this question of exercising the discretion as to granting leave to Appeal.

This would seem to indicate that without admitting the prerogative to grant leave to Appeal is gone, Lord Haldane recognises that to maintain it, leave to Appeal will have to be granted only in cases where it is desired. Has this been forgotten in the Irish Civil Servants' Case?

CONCLUSION.

Assuming that the Constitutional Status of the Dominions forty years ago in the main approximated our statement of the Legal Status of the Dominions made in the opening chapter of this study, what have been the main constitutional changes in Dominion Status in the past forty years, revealed by speeches of British Statesmen at the various Colonial and Imperial Conferences?

The Crown is now considered to be the chief connecting link of the Empire. No longer are the Parliaments of the Dominions considered to be subordinate to and as deriving their power from the Imperial Parliament. The Governments of Great Britain and the Dominions are considered as being equal and in no way subordinate to each other.

The Governors-General are no longer considered to be under the control of and appointed by the Imperial Parliament, but are considered to be direct representatives of the King in the Dominions. The power of the Governors-General to refuse to assent to Dominion Legislation is considered obsolete. The right of disallowance is not now exercised unless it has become a subject of discussion and the Dominion has expressed willingness, after such discussion, that such Legislation should be disallowed.

The field of Legislation applicable by the Imperial Parliament to the Dominions has been greatly narrowed. The right to Appeal to the Privy Council by leave of the Judicial Committee has undergone no appreciable change, but Appeals as of right have been greatly curtailed, and in some instances entirely eliminated in the Imperial Acts setting up the Dominions, such as Australia, South

Africa and the Irish Free State; but the position of Appeals as of right to the Judicial Committee from Canada have undergone little change. The Judicial Committee still remains the final Court of Appeal from the Dominions as the House of Lords remains for Great Britain, but the whole matter of the prerogative right to hear Appeals will be open to review by the next Imperial Conference.

The right of the Dominions to legislate extra-territorially has been conceded in principle. The Dominions now to a large extent control their own external affairs as they affect themselves alone and negotiate and complete treaties in the names of their own representatives designated by the Crown on the advice of the Dominions. The Empire is still considered one diplomatic unit, but the Dominions' membership in the League of Nations have given them a certain international status not known in 1887.

The Dominions must now be consulted and weight given to their opinions in matters concerning foreign policy which affect the Empire generally. The representatives of the Dominions sign all general treaties on behalf of the particular Dominions which they represent.

In contrast to the summary of the development of the Constitutional Status of the Dominions which is revealed by the speeches of British Statesmen at the Imperial Conferences is our summary of the Status of the Dominions as revealed in the Privy Council cases. The Privy Council cases show that the law of all of the Dominions is still in a certain class of cases subject to interpretation by an outside tribunal, namely, the Judicial Committee of the Privy Council. The Privy Council in an *obiter dicta* has decided that the House of Lords is the proper tribunal to finally decide what is English law, and thus the Colonial Courts are to a great extent influenced by another outside tribunal, the House of Lords.

It is also clear that the Dominions have no power to legislate with extra-territorial effect, and that Imperial Legislation is paramount to Colonial Legislation, in so far as the Imperial Parliament wishes to apply it to the Dominions. Dominion Legislation is void, if repugnant to Imperial Legislation, covering the same field. The Governors-General are not Viceroy, but are Appointees of the Imperial Government, with certain definite limited authority. The Constitutions of the various Dominions are subject to interpretation by the Judicial Committee. One Privy Council case also seems to strongly suggest that the Crown in its Imperial aspect

is supreme and overrides the Crown in its Dominion aspect, and that even in the field in which the Crown in the Dominions has the right to exercise its prerogative. The effectiveness of the Privy Council has been this far maintained, but the recent Irish Civil Servants' cases have cast a great doubt over the continuance of its effectiveness.

Thus we see that the Status of the Dominions as revealed by speeches made by British Statesmen at Colonial and Imperial Conferences is, in many instances, quite different from the Status of the Dominions as revealed by concrete cases decided by the Judicial Committee of the Privy Council. It is the work of bringing these conceptions of Dominion Status into harmony that will be the great task before the next and future Imperial Conferences, and after considering the recent Irish cases and the opinion of Appeals to the Judicial Committee expressed by Lord Haldane, it may seem impossible to harmonise the conceptions of equality of Status of Great Britain and the Dominions, as pictured by the Reports of the Imperial Conferences, with the subordinate Status of the Dominions and that of Great Britain as revealed by Privy Council cases, yet in the words of the writer of a recent book, entitled "The Feet of the Young Men":

With us, strange illogical folk that we are, fact is generally far less formidable than theory, and we have a positive genius for combining the two when they are entirely inconsistent with each other.

And the truth of this saying is driven home to us as time goes on because the everyday usage and practice in governing the Great Empire fact is gradually approximating itself to theory as one by one the remaining anomalies of Colonial Status cease to be used and gradually disappear.

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