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CORRESPONDENCE

RESPECTING THE

SUPREME

AND

EXCHEQUER COURT

OF CANADA.

Confidentially printed for the use of the Privy Council.

CORRESPONDENCE.

CONFIDENTIAL.

OTTAWA, 6th Oct., 1875.

SIR,—

You inform me that some difficulty is felt by the Colonial Secretary with reference to the constitutional right of Parliament to pass the 47th Clause of the Act to establish the Supreme Court of Canada, and that he is about to submit the question to the Law Officers of the Crown with a view to considering whether the Act should be disallowed, and you request me to report to you confidentially upon the subject.

I do not understand that I am asked to say anything as to the policy of the clause, the advantages of which are obvious.

It is of course difficult to anticipate the views which may be entertained by the Colonial Secretary or the Law Officers of the Crown, and there may very possibly be considerations which have not occurred to me, and to which, therefore, I may not allude, but I will state what does occur to me.

The clause is 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."

It will be observed that there is an express saving of the prerogative, thus no question arises as to the power of the Canadian Parliament to affect the prerogative, nor am I called on to consider what may be the nature or extent of Her Majesty's prerogative rights in this connection, or how far they may be affected by the clause.

The clause purports to make final and conclusive the Judgments of the Supreme Court, and to provide that no appeal shall be brought from such judgments to any Court of Appeal established by the Imperial Parliament by which appeals or petitions to Her Majesty in Council may be ordered to be heard.

Of course this clause cannot have the effect of preventing the exercise of any of the powers with which the Imperial Parliament is invested. No Act of the Canadian Parliament can have such an operation. If in the present relations of England to Canada, and having regard to the constitutional rights of Her Majesty's subjects residing in this Dominion, it were deemed by England to be right and consistent with the powers of self-government vested in Canada that a Court of Appeal for Canadians should be established in England against the wishes of the Canadian people, or if it were deemed to be right or consistent to alter against their wishes the provisions of their constitutional Act, the legal power to do these things exists in the Imperial Parliament; the objection to the doing of them, however grave, being based upon other and higher considerations than those involving the existence of the legal power. It is enough to say that whatever authority the Imperial Parliament had before the passing of this Act it still retains.

The clause is therefore 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. It is true that special considerations apply to Criminal Appeals, but it is nevertheless significant that Provincial Statutes have been long in force for preventing appeals from the decisions of the Courts of Upper Canada, now Ontario, in criminal cases, though these of course involve questions infinitely more important to the subject than those of property. For many years Provincial Legislation has precluded the right of appeal in the vast majority of the civil matters decided by the Provincial Courts. All matters arising in the Division Courts, all matters arising in the County Courts, and all matters arising even in the Superior Courts (excepting those few of the latter which involve more than $4,000, or the taking of a rent, &c., &c.,) and some phases of the trial of even such exceptional matters are finally disposed of in the Provincial Courts. Thus by 34th Geo. III. Cap. 2, it is enacted that the judgment of the Provincial Court of Appeal shall be final in cases where the amount involved does not exceed £500. So again by the Consolidated Statutes of Upper Canada, Cap. 13, Sec. 57 (consolidating 12 Vic., Cap. 63), it is provided that the Judgment of the Provincial Court of Error and Appeal shall be final where the matter in controversy does not exceed the sum or value of $4,000; and by the 58th and following sections special provisions are made for an appeal to Her Majesty in Council in the excepted cases, but there are attached stipulations and conditions upon the performance of which the right to appeal depends. So again by the 29th section of the same statute (consolidating 20 Vic., Cap. 61) it is provided that in the criminal cases in which appeals to the Provincial Court of Error and Appeal are by that Act allowed the order of the Court of Error and Appeal shall be final. It is needless to refer to the other statutory provisions as to Ontario in the same sense, as those cited are sufficient to exemplify the proposition I advance.

In the late Province of Lower Canada, now Quebec, by 34th Geo. III, Cap. 6, Sec. 30, it was provided that the Judgment of the

Provincial Court of Appeals should be final in all cases where the matter in dispute does not exceed £500 stg. in value, and in the excepted cases an appeal is given to Her Majesty in Council on certain conditions as to time and other points failure in the performance of which abrogates the right of appeal.

The Consolidated Statutes of Lower Canada, Cap. 77, Secs. 52-3-4-5, may be referred to in the same sense.

It is therefore abundantly manifest that for a great number of years the Provincial Legislatures have, without remonstrance, exercised the power of determining that the Judgment of the Provincial Courts shall be final in all those cases, (comprising the large majority of the whole number of cases tried) in which they thought it was for the public advantage that there should be no appeal beyond the Provincial Courts. It would therefore seem unnecessary under these circumstances to enter into any elaborate investigation of the foundation of rights which have been sanctioned by such long usage. I presume that they are to be taken as a part of the general powers of self-government given to the Provinces. To the Provinces was given the power of establishing laws for their order and good government, laws by which the rights and liberties of their inhabitants should be regulated; and practically they had in these matters absolute legislative power. To the Provinces was also given the right of establishing the courts by which their laws were to be administered. Their power to refer the execution of their laws to judicial establishments was, as it should have been, commensurate with their power to make the laws themselves, and therefore what they could by a Legislative Act finally decree to be the law they could by a like Act decree should be finally interpreted and executed by a court of their own creation. If the law, as expounded by any court, however high, did not meet the public exigencies, the Provincial Legislature altered the law in order to remedy the defect, and what the Provincial Legislature could itself legislatively expound without appeal, it had the right to declare should be by its own courts judicially expounded without appeal.

That the effect of the grant of these Legislative powers (even though in their exercise the prerogative was saved) is to give absolute power to the Province to cut off the right of appeal has been judicially determined by the Committee of the Privy Council in several cases. See Cuvillier & Aylwin, 2 Knapp. 72, where the Appellant, judgment having having been obtained against him in the Court of Appeals for Lower Canada for a sum under £500 stg., 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., 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 a

Provincial Legislature to take away the right to receive the appeal, and that such a construction would be inconsistent with the Constitutional Charter of the Canadas. 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 his rights, and that the petition must therefore be dismissed. No case could be more clearly in point. See also "The Queen *vs.* Edulgee Byramgee," 5 Moore's Privy Council Cases, 276, in which like conclusions were arrived at with reference to the effect of the Royal Charter of Bombay, which gave to the judges the power of granting or refusing any appeal. This charter being granted under the authority of an Act of the Imperial Legislature was decided absolutely to preclude the right to appeal except with the leave of the Local Court. But even if it were to be held, contrary to these authorities, that there still remained in Her Majesty power on special application to grant leave to appeal in cases excluded by the local laws, yet these laws would have force for the purpose of preventing appeals in the excluded cases without such leave by virtue of the ordinary jurisdiction of the Judicial Committee. It seems that in early days the appeal to the King in Council was to the King in Council "*in parliamente*," and in effect the Justice there dispensed was dispensed by Parliament. An independent jurisdiction, however, of the King in Council had been for some centuries exercised when by 3 and 4 William II, Cap. 41, provision was made for the appointment of a permanent Judicial Committee for the disposal of appeals under references by His Majesty in Council. By subsequent legislation various important alterations were made in the mode of administering justice as well as in the constitution of the tribunal; but in no particular were the principles I have stated interfered with by any of these alterations, and the recent legislation in England proposes no more than a transference to the new Court of all jurisdiction capable of being exercised by Her Majesty in Council or by the Judicial Committee upon an appeal. There is therefore nothing in Imperial Legislation affecting the considerations which arise from the constant usage of more than eighty years, and from the judgments of the Court itself; and the language of the clause in question differs only from that of former Acts by the adoption of words proper to describe the new Court to which the old jurisdiction has been transferred. Now it is not pretended that any of the powers of self-government exercised by the Provinces 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 of "justice in the Province, including the constitution, maintenance and

" organization of Provincial Courts, both of Civil and of Criminal " Jurisdiction, and including procedure in civil matters in those Courts."

By another clause 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 stg. 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 prohibiting 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. This further observation is to be made that, even on the inadmissible assumption that the 47th clause is beyond the constitutional power of the Canadian Parliament, yet by it no harm is done. It is in such a case inoperative. Besides it does not purport to do anything positively; no action can be taken by anyone under colour of it. It simply purports to restrain an appeal. So that if but for the clause there would be an appeal there is an appeal notwithstanding the clause. And if we are to contemplate the occurrence of an event so unlikely and so much to be deprecated, as that by Imperial Legislation such an appeal should be given, that appeal can be taken notwithstanding the clause in question just as it might if so given, be taken in the cases in which appeals have been so long prohibited by the Provincial Statutes to which I have referred. The objection to such action by the Imperial Parliament would be political not legal, and would exist whether the clause in question were retained or repealed. This is therefore a case in which there is no

necessity for disallowance even though an adverse view of the pretensions of the Canadian Parliament should be entertained by the Colonial Secretary, and I need hardly observe that the wise policy has been adopted of restricting the use of the power of disallowance to cases where its exercise is thought absolutely necessary in order to avert some action deemed to be of a gravely obnoxious character.

You have also asked me to advise you with reference to the question whether it would be possible to delay the exercise by the Court of the Jurisdiction conferred on it by the Act. A short period will elapse before the Rules and Regulations to be made by the Judges can be promulgated, but I am anxious as much as possible to curtail that interval and to arrange that at the earliest moment the Court should proceed to act. For this there are several reasons: 1st. The establishment of the Court was determined on by an enormous majority of the representatives of the people upon the ground of a felt public necessity, and it would seem indefensible that executive authority should postpone the operation of the Act, thus depriving the public of the benefit which Parliament had determined should be conferred by its establishment.

Again, there are several important questions pending between some of the Provincial Governments and this Government, the adjustment of which has been delayed pending the establishment of the Court, and which are by arrangement to come before it for consideration immediately upon its organization. Further delay in the settlement of these questions will be productive of great public inconvenience.

Again, under the Statute passed last session with reference to Petitions of Right, provision is made for the subject, suing the Crown in many classes of cases. Under this Act very large claims are to be brought against the Government, and it is in my opinion of the very last importance that the Supreme Court Act should be put in force, so that the proceedings may be taken in the Supreme Court instead of in the various Provincial Courts, where for many reasons it is undesirable they should be tried.

Again, suitors are awaiting the commencement of the operations of the Court, and a considerable number of cases between subject and subject are, I am informed, to be entered immediately upon its organization.

Again, a great public charge is created by the appointment of the Judges whose salaries become now payable, and it would not be defensible to leave these gentlemen without the opportunity of discharging the duty for which the country is to pay.

With all these reasons in favour of the early commencement of Judicial business, I trust you will not entertain the idea of endeavouring to postpone the exercise by the Judges of their Judicial functions.

I am,

Yours, &c.,

EDWARD BLAKE.

CANADA.

No. 55.

DOWNING STREET,
9th March, 1876.

MY LORD,—

I was much gratified by the intimation which I received from you some time ago by telegraph, that the Minister of Justice of the Dominion would visit England early in this year for the purpose of conferring with me on the subject of Canada Supreme and Exchequer Court Act of 1875.

This course has appeared to Her Majesty's Government far better calculated than any other could be to promote a clear and satisfactory understanding of the questions as to appeal which are raised by the 47th Section of this Act.

As these are questions of policy as much as of law or constitutional right, they are eminently such as should be cleared up, as far as practicable, by friendly discussion before opinions or decisions are definitely expressed in writing.

2. As, however, Mr. Blake's Parliamentary and professional duties have necessitated some slight postponement of his visit, and as the subject is one of much importance, with respect to which it seems desirable that your Government should be made aware of the general opinions of Her Majesty's Government (in so far as they have allowed themselves to form opinions pending these further personal explanations with Mr. Blake, to which I look forward.)

I think it may be convenient that I should transmit to you copies of two memoranda which have been drawn up here, stating the objections to which it has been conceived that the Legislation now in question is reasonably open from an Imperial, if not also from a Canadian point of view.

3. I also enclose a Draft Clause which, in the opinion of the highest authorities, might serve to guard the Queen's prerogative, and at the same time to secure the objects which the Dominion Legislature is understood to have principally desired to attain.

4. The first of these memoranda was prepared in the Privy Council Office by the direction of the Lord President, when the Act was originally received here, and the second, which has been revised and settled by the Lord Chancellor, embodies the opinion which His Lordship is disposed (subject of course to any further explanations) to entertain on the whole subject, after perusing Mr. Blake's memorandum.

Governor General,
The Right Honorable
The Earl of Dufferin, K.P., K.C.B.,
&c., &c. &c.

5. I feel confident that my object in sending to you these memoranda, for the consideration of your ministers, will not be misunderstood, and that these papers will not be construed as expressing the finally formed opinion of Her Majesty's Government, who have promised to await Mr. Blake's visit before coming to any definite conclusion.

I transmit them to you because I feel that your advisers (and more particularly of course Mr. Blake) are entitled to such explanations as I am now in a position to give them respecting the present views of Her Majesty's Government, and are moreover entitled (as recent communications have been either private or by telegraph) to some official assurance that Her Majesty's Government have not neglected to give due consideration to this very important subject, and to Mr. Blake's able communication respecting it.

6. Your ministers will I doubt not agree with me that there will be no advantage in their making at the present moment any such reply to, or observations upon, these documents as would be desirable if the discussion had reached a more advanced stage.

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 honor to be,

My Lord,

Your Lordship's most obedient humble servant,

CARNARVON.

CLAUSE TO BE SUBSTITUTED FOR CLAUSE 47 OF THE CANADA APPEAL COURT ACT:—

And be it further enacted, that no appeal from any judgment, decree, order or sentence of the said Supreme Court in Appeal to Her Majesty in Council shall be allowed when the sum or matter in dispute does not amount to the value of $5,000, or does not involve a claim, demand or question to, or respecting property or any civil right to the value of $5,000, except by permission to be granted at the discretion of the Judges of the said Supreme Court. Provided always, that nothing in this Act contained shall extend or be construed to extend to take away or abridge the undoubted right and authority of Her Majesty, Her Heirs and Successors, upon the humble petition of any person or persons aggrieved by any judgment, decree, order or sentence of the said Supreme Court in Appeal, to admit on consideration of the particular circumstances of the case his, her or their appeal to Her Majesty in Council, from any rule, judgment, decree, order or sentence, upon such terms and securities, limitations, restrictions and regulations as Her Majesty in Council, Her Heirs and Successors shall think fit.

1.

CONFIDENTIAL.

Memorandum upon the "Supreme and Exchequer Court Act" of Canada, and the right of Appeal from the Colonial Courts to Her Majesty in Council.

The Earl of Carnarvon having caused an Act of the Canadian Parliament to be transmitted to this Department, for the information of the Lord President of the Council.

It is obvious that in establishing a Supreme Court of Appeal in Canada the Legislature of the Dominion has been actuated by a laudable intention of improving the administration of justice in the Colonial Courts, and of carrying into effect the provision of the Imperial Legislature in the 101st Section of the 31st Vict. It was also apparently contemplated by the Imperial Legislature that a Supreme Court of Appeal should be constituted, exercising jurisdiction over the several Provincial Courts of the Dominion, with a view to establish a central unity of jurisdiction over them, and to decide difierences arising between them. As far as this intention is carried into effect by this Act of the Parliament of Canada, it does not fall within the province of this Department to offer any remarks upon the measure.

But it would seem, in the first place, that there is some obscurity as to the effect of the 17th Section of this Act. A right of appeal to the Supreme Court of Appeal of Canada is given to suitors from all the highest Courts of final resort in any Province of Canada. The Charters of Justice, Order in Council, or other instruments by which the Supreme Courts of New Brunswick and Nova Scotia are constituted, recognize and establish, on the other hand, a right of appeal from them to Her Majesty in Council, Lord Carnarvon presumes that such an appeal may be brought notwithstanding the provisions of the 17th Section, and it is reasonable to suppose that the powers conferred by Her Majesty's Charters and Orders in Council are not abrogated by this Act of the Parliament of Canada. But if this be so, it would seem that there exists under this Act a double or alternative right of appeal; and possibly the suitors from New Brunswick and Nova Scotia would retain a right of appeal to England, of which the suitors in the Courts of Ottawa and Quebec would be deprived, inasmuch as the right of appeal in Canada proper is regulated by a Colonial Act (34 George III, c. 6) and not by any direct Charter or Order of the Crown. This cannot have been intended, and on this point further explanation seems to be required.

The main point in the whole question lies, however, in the interpretation to be given to the 47th Section of the Canada Act, and in the effect of that clause.

As Lord Carnarvon intimates that it will be necessary to take the opinion of the Law Officers of the Crown on the legal questions arising out of this clause, viz., whether it was competent to the Legislature of Canada to pass it? whether the proviso saving the rights of Her Majesty's prerogative suffices for the protection of those rights? and, lastly, whether the right of direct appeal to the Queen in Council is affected by the Supreme and Exchequer Court Act?" it must be left to the Law Advisers of the Crown to decide these questions.

But it is impossible to read the debates of the Canadian Parliament, a copy of which accompanies these papers, without preceiving that the intention of the Canadian Ministers who introduced the Bill, and of the Canadian Legislature which passed it (not without a strong opposition and protest against the measure), was to abolish and take away, as far as lay within their power, the right of appeal from Canada to the Queen in Council.

At the time when this Bill was proposed to the Canadian Legislature it seemed probable, if not certain, that the provisions of the British Judicature Acts of 1873 and 1874, with reference to appeals, would speedily come into operation, and that the effects of these Acts would be that Colonial and other Appeals to Her Majesty in Council, instead of being referred as heretofore to the Judicial Committee of the Privy Council would henceforth be referred by Her Majesty to a British Court designated as the High or Imperial Court of Appeal. It had long ago been pointed out as a probable contingency that the Colonies would object to this transfer of jurisdiction, which, for the first time, was to have given a British Court, not being a part of the Privy Council, judicial authority over them. The terms of the 17th Section clearly show that this objection was not unfelt in Canada (indeed, Mr. Fournier stated as much in introducing the Bill), for that clause expressly enacts that "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." These words are a direct response to the clause in the Judicature Act which was to transfer the reference of appeals and petitions by Her Majesty from the Judicial Committee to the Imperial Court of Appeal. 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, not 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 acknowledged 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.

About four years ago, when a somewhat similar measure, the establishment of a Colonial Court of Final Appeal, was contemplated by some of the Australian Colonies on the ground of the expense and delay attending the Appeal to England, the opinion of this Department was asked upon the subject, and (after showing that the delays were mainly attributable to the parties themselves) this opinion was stated in the following terms:—

"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 a part of the prerogative which has been exereised for the benefit of the Colonies from the date of the earliest settlements of this country, and that 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."

"The power of establishing or remodelling the Colonial Courts of Justice is vested by the 28 & 29 Vic., in the Colonial Legislatures, and 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."

"It by no means follows as a necessary consequence of the powers vested in the Colonial Legislatures by the 28 & 29 Vic., that laws should be enacted which would control the exercise of the prerogative of the Crown in the exercise of its supreme appellate jurisdiction."

These principles were adopted by Her Majesty's Government; they were afterwards quoted before a Select Committee of the House of Lords on the Appellate Jurisdiction; and they were eventually assented to as sound and just by the Governments of the Australian Colonies them-

selves. They may, therefore, be taken to convey the grounds of a policy applicable to the whole judicature of the Empire, and they are equally applicable to the present enquiry.

But 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.

The Supreme Appellate authority of the Empire or the realm is unquestionably one of the highest functions and duties of sovereignty. 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 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.

It was stated in the course of the debate in Canada, by Sir John Macdonald, that this 47th Clause was the first step towards the severance of the Dominion from the Mother Country.

The clause, indeed, contains a proviso "saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative;" and it was admitted that no enactments of the Canadian Parliament could annul or override such rights. But this proviso is directly at variance with the former part of the same clause, and it might, and probably would, give rise to an unseemly conflict of jurisdiction. The promoters of this Bill in Canada appear to have drawn a distinction between an appeal to the Soverign in Council, as a species of prerogative remedy in peculiar cases, and an appeal in the regular course, as referred to the Judicial Committee. This distinction is founded on a complete misapprehension. The right of appeal to the Sovereign in Council is one

and indivisible, and it should be observed that in all the Colonial Acts or other instruments relating to appeals from the Colonies, words have invariably been introduced reserving the undoubted right of Her Majesty, her Heirs and Successors, to admit appeals from all judgments whatsoever of the Colonial Courts. The Canada "Supreme and Exchequer Court Act" is the first exception to the rule.

This subject has more than once been the subject of judicial decisions by the Privy Council itself (see the cases of "Cuvillier *v.* Aylwin," 2 Knapp, p. 72; "Macfarlane *v.* Leclaire," 15, Moore's P. C. C., p. 181; and "*in re* Louis Marois," 15, Moore's P. C. C., p. 189); when the effect of the Lower Canada Act, 34 George III, Cap. 6, was under discussion. The result of these arguments and decisions seems to be that the jurisdiction by way of appeal from all Colonial Courts is a prerogative of the Crown which cannot be taken away except by the express words of an Act of the Legislature to which the Crown has given its assent; but Lord Chelmsford intimated, in delivering judgment in this last mentioned case, that their Lordships desire not to be precluded from a further consideration of the serious and important question which it involves.

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. Accordingly, a very strong opposition manifested itself in Parliament against this Bill, and a protest was signed by no less than seventeen members of the Legislature.

It may be said that the Canadians are the best judges of their own 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. The delay rests entirely with the parties or their agents: any appeal may now be heard within six months; the expense

depends almost entirely on the Counsel the parties think fit to employ. 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.

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*l.* sterling instead of 500*l.*

CANADA.

SUPREME COURT OF JUDICATURE.

Memorandum.

The 47th Section of the Supreme and Exchequer Court Act of the Parliament of the Dominion of Canada, prohibits appeals 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, however, any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal prerogative.

It may, in the first place, be observed that this section is framed in such a way that it would in reality be inoperative. There is not, and there is not likely to be, any appeal from any Colony "to any Court of Appeal established by Parliament." The only appeal from a Colony known to the Constitution is an Appeal to Her Majesty in Council. This Memorandum, however, will assume that the intention of the Act is to prohibit such an appeal.

Although this 47th Section was inserted at a very late stage of the passage of the Bill, it was the subject of considerable discussion, and its retention is advocated by men of considerable weight in the interests of the Supreme Court and of the Dominion.

On the other hand, it is maintained that many and grave difficulties and disadvantages will arise if Her Majesty should be advised to permit the Act to continue in operation in its present form, and it is clear that this opinion cannot be overlooked in arriving at a decision on the case.

A Memorandum prepared in the Privy Council Office sets out some of the difficulties so clearly, and describes so completely the nature and operation of the Appellate Jurisdiction of Her Majesty in Council, that it is not necessary to do more than to refer to this document on these heads.

A Memorandum of the Minister of Justice, Mr. Blake, in support of the 47th Section, which he addressed to Mr. Mackenzie on the 6th of October last, enumerates clearly and forcibly the considerations which occur to him in its favor.

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 recognised 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. The result which it is most desirable on public grounds to secure should establish two separate and independent principles: on the one hand, that on every important question of law there should be the opportunity of reference to the Supreme Appellate Authority of the Empire; and, on the other hand, that no frivolous or trival cases should be brought for the mere purpose of vexation. The system as at present established keeps both these principles in view. There is no disputed point of law (not even excepting cases arising under the Criminal Law), which may not in some form or another be brought before the Sovereign in Council, while, by restrictions such as those which Mr. Blake cites as having been already sanctioned, it is sought to limit the appeal to such cases as are of real importance. It must, it is true, be always a matter of some difficulty to determine at what point the small importance of a cause is to limit the right of a defeated party to an appeal; but though on this detail opinions may well differ, it cannot be admitted that the difficulty of determining where a line should be drawn ought to be solved by doing away with the right of appeal altogether.

Mr. Blake further argues 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 unnecssarily, 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.

Mr. Blake cites, in support of his argument, the case of Cuvillier *v.* Aylwin. It would appear, however, that he is here under some slight misapprehension, both as to the powers of the provinces and as to the effect of the case cited. The case of Cuvillier *v.* Aylwin is an old one, decided before the formation of the Judicial Committee, and the judgment, which is contained in about six lines, does not appear to have been the

result of long or elaborate consideration. Without, however, desiring to impugn the correctness of the judgment on the particular point, which has been further considered in other cases not cited by Mr. Blake, the result of this case and the others appears to be that the jurisdiction by way of appeal from all Colonial Courts, is a prerogative of the Crown which cannot be taken away except by the express words of an Act of the Legislature to which the assent of the Crown has been formally ratified.

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 Sovereign 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 appeals 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.

March, 1876.

N. Audley Street
Grosvenor Square,
29th June, 1877

My Lord,

Although for the reasons I mentioned to your Lordship, I have not put on paper what may be said in answer to the greater part of the memorandum, confidentially submitted from the Privy Council Office upon the subject of the Appeal to the Queen in Council, for the present at any rate, preferring the course to which your Lordship was good enough to agree, that of verbal discussion, yet it has occurred to me since our interview that it might be convenient to your Lordship and not otherwise objectionable, that I should put on paper the details of some of the statistics with which I troubled your Lordship yesterday; in connection with which I may set down some of the views held by members of the profession in Quebec as to the practical working of the Appeal in that Province.

First, as to the costs of the Appeal:—

The fair result of the evidence of Mr. Reeve, pages 20, 21 and 22 of the Minutes of the Select Committee of the House of Lords on appellate jurisdiction, 1872, is that in his view the average party and party costs on each side are £300, to which he would add from 20 to 25 per cent. for the Solicitor and client costs, making the average total expenses £735.

Lattey's Privy Council practice '69, p. 7 gives the ordinary party and party costs of an appeal, where the case is printed in England, at £360 to Appellant, and £320 to Respondent.

Adding 22½ per cent. for costs, as between Client and Solicitor, this would bring the total average up to £833. Both these authorities are general.

With reference to the cost of Appeals from Lower Canada, now Quebec, the Clerk of the Court has furnished for my information a memorandum showing the result in the 19 cases in which judgments were affirmed and costs taxed to Respondent's between 1st January, '71, and 1st January, '76. The aggregate he says, is £7,646, making the average £402. Adding to this in estimating the Appellant's costs, the £40 extra, estimated by Lattey as the excess of Appellant's party and party costs over Respondent's, we find the result £844. Adding 22½ per cent. for extra costs, the total average costs of an Appeal from Lower Canada would appear to be £1,034. But none of these estimates include other extra costs, not infrequently incurred; for costs of opinion as to the propriety of appealing and so forth; nor do they include an allowance for those cases, lately very common, in which Lower Canada Counsel are, owing to their familiarity with the peculiar laws and practice of the Province, specially retained to argue appeals, with fees necessarily very high.

Until the establishment of the Supreme Court the highest Local Appellate Tribunal for Quebec was the Court of Queen's Bench, appeal side, in which the proceedings are required to be printed. I have procured from a practitioner of great experience his estimate of the average taxed costs, which is £38 a side, or £76 in all. The only extra cost is where another Counsel is retained for the argument.

This is frequently done at a varying fee. It is rather difficult to estimate the average cost; but as far as I can judge I should consider £24 on both sides a liberal allowance, making the total average costs £100.

The highest Appellate Tribunal in the Province of Ontario, is the Court of Appeals, in which also the proceedings are printed. I have obtained a statement of the costs taxed to Respondents in the cases between '72 and '76, which shows for the 27 cases an average of less than £27 10. The practice of allowing costs to the Appellant is but recent, and they have been taxed in 5 cases only, the average of which would be less than £55. But in one of these cases the costs appear to be exceptionally low. Omitting this, the average would be £60, which I have reason to believe is a fair result. This would make the total taxed costs £87 10, to which my enquiries lead me to the conclusion should be added for extra costs 22½ per cent, or £19 10, making the total average expenses of the appeal £107.

I have no doubt that the costs in the Supreme Court will be about the same, with this exception that as its seat is a few hours distant from the headquarters of the Bars of Quebec and Ontario, there will be a moderate addition to the Counsel fees in the more important cases.

Secondly, as to the numbers of appeals from the Provinces of Canada.

A memorandum from the Clerk of the Local Court shows that the appeals allowed from Quebec between 1st January, '71, and 1st January, '76, numbered 93; but in 48 only of these was security given; 38 only were effectually prosecuted; 29 were adjudged upon, comprising 19 affirmances and 10 reversals. The same officer states that the figures in the latter part of this period, from June, 1874, to March, 1876, were 46 appeals allowed, in 20 only of which security was given, and 12 only of which were effectually prosecuted.

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 to 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 to be 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 poorer suitors.

A return to the Senate of Canada shows that the appeals to the Privy Council from Ontario during the five years preceding the 10th March, '75, were 2 in number; from Nova Scotia during the five years there were 8; from New Brunswick there were 5, leave having been granted in 3 other cases which were not prosecuted; from Prince Edward Island there were none; from British Columbia there were none; and from Manitoba, since the date of its erection into a Province, 12th May, '70, there were none.

I am, my Lord,

Faithfully yours,

EDWARD BLAKE.

PRIVATE AND CONFIDENTIAL.

Observations on the Confidential Memoranda, on the subject of the 47th Clause of the Supreme Court, transmitted by Lord Carnarvon, 9th March, 1876.

The 47th Clause was framed and my memorandum of October was drawn on the theory that the proposed Court of Appeal to be established by the Parliament of Great Britain and Ireland, was about to be established.

The memoranda now to be considered, besides discussing the meaning and effect of the 47th Clause, enter into several considerations on the subject of the appeal to the Queen in Council.

I have already verbally discussed with Lord Carnarvon and the Lord Chancellor, the meaning and effect of the clause, and I do not propose to enter now upon that subject; but at Lord Carnarvon's request, set down what occurs to me in answer to the objections taken to the abolition of the appeal to the Queen in Council, and in reference to the proposals made in the Memoranda for its regulation.

Of course, I refer to, though I do not repeat, the arguments advanced in my memorandum of October.

1. The memorandum from the Council Office.

It is correctly stated that the proviso annexed to the 47th Clause acknowledges the prerogative in reference to appeals to the Queen in Council.

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 authorised 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.

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 than 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 acknowledgement 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. It is to be observed that although, in a general sense, the right of appeal from the Courts of last resort in the Colonies to the King in Council was claimed, exercised and conceded with reference

to the Old North American Colonies, yet its exercise was not generally assumed until about 1680, and it was not then conceded as a matter of right in all the Colonies. On the contrary, Massachusetts resisted under her first charter. In her second, that of 1691, the right of appeal was expressly reserved. Rhode Island and Connecticut at first denied it as inconsistent with, or rather as not provided in their Charters. Rhode Island soon after yielded the point, but Connecticut continued her opposition till a later period. Much disquietude was created in New York in 1764 by an attempt on the part of Governor Colden to allow appeals in cases not of error, and the representation of the Lords of Trade of September 24th, 1765, and the Report of the Law Officers of the Crown of November 2nd, 1765, clearly show that from the first institution of government in that province, under James the Second, the appeal was confined to cases of error only. Notwithstanding these exceptions, it is said that in those early days the appeal was in a general sense deemed rather a protection than a grievance ; but it need hardly be added that the circumstances of those Colonies and their relations to England afford, in this particular, but little useful learning.

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 administration 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.

Having regard to other parts of the paper which allege that the " appeal provides a remedy in certain cases not falling within the jurisdic- " tion of ordinary Courts of Justice ;" "that it is unquestionably one of the " highest functions and duties of Sovereignty ;" " that the power of con- " struing, 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 ;" that " 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 exer- " cising the authority of the Crown over its possessions abroad ;" and that " it is important for the Crown to retain the uncontrolled power of admit- " ting and deciding the Colonial appeals for the sake of justice, public order " and Sovereignty ; " I must say that the general tenor of these and other observations which attribute to the Crown, through this appeal, a power so vast, vague and undefined, is ill calculated to reconcile the mind to its continuance, and rather brings back to our recollection, the fact that the power, whatever it be, is but a relic of the ancient, odious, and abolished judicial powers assumed by the Privy Council and its committees, including the Court of Star Chamber.

I do not say that the same kind of abuses which provoked the abolition of this jurisdiction are to be apprehended now ; but I do say that neither the origin of this jurisdiction nor the definition, if accurate, of its extent given in the paper under review is calculated to invite the confidence of the Colonial subjects of the Crown. The statement that it provides a remedy in certain cases not falling within the jurisdiction of of ordinary Courts of Justice, I need not consider, since no suggestion has been made of dealing with anything except matters which *do* come within the jurisdiction of ordinary Courts of Justice, the appeal from whose decision is in question.

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 matter 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.

The paper adds that the appeal 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. The law of property and civil rights is different in each of the seven Provinces of the Dominion. Local Legislatures are yearly altering it in each of these Provinces. In the important Province of Quebec, it is based, not on the English nor yet on the modern French law, but on the old French law, to which the people of that Province are devotedly attached. So important do they feel it to their interests that some of the Judges of the Supreme Court should be familiar with that law, that their representatives asked and obtained the concession of a clause providing that two out of the six judges should be chosen from the bar or bench of Quebec, thus carrying out the same views which have in late years induced the appointment to the Judicial Committee of the Privy Council of Indian Judges, and the elevation to the House of Lords of a Scottish lawyer, in order to secure to the suitors from these countries the advantage of the presence upon the appellate benches of some one familiar with the law and customs of the country from which the appeal is brought. To the great Province of Quebec, I need hardly say that the observation on which I am commenting, is wholly inapplicable ; but I deny its applicability to the other Provinces. They originally derived the great bulk of their law from Great Britain, but it has been for years, and will continue to be, in a constant course of change, in some particulars, perhaps, of assimilation, in others of divergence. It would not be a just object to create by the decision of judges such an interpretation of statutes as would produce an artificial uniformity. The law is to be construed without reference to any such object, and if its exposition indicates that it does not meet the intention of the Legislature which has enacted it, the remedy is in their hands. If the decision of the judges show that an unintended divergence has taken place, they can correct it, but in no sense can the object suggested by this paragraph be admitted as one justifying the continuance of an appeal.

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

The next passage of the quotation refers to the general Imperial authority, under which the Australian Legislatures act in establishing or

remodelling Courts of Justice; but it is to be remarked that irrespective of this authority several of the Provinces of Canada have had for nearly a century such powers, their rights flowing from their own constitutional Acts.

The general observations which follow as to the influence and value of the highest controlling power of the Court of Appeal may be not without pertinence when applied to some of the Colonies; but I dispute their applicability, in the sense intended, to Canada, where,as I believe, the beneficial results indicated would flow from the existence as a Final Court of Appeal *of the Supreme Court of Canada.*

The last paragraph of the quotation points out that "it by no "means follows as a necessary consequence of the powers vested in the "Colonial Legislatures by the 28 and 29 Vict., that laws should be enacted "which would control the exercise of the Prerogative of the Crown in the "exercise of its Supreme Appellate Jurisdiction." For the reasons to which I have alluded this observation is not applicable to the case in hand. It is of course not a necessary consequence of giving powers that they should be exercised; but a very different question arises when it is proposed by the use of the right of disallowance to frustrate the attempted exercise of such powers.

I have already alluded in general terms to several of the succeeding parts of the paper. I may add that the statement that "the Supreme Appellate authority of the Empire or of the Realm is unquestionably one of the highest functions and duties of Sovereignty," includes a proposition which, if it were true would, render the appeal to the Queen in Council intolerable. But it is not true. How can that be one of the highest functions and duties of Sovereignty which is admittedly no part of the function and duty of the Queen of the Realm with reference to Her subjects residing in Great Britain and Ireland? Is it pretended that there exists with reference to Her subjects residing elsewhere and possessed of constitutional rights some Sovereign power not possessed with reference to Her subjects residing here? Surely not. And if not, this observation by itself disposes of the statement.

The following passage describing the unlimited and uncontrolled power attributed to the Crown is open to the same answer. It is said that "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 the law, and to renounce the last and "most essential mode of exercising the authority of the Crown over its "possessions abroad." There is not, and it is not now proposed that there shall be in the United Kingdom one paramount Court. The appeals to the House of Lords and to the Judicial Committee are both to be preserved. The sources of Provincial and Canadian law are the Provincial and Canadian Legislatures. Obedience to these laws may well be enforced by Her Majesty's Canadian Judges. It is so enforced practically at present. I have already answered the argument here employed, that to sanction the abolition of the

appeal to the Queen in Council in Canada is necessarily to sanction it for every other dependency. I am unable to comprehend the suggestion that that step would be to renounce the last and most essential mode of exercising the authority of the Crown over its possessions abroad. If the appeal in judicial matters is used or is capable of being used for such a purpose, it should be defined, and we should understand exactly what that is which is sought to be preserved.

I may here observe that if I am not misinformed the subjects of Her Majesty residing in Ireland and Scotland did not approve of the proposal to establish a Parliamentary tribunal in London, as a final Court of Appeal for them in lieu of the House of Lords, where they were in some sort represented; and that this proposal evoked a feeling which would probably, had it been persisted in, have led to an agitation for final Courts of Appeal in Edinburgh and Dublin. The grounds on which Scotchmen and Irishmen objected to the substitution of a new court for the House of Lords, are grounds on which Canadians may fairly entertain objections to the maintenance of the appeal from Canada to the Queen in Council.

The memorandum states that "in all Colonial Acts or other "instruments relating to appeals from the Colonies, words have invariably "been introduced, reserving the undoubted right of Her Majesty, her "Heirs and Successors, to admit appeals from all judgments whatsoever of "the Colonial Courts;" and that "the Canada 'Supreme and Exchequer "Court Act' is the first exception to this rule." I have not investigated the facts except with reference to the Old Provinces of Upper and Lower Canada. An Imperial Act was passed in 1791, which dividing Quebec into Upper and Lower Canada, provided for the making and effect of Local Laws and for a Local Court of Appeal, subject to the like appeal therefrom as formerly existed, "but subject nevertheless to such other provision as might be made in this behalf by Local Act assented to by His Majesty." In 1793 Local Courts were created in Lower Canada with an appeal in matters involving a certain amount to a Local Court of Appeal, whose judgment was made final in matters below £500; but in matters above £500, and in any matters relating to a fee of office or certain other particularly specified subjects, an appeal was given to the King in Council on certain conditions. This Act, which embraced a multitude of legislative provisions, contained a clause declaring that nothing in it should be held to derogate from the rights of the Crown to erect, constitute and appoint Courts of Civil or Criminal Jurisdiction within the Province, &c., or from any other right or prerogative of the Crown whatsoever. The effect of this clause has been the subject of discussion; it is the only clause which can apply to this particular prerogative, and the Act contains no such specific reservation as is stated in the paper. In 1805 the Legislature of the same Province passed a Regulation of Pilots Act, making the judgment of the Local Court final up to £500, granting an appeal for sums beyond to the Provincial Court of Appeals, and thence to the King in Council, without any saving or reservation. In 1839, during the suspension of the Constitution of Lower Canada, a special ordinance, touching bankruptcy, was made,

which granted an appeal to the Provincial Court of Appeals, and afterwards to the King in Council, in such cases as Bills and Writs of Error were by law allowed in the Court of Queen's Bench and no other. There is not here any saving or reservation. In 1843, after the Union, the Legislature of the United Province created a new Court of Appeal for Lower Canada, giving an appeal from the new Court to the King in Council in cases in which an appeal would have lain from the abolished Court, and on like conditions without any saving or reservation. In 1860 the Statutes of Lower Canada were consolidated, and by Chapter 77 the Judgment of the Provincial Courts was made final up to £500; in cases beyond or relating to a fee of office or certain other specified subjects an appeal was given to the King in Council on conditions. There was here no saving or reservation. In 1866-7 the Lower Canada Codes were put in operation by Statute, and by the 1,178th section of the code of civil procedure an appeal was granted to the King in Council in certain specified cases. being the same as those formerly specified. There was here no saving or reservation. Turning to the Province of Upper Canada, in 1794, by local act, an appeal was given to the Governor in Council, in matters over £100, or relating to annual rents or certain other specified subjects; the judgment of the Governor in Council was made final, save in matters exceeding £500, or relating to certain specified subjects in which the appeal was given to the King in Council on certain conditions. There was here no saving or reservation. In 1837 the Court of Chancery was established with an equitable jurisdiction, and like provisions were made as to appeal without saving or reservation. In 1849, a Court of Error and Appeal was established, whose judgments were made final up to £1,000 cy.; in matters beyond or relating to annual rents or certain other specified subjects, an appeal was given to the King in Council. There was here no saving or reservation. In 1850, Division Courts were established, whose judgments were made final and conclusive. In 1857 a limited appeal was give in the Court of Error and Appeal in criminal cases, and its decisions were made final and conclusive. In 1857 the Court of Appeal was remodelled with provisions as to appeal similar to those formerly made and without saving or reservation. In 1859 the Upper Canada Statutes were consolidated and similar provisions were re-enacted, nor was there here any saving or reservation.

The paper refers to some of the decisions bearing more or less directly on this subject. It appears to me that the expressions in the later cases incling to a different view of the question raised in Cuvillier *v.* Aylwin, from that which was taken in The Queen *v.* Edulgee Byramjee, are fairly to be referred only to the point arising from the saving of the prerogative which was not adverted to in the judgment. Upon this question both the reasoning in the judgment in The Queen *v.* Edulgee Byramjee, and the mode in which that judgment refers to Cuvillier *v.* Aylwin, are worthy of consideration; but it does not appear material to discuss this particular point at length. Indeed to rely upon the saving clause is to admit that without the saving clause, the Act would have absolutely cut off appeals except in the specified cases, and I have already shown a long series of other cases which do accomplish this result. In this connection, I may

refer to the G. W. Ry. of Canada *v.* Braid, 1 Moore, P. C., N. S. 101, upon the Upper Canada Act, where the validity and efficiency of the restrictive clause in that Act appear to have been admitted.

It is said to be important for the Crown to retain the uncontrolled power of admitting and deciding Colonial appeals for the sake of "justice, public order and Sovereignty." Without attempting to dissect these vague allegations to which I have already alluded, I would observe that it has been already shown that in old Canada the appeal was long ago made subject to local provision, and the power of abolishing the right of appeal in certain classes of cases has accordingly been repeatedly exercised; and therefore that uncontrolled power which has been spoken of does not exist.

It is said to be "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." In the latter observation, I concur, and it is only when the people of Canada believe that the substitution of a local Court of Appeal for the appeal to the Queen in Council would be an advantage, and that the continuance of the appeal to England would be not a benefit, but a grievance, that its abolition is likely to be proposed.

It is said that the "Act would deprive suitors in Canada of a "right and a remedy, which they have not been slow to use." The bulk of the appeals have proceeded from the Province of Quebec. The number which after all is trifling, is attributed to exceptional reasons, some of which have ceased to exist, while others will be removed by the establishment upon a firm basis of the Supreme Court; but even in Quebec, my information shows that from the 1st January, 1871, to 1st June, 1876, five years and a half, only 38 appeals were effectually prosecuted, of which, but 29 were decided, comprising 19 affirmatives and 10 reversals. The appeals from Ontario during the five years preceding 10th March,'75, were 2 in number; during about the same period from Nova Scotia, there were 8; from New Brunswick there were 5, leave having been granted in three other cases which were not presented; from Prince Edward Island there were none; from British Columbia there were none; and from Manitoba, since the date of its erection into a Province, 12th May, '70, there were none. It is unnecessary to say a word upon these figures as to the Provinces, other than Quebec. As to Quebec, the leaves to appeal granted during the period named, were no less than 93, in 48 only of which was security given, while as I have said, only 39 were effectually prosecuted. It has been publicly stated by men of prominence in the profession, and I have myself been informed by men of the highest standing, both on the Bench and at the Bar, that there is no doubt that the right to appeal is used vexatiously in many of the applications composing this large aggregate of 93, merely with a 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 although advised and believing 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 considerable loss and of the law's delay. It has been further stated upon like authority that the practical effect of the present state of things is to give a remedy or means of oppression to the wealthy litigant, not available to poorer suitors. I shall presently give details upon the subject of expense and delay.

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 within 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 decisions 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 system which 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 a 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 from the probably superior mental capacity of the Judges of the London Tribunal.

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; they 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 favor 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.

It is said that there was a very strong opposition in Parliament against the Bill, and that a protest was signed by no less than seventeen members of the Legislature. The clause in question, which is in the paper assumed to affect the appeal to the Queen in Council, was carried in the House of Commons upon a division of 112 to 40. It is true that a protest was signed in the Senate by only seventeen out of that body.

Answering the argument that the Canadians are the best judges of their own wants, and are entitled to place the administration of justice to themselves in whatever hands they please, it is remarked that the allegation of extreme expense and delay in the prosecution of appeals to England is unfounded; that the delay rests entirely with the parties or their agents; that any appeal may now be heard within six months, and that the expense depends almost entirely on the Counsel the parties think fit to employ. As to the delay, I learn that practical experience with reference to Quebec Appeals shows that it takes between two and three years from the time of delivery of Judgment in the Local Court of last resort to reach the ultimate decision of the appeal to the Privy Council. It is to be remembered that in many cases the Appellant is anxious to protract rather than to expedite proceedings. The evidence of Mr. Reeve before the Select Committee on appellate jurisdiction shows several of the elements which must be considered, and the best test is that of practical experience to which I have referred. But a delay of between two and three years, or even one half that time, after a suitor has run the gauntlet of all the local courts is generally very serious, and may not infrequently be ruinous. As to the expense, the view of Mr. Reeve is that the party and party costs of each side will average £300, to which he would add 20 to 25 per cent. for solicitor and client costs, making an average total of expenses of £735. The figures in Lattey's Privy Council practice would produce an average result of £833. These authorities are general. As to the Quebec appeals, the average of the costs actually taxed to Respondents in the cases heard in the last 5½ years is £402. Doubling this and adding the £40 extra for Respondents, estimated by Lattey, and adding also the per centage for solicitor and client

costs, the total average costs of an appeal from Quebec would be £1,034. But none of these estimates include any allowance for certain classes of extra costs not infrequently incurred; nor do they include any allowance for the special fees paid to Quebec counsel, who of late years have been specially retained to cross the Atlantic in order to argue an appeal in London It is said, indeed, that the expense depends almost entirely upon the counse the parties think fit to employ. That observation is not strictly accurate, as is shown by reference to the evidence of Mr. Reeve, who fixes the solicitor's party and party costs, irrespective of disbursements and of the fees of the office at £100 a side; but it is to be added that with a view of remedying to some extent the evils already alluded to, inseparably connected with a non-resident tribunal, it is necessary that eminent counsel should be employed, and that extra fees should be paid to compensate them for the labor involved in preparing for the argument of cases dependent upon foreign laws. Here, again, practical experience is the test. One may be reasonably sure that the suitor does not pay more than is required, and the figures which I have given, unless controverted, must be taken as the measure of the expense of the appeal. What course may a litigant be expected to take who has recovered judgment for £500, and who learns that his adversary's threatened appeal to the Privy Council will involve, first, a delay of between two and three years; secondly, an advance of over £500, which he must raise meantime, and upon no part of which can he recover interest; thirdly, an inevitable loss in extra costs of over £112. 10. 0, altogether independent of the possibility of the success of the appeal, in which case he will lose, besides his claim, over £1,000. It is quite clear that to throw off a large part of a just demand must be better than to resist the appeal; and accordingly, I am informed, that this course is expected by those who apply for leave to appeal in the majority of cases, and that their expectations are realized. Nor is it unreasonable to contrast this expense with that of the Provincial Courts of Appeal. The total average expenses of an appeal to the highest Provincial Court of Quebec may fairly be estimated at £100; to the highest Provincial Court of Ontario at £107; and I presume that the expense in the Supreme Court will be about the same, save that its seat being a few hours distant from the headquarters of the bars of Quebec and Ontario, there will be a moderate addition for Counsel fees in the more important cases. To give to Canada an efficient Court of Appeal possessing the confidence of the country at an average expense to suitors of £120, and a probable delay of less than six months is what would be proposed in Canada; to provide a new intermediate Court of Appeal, leaving over the head of the suitors the possibility of a further expensive and dilatory appeal to England, would be the result of the views taken by the paper.

The paper proceeds to observe that Canadians are by no means the only parties to suits in Canadian Courts; that every British subject who has invested money or bought property in Canada is equally interested in the administration of justice in these provinces; that 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; and that to abandon this appeal would be to place these rights in entire dependence on the authority of a Canadian Judicature. This is in effect a repetition of former arguments already discussed, and it practically presumes that British subjects and foreigners would not receive justice at the hands of the Canadian Judges, while it affirms that the Canadians would receive justice at the hands of the British Court.

Besides it is to be remembered that the legislative power is after all the controlling power, and that if (which I utterly repudiate) there is danger of injustice being done in Canada to non-residents, that danger is obviously infinitely more likely to accrue from the legislative Acts of a small local popular legislative body than from the solemn judicial decisions of the Supreme Court of Canada. Yet no such danger is apprehended from the more likely source; its apprehension from the less likely source is a baseless imagination.

It is said that the Crown itself has numerous rights or obligations which are daily discussed and enforced in courts of justice, that 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; and it is asked whether such rights as these are to be determined absolutely and finally by any Colonial Court of Justice however eminent, and whether the Crown is 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. It is added that such questions might involve some conflict between the Imperial and Colonial laws and interests, and the question is asked whether it can be contended that these are to be left to the exclusive decision of a Canadian Court; it is alleged that such an admission would be a virtual abdication of Sovereignty itself. I do not apprehend the practical application of these observations. I know of no rights of the Crown as represented in England which come into controversy in Her Majesty's Courts in Canada, nor is it easy to conceive how such cases can arise. There are, I believe, some small parcels of land held by the Imperial authorities at Halifax, and possibly at one or two other points. No litigation it is supposed could arise in reference to these, but they are the only matters which occur to me as giving ground for the argument. Anything else it would seem must refer to issues raised by the Crown as represented in Canada, and inasmuch as the right of self Government in such matters belongs to the Canadians, there does not appear to be any difficulty in leaving the decision of such questions, upon the arguments of Her Majesty's Canadian Law Officers, to Her Majesty's Canadian Judges. As to the Sovereignty, I have already pointed out that the Sovereign has no concern in the actual administration of justice. I may, however, observe that if it can be pointed out that issues may arise before the courts involving Imperial interests, this cannot be a reason for preserving the general power to admit appeals. The furthest limit to which it would lead would be that the right to appeal should be preserved *in such cases.*

It is said that on the various grounds referred to 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 and distinctly declared. I have already answered in detail the arguments by which these propositions are said to be maintained The argument seems to ignore as part of the Colonial policy any difference in the conditions of the British Colonies or any process of development of Colonial institutions: and the applicability of traditions to an ever-changing state of circumstances may be fairly questioned; but I have pointed out that the language of former Acts in the case of the provinces of Old Canada, and, I may add in the case of New Zealand, is conclusive against the proposition that it is requisite that there should be a distinct reservation and expression of the right of final appeal. and it seems clear that with reference to Canada there should be no declaration or acknowledgement of a right to admit of all appeals whatsoever on special application. On the contrary, that would be a step of the most retrograde character; since, as I have already shown, for more than eighty years the right of absolutely prohibiting appeals in cases under the sum from time to time prescribed by the Local Legislatures, has been enjoyed and exercised by the Provinces of Old Canada.

The paper concludes by an observation that 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, and suggests its being fixed as in India at £1,000 instead of £500. I have already pointed out that in the most important Province of Canada the limit of appealable value is at present $4,000; but even this sum is absurd when compared with the costs of appeal as already detailed. A thousand pounds, it is true, is the limit in India; but it is also the limit in Malta and some other small dependencies.

Take the gross results in Quebec, to which I have alluded. There were 39 appeals prosecuted at a cost of say £40,326; resulting in 10 reversals only so far as ascertained.

Apart from the arguments to be drawn from the statements I have made as to expense and delay, I may remark that the number of intermediate appeals in the more important provinces in Canada is such as to render an additional appeal both grievous and unnecessary, at any rate in cases of minor importance. In Quebec, for example, there is after the decision in the Supreme Court an appeal to the Court of Review, thence to the Court of Queen's Bench, appeal side, thence to the Supreme Court. There are thus three Colonial appeals, that to the Queen in Council making the fourth. In Ontario there are always two and sometimes three Colonial appeals. These circumstances together with the high standing which must be accorded to such a court as the Supreme Court of the Dominion of

Canada afford additional reasons for fixing the limit of appealable value very much higher. It is to be observed that many years ago the limit from Bengal was £5,000 stg., a sum which would be more reasonable than £1,000.

Turning to the memorandum revised by the Lord Chancellor, it is unnecessary to recapitulate the observations already made, some few of which may be more or less applicable to the positions taken in this paper.

The argument in my memorandum of October, as to the effect of the policy which had been for so many years pursued in Canada and recognized in England is combatted. What I meant to convey as my notion of this policy, was that it was a policy of making the judgment of the Colonial Courts final in *all cases in which it was thought to be the interest of the Canadian people that they should be final.* I pointed out that in carrying out that policy, the Colonial judgments had been in the great bulk of the cases already made final, and I desired to argue that when the day should arrive on which it was thought for the interest of the Canadian people to make *all* such judgments final, legislation in that sense would be but the carrying out of the same policy. It is to be observed that the express powers under which these various Colonial enactments were passed are, even apart from the general powers, wide enough to authorize total abolition, although hitherto exercised only for the purpose of partial abolition.

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 distinguished 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 Crown over Provincial legislation and 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, recognised 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 ascer-

" tained 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.

With reference to my citation of Cuvillier *v.* Aylwin, I may observe that my intention was to point out that the Privy Council had recognised the power of the old Province of Canada, so as to legislate as absolutely to cut off the right of appeal in certain cases. I wished also to point out that this legislation had taken place repeatedly without objection, and to argue that there was thus a recognition of the right to cut off the appeal so far as it had been cut off, and a recognition of the soundness of, or at any rate an absence of remonstrance against that policy; and I desired to argue that the line of action so taken entitles us to expect that when, under the altered circumstances to which I have referred, the Supreme Court of Canada is established, an Act to make final the decisions of that tribunal should not be disallowed.

My conclusions are, that in case the Canadian Parliament should pass an Act making the decisions of the Supreme Court final, that Act should be left to its operations, and that in case the Canadian Parliament should instead of thus abolishing only restrict or regulate the appeal, it should be restricted to cases involving a very important sum, and absolutely abolished in other cases.

EDWARD BLAKE.

PRIVATE AND CONFIDENTIAL.

19 N. AUDLEY STREET,
15th August, 1876.

MY DEAR LORD CARNARVON,—

I have to acknowledge the receipt of your letter of the 12th inst., on the subject of the Supreme Court Act with its enclosure, and am very glad that your Lordship proposes to deal with the modified draft of the Lord Chancellor in the manner you explain. I will communicate the result to my colleagues, who, I am sure, will be equally sensible with mysely of the great consideration which your Lordship has given to our views.

I have prepared, and will send to Mr. Herbert, the confidential memo. which I promised to leave on the subject of the Appeal to the Queen in Council, for which of course there is no present use, but which your Lordship thought might be of service in the event of a renewal of the decision as to the abolition or regulation of that appeal.

Faithfully yours,

EDWARD BLAKE.

The Right Honorable,
The Earl of Carnarvon.

CANADA.

No. 240.

DOWNING STREET,
29th August, 1876.

MY LORD,—

I have the honour to inform you that Her Majesty will not be advised to exercise her power of disallowance with respect to the Act of the Legislature of Canada, entitled "An Act to establish a Supreme
38 V., C. ii. " Court and a Court of Exchequer for the Dominion of Canada," transcripts of which accompanied your Lordship's despatches No. 93 of the 9th of April, 1875, and No. 147 of the 8th of November last.

I have, &c.,

CARNARVON.

Governor General,
The Right Honorable,
The Earl of Dufferin, K.P., G.C.M.G., K.C.B.

The Earl of Carnarvon to the Earl of Dufferin.

CANADA.

Secret.

DOWNING STREET,
29th August, 1876.

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 Kingdon 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 affimative words "The judgment "of the Supreme Court shall in all cases be final and conclusive," 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 questitn 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 Dominon, with whom, in the first instance at least, the consideration of these regulations ought to rest.

I have, &c.,

CARNARVON.

Governor General,
The Right Honorable,
The Earl of Dufferin, K. P., G. C. M. G., K. C. B.,
&c., &c., &c.