49, 1897

In the Privy Council.

No. 3 of 1897.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE DOMINION OF CANADA . . . . . *Appellant,*

AND

THE PROVINCE OF ONTARIO. . . . . *Respondent.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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THE DOMINION OF CANADA . . . . . *Appellant,*

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RECORD OF PROCEEDINGS.

RECORD.

No. 1.
Certificate of Registrar of Court of Appeal, Ontario, verifying Transcript Record, 25th Jan., 1897.

In the Court of Appeal for Ontario.

In the matter of the appointing of Queen's Counsel for the Province of Ontario and of the precedence or pre-audience of Members of the Bar of the Province in the Provincial Courts.

Referred for hearing and consideration to the Court of Appeal for Ontario under 53 Victoria chapter 13, by the Lieutenant-Governor of Ontario by Order in Council on the 16th day of April, 1892.

I, Alexander Grant, of the City of Toronto, Registrar of the Court of Appeal for Ontario, humbly certify to the Queen's Most Excellent Majesty in Her Privy Council that the documents mentioned in the schedule hereto annexed comprise the record of the proceedings in this cause.

And I further certify that the correct transcript of such record is hereto annexed and that an index of the same is contained in the said schedule.

And I furthur certify that every sheet of such record is marked with my signature and that the seal of the Court of Appeal for Ontario is affixed hereto with the sanction of the said Court and that the fees and expenses incurred and paid by the Appellant the Minister of Justice for the Dominion of Canada for the preparation of such transcript amounts to the sum of one pound and twelve shillings.

In witness whereof I have hereunto set my hand and affixed the seal of the Court of Appeal for Ontario, this twenty-fifth day of January one thousand eight hundred and ninety-seven.

A. GRANT.
Registrar.

(Seal)

RECORD.

SCHEDULE.

No. 1. Certificate of Registrar of Court of Appeal, Ontario, verifying Transcript Record, 25th Jan., 1897 — *continued.*

1. Printed record of the matter referred to the Court of Appeal for Ontario by the Lieutenant-Governor in Council.

2. Printed copies of the opinions of the several Judges by whom the matter was heard.

3. Type written copies of the certificate of judgment in the Court of Appeal.

No. 2. Order in Council, approved by Lieut.-Governor of Ontario, 16th April, 1892.

In the matter of Queen's Counsel and Precedence at the Bar.

Copy of an Order in Council approved and ordered by His Honour the Lieutenant-Governor, the 16th day of April, A.D. 1892.

The Committee of Council have had under consideration a memorandum of the Honourable the Attorney-General, dated 13th April, 1892, wherein he states that with reference to the matter of Queen's Counsel and of precedence in provincial courts, controversies have been raised, involving very wide questions as to local and federal jurisdiction, dependent on the true interpretation of the British North America Act, 1867, as to certain powers of the Legislature and of the Lieutenant-Governor of the province, as to the validity and the effect of certain provincial legislation and certain provincial executive action thereunder, and as to the status and precedence in the provincial courts of members of the provincial bar.

That unsuccessful efforts have been made to arrange with the Government of Canada, or otherwise for the submission to a judicial tribunal of the important questions so raised.

That in the ordinary course of the courts there seems no adequate means for procuring an authoritative and conclusive decision on these questions.

That confusion, uncertainty and inconvenience has been produced by the existing state of matters, and it is in the public interest that the questions involved should be settled by judicial decision.

The Attorney-General recommends that the Lieutenant-Governor in Council should pursuant to the provisions of cap. 13 of 53 Victoria, Ontario, 1890, refer to the Court of Appeal for Ontario for hearing and consideration, the matters and questions stated and put in the case submitted herewith and signed by him.

The Committee of Council respectfully advise that the recommendation of the Attorney-General be concurred in and acted upon, and that the said case be transmitted to the Court of Appeal accordingly.

J. LONSDALE CAPREOL,
Assistant Clerk Executive Council.

Executive Council Chamber,
Toronto, 19th April, 1892.

No. 3. Certificate of Clerk of Executive Council, verifying case referred to Court of Appeal, 19th April, 1892.

I hereby certify that the following case is a true copy of the case signed by the Honourable Oliver Mowat, Attorney-General for Ontario, referred by the Lieutenant-Governor in Council to the Court of Appeal in accordance with the Order in Council of 16th April, 1892.

J. LONSDALE CAPREOL,
Assistant Clerk Executive Council.

CASE.

No. 4. Case referred by Lieut.-Governor to Court of Appeal for Ontario, 16th April, 1892.

In the matter of the appointment of Queen's Counsel for the Province of Ontario, and of the precedence or pre-audience of Members of the Bar of the province in the Provincial Courts. Referred for hearing and consideration to the Court of Appeal for Ontario, under 53 Vict., chap. 13, by the Lieutenant-Governor of Ontario by Order in Council on the 16th day of April, A.D. 1892.

No. 5. Report of Minister of Justice of Canada, as to power of Provincial Government to appoint Queen's Counsel, 3rd Jan., 1872.

I. On the 3rd of January, 1872, the Minister of Justice of Canada made a report as follows:—

Department of Justice, Ottawa, 3rd January, 1872.

The undersigned has the honour to report to your Excellency that the question has been raised by the Government of the Province of Nova Scotia, as to whether they have the power of appointing Queen's Counsel for the province, their opinion being that they have no such power.

The undersigned is of the opinion that, as a matter of course, Her Majesty has directly, as well as through her representative the Governor-General, the power of selecting from the bars of the several provinces her own counsel, and, as *fons honoris* of giving them such precedence and pre-audience in her courts as she thinks proper.

It is held by some that lieutenant-governors of the provinces, as they are now not appointed directly by her Majesty, but by the Governor-General, under "The British North America Act, 1867," clause 58, do not represent her sufficiently to exercise the Royal prerogative without positive statutory enactment. This seems to have been the view of her Majesty's Government in 1864, when they refused to confer the pardoning powers on the lieutenant-governors. (See despatch of Mr. Cardwell, of 3rd December, 1864; also Lord Granville's despatch of 24th February, 1869.) On the other hand, it is contended that the 64th and 65th clauses continue to the lieutenant-governors the powers of appointing Queen's Counsel, which they exercised while holding commissions under the Great Seal of England.

Reference is also made to the 63rd section, by which the Lieutenant-Governors of Ontario and Quebec appoint attorney-generals, and the Lieutenant-Governor of Quebec also a solicitor-general.

However this may be, it will be seen that by the 92nd clause of the Act it is provided that, "The Legislature of each province may make laws in relation to the administration of justice in the province, including the constitution,

RECORD.

No. 5. Report of Minister of Justice of Canada, as to power of Provincial Government to appoint Queen's Counsel, 3rd Jan., 1872 —*continued.*

maintenance and organisation of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts.

Under this power, the undersigned is of opinion that the Legislature of a province, being charged with the administration of justice and the organisation of the Courts, may, by statute, provide for the general conduct of business before those Courts; and may make such provisions with respect to the bar, the management of criminal prosecutions by counsel, the selection of those counsel, and the right of pre-audience, as it sees fit. Such enactment must, however, in the opinion of the undersigned, be subject to the exercise of the Royal prerogative, which is paramount, and in no way diminished by the terms of the Act of Confederation.

As the matter affects Her Majesty's prerogative, the undersigned would respectfully recommend that it be submitted to the Right Honourable the Secretary of State for the Colonies, for the opinion of the law officers of the Crown and for Her Majesty's decision thereon.

The questions for opinion would seem to be:—

(1) Has the Governor-General (since 1st of July, 1867, when the union came into effect) power, as Her Majesty's representative, to appoint Queen's Counsel?

(2) Has the Lieutenant-Governor, appointed since that date, the power of appointment?

(3) Can the Legislature of a province confer by statute on its Lieutenant-Governor the power of appointing Queen's Counsel?

(4) If these questions are answered in the affirmative, how is the question of precedence or pre-audience to be settled?

All which is respectfully submitted.

JOHN A. MACDONALD.

No. 6. Despatch, Governor-General to Colonial Secretary, 4th Jan., 1872.

II. Pursuant to this Report on the 4th January, 1872, the Governor-General requested an opinion of the Law Officers and decision of the Colonial Secretary by a letter as follows:—

Ottawa, 4th January, 1872.

My Lord,—I have the honour to enclose for your Lordship's consideration a report drawn up by the Honourable the Minister of Justice (Sir John A. Macdonald) on a question which has been raised as to the power of appointing Queen's Counsel for the provinces.

(2) I shall feel obliged if your Lordship will have the goodness to procure the opinion of the Law Officers of the Crown, and communicate to me your decision on the question of prerogative.

(3) Questions will probably be put upon the subject to the Ministers soon after the commencement of the approaching session of Parliament, *i.e.*, soon after the middle of next month.

I have, etc.,

LISGAR.

The Right Honourable the Earl of Kimberley, etc., etc., etc.

III. On the 1st February, 1872, the Colonial Secretary communicated to the Governor-General the advice of the law officers in a letter as follows:—

No. 7. Communication, Colonial Secretary to Governor-General, 1st Feb., 1872.

Downing Street, 1st February, 1872.

My Lord—In compliance with the request contained in your despatch No. I. of the 4th January, I have taken the opinion of the Law Officers of the Crown on the question raised therein with regard to the power of appointing Queen's Counsel in the provinces forming the Dominion.

I am advised that the Governor-General has now power, as Her Majesty's representative, to appoint Queen's Counsel, but that a Lieutenant-Governor, appointed since the union came into effect has no such power of appointment.

I am further advised that the Legislature of a province can confer by statute on its Lieutenant-Governor the power of appointing Queen's Counsel; and, with respect to precedence or pre-audience in the Courts of the province, the Legislature of the province has power to decide as between Queen's Counsel appointed by the Governor-General and the Lieutenant-Governor, as above explained.

I have, etc.,

KIMBERLEY.

Governor-General, the Right Hon.
Lord LISGAR, G.C.B., G.C.M.G.

IV. On the 16th day of March, 1872, the preceding facts not having been made public, the Lieutenant-Governor of Ontario by Letters Patent issued in Her Majesty's name under the Great Seal of Ontario purported to appoint to be Queen's Counsel for Ontario the following members of the Provincial Bar:—

No. 8. First appointments of Queen's Counsel by Lieut.-Governor of Ontario, 16th March, 1872.

Daniel McMichael, of Osgoode Hall, Esq., barrister-at-law.
William Proudfoot, ,, ,,
Christopher Salmon Patterson, ,, ,,
Edmund Burke Wood, ,, ,,
John Anderson, ,, ,,
Samuel Hume Blake, ,, ,,
Thomas Moss, ,, ,,

V. On the 2nd of October, 1872, an Order in Council was made by the Government of Canada as follows:—

No. 9. Order in Council of Dominion Government, confirming appointments, 2nd Oct., 1872.

On a memorandum, dated 28th September, 1872, from the Hon. the Minister of Justice, reporting that it appears by the Ontario "Official Gazette," of the 16th of March last, that the Lieutenant-Governor of that province appointed the following gentlemen to be Queen's Counsel:—

Daniel McMichael, of Osgoode Hall, Esq., barrister-at-law.
William Proudfoot, ,, ,,
Christopher Salmon Patterson, ,, ,,
Edmund Burke Wood, ,, ,,
John Anderson, ,, ,,
Samuel Hume Blake, ,, ,,
Thomas Moss, ,, ,,

RECORD.

No. 9. Order in Council of Dominion Government, confirming appointments, 2nd Oct., 1872 —*continued.*

The Minister states that, being of opinion that in the absence of legislation on the subject, the Lieutenant-Governor of a Province of the Dominion had not since the 1st July, 1867, the right to exercise the Royal prerogative in the appointment of Queen's Counsel, but that such power was vested in the Governor-General, as Her Majesty's representative; he had made a report to that effect, and His Excellency the late Governor-General transmitted such report to the Secretary of State for the Colonies, for the purpose of obtaining the opinion of the Law Officers of the Crown on the subject.

That by a despatch dated 1st February last, Lord Kimberley informed Lord Lisgar that the Governor-General had the power, but that a Lieutenant-Governor appointed since the union came into effect had not the power of appointment.

That under the circumstances, great doubt must exist as to the validity of the commissions issued to the gentlemen named.

That by the law of Upper Canada, Queen's Counsel can, in certain cases, at the request of a Judge of the Superior Courts, perform certain judicial duties, such as the trial of civil and criminal cases. That their authority to act might be disputed, and that if it were eventually decided to be illegal, a failure of justice would be the consequence.

That under these circumstances, as the gentlemen mentioned are fully qualified to perform the duties of Her Majesty's Counsel, the Minister of Justice recommends that commissions be issued by the Government of Canada to these gentlemen, or such of them as desire to receive the same.

The committee submit the above recommendation for your Excellency's approval.

(Certified) W. A. HIMSWORTH,
Clerk, Privy Council.

No. 10. Order in Council of Ontario Government respecting Provincial Legislation, 23rd Oct., 1872.

VI. On the 23rd of October, 1872, an Order in Council was made by the the Government of Ontario as follows:—

The Committee of Council would respectively call your Excellency's attention to the fact, that some of the gentlemen whom your Excellency appointed Queen's Counsel for Ontario, on the 16th of March last, have during the present month received from the office of the Honourable Secretary of State for Canada, letters in the following form:—

Department of the Secretary of State,
Ottawa, 7th October, 1872.

Sir,—I have the honour to inform you that the question having been raised in the Province of Nova Scotia as to where the power of appointing Queen's Counsel, rested since the union of the provinces His Excellency the Governor-General, on the 4th January last, obtained through the Right Honourable the Secretary of State for the Colonies the opinion of the Law Officers of the Crown of England on the subject. These officers advised that the Governor-General has now the power as Her Majesty's representative, to appoint Queen's Counsel, but that a Lieutenant-Governor appointed since the union came into effect, has, in the absence of legislation, no such power of appointment.

Under these circumstances, and to remove all possible doubt as to the legality of your status as one of Her Majesty's Counsel for the Province of Ontario, I am commanded by His Excellency the Governor-General to inform you that a commission will be issued under the Great Seal of Canada appointing you Queen's Counsel for Ontario should you desire it.

I have the honour to be, sir,
Your obedient servant,
E. PARENT,
Under Secretary of State.

The committee regret that the Government of Canada, entertaining the view that the opinion of the law officers referred to in this letter was applicable to Ontario, should not have thought fit to transmit a copy of it for Your Excellency's information. Although Your Excellency's Government is of opinion that Your Excellency is invested with the power to make such appointments without legislation, yet had they been aware of the view of the law officers, they would have thought it proper to propose the legislation requisite for the removal of any possible doubt on the subject; and, having now become aware of it, it is their intention to propose such legislation during the session which is to commence within a few weeks. It appears to the committee that grave inconveniences and complications may arise from the proposed action of the Government of Canada.

The committee entertain the view that appointments of this description fall properly within the local and not within the federal jurisdiction, and they trust that having regard to their expressed intentions as to legislation, the Government of Canada may see fit to abstain at present from issuing the proposed commissions.

Should that Government, however, be of opinion that, notwithstanding the proposed legislation, the power of issuing such commissions would remain with and should be exercised by His Excellency the Governor-General, it appears to the committee that before acting on that view the opinion of the Judicial Committee of the Privy Council should be taken on a joint case to be argued on behalf of the respective Governments.

The committee purposely abstain from entering into any discussion of the constitutional point, but they are bound to state that in their opinion the proposed action involves questions of local and federal jurisdiction far wider than the single question under discussion, and this renders them the more anxious that the course they propose should commend itself to His Excellency the Governor-General. The committee advise that Your Excellency should communicate this minute of Council to the Secretary of State for the Provinces.

(Certified.) J. G. SCOTT,
Clerk, Executive Council, Ontario.

October 25th, 1872.

RECORD.

No. 11. Order in Council of Dominion Government, in reply, 13th Dec., 1872.

VII. The said order having been transmitted to the Government of Canada, that Government on the 13th of December, 1872, made an order in Council as follows:

"The Committee of the Privy Council, to whom was referred the despatch "of the Lieutenant-Governor of Ontario, dated 28th October, 1872, covering a "minute of the Executive Council of that Province, on the subject of the "appointment of Queen's Counsel, beg leave to report

"That considerably more than a year ago, the attention of the Government "was called to the expediency of appointing Queen's Counsel in Nova Scotia. "It appeared that, according to the practice that obtained in that province, "criminal prosecutions are generally conducted by Queen's Counsel, and it was "stated that there was not a sufficient number of professional gentlemen, holding "that rank, to perform the criminal business satisfactorily.

"As the question, where the power of appointment rested, had been mooted "in the newspapers, and as it was one that affected the Royal prerogative, it was "deemed expedient to pursue the usual course in such cases, and to submit the "question for Her Majesty's consideration, and for the opinion of the Law "Officers of the Crown.

"This opinion was obtained, and it was to the effect that the Governor-"General has power, as Her Majesty's representative, to appoint Queen's Counsel, "but that a Lieutenant-Governor, appointed since the union came into effect, "has no such power of appointment.

"Her Majesty was further advised in such opinion that the Legislature of a "province could confer by statute, upon the Lieutenant-Governor, power of "appointing Queen's Counsel, and of settling the practice as to precedence or "pre-audience in the courts of the province.

"No appointments of Queen's Counsel for Ontario have yet been made by "the Governor-General.

"The Lieutenant-Governor of Ontario has given commissions as Queen's "Counsel to seven members of the bar, as appears by the "Ontario Gazette" of "the 16th March last.

"The validity of these appointments was at once questioned by the "profession and in the press. Had the question been one merely involving "pre-audience in the courts, the Government would have left it to the decision of "those Courts, but by law a Superior Court Judge in Ontario has the power of "deputing any of Her Majesty's Counsel to perform his judicial duties, both civil "and criminal, at the assizes. In case any of the counsel who have lately "received commissions from the Lientenant-Governor should act for a Judge at "the Assizes, and the invalidity of the commission afterwards established, serious "consequences might ensue, as all the proceedings in court before him would be "illegal, and *coram non judice*, to the great disturbance of the administration of "justice both civil and criminal.

"Under these circumstances, and to remove all doubt, the Minister of "Justice recommended that His Excellency the Governor-General, should grant "commissions to such of the gentlemen appointed by the Lieutenant-Governor as "desire to receive the same.

"The minute of the Executive Council of Ontario states that, although they

No. 11. Order in Council of Dominion Government, in reply, 13th Dec., 1872 —*continued.*

"are still of opinion that the Lieutenant-Governor has the power to grant such "commissions, it is their intention, in order to remove all doubts, to submit "a measure to the Provincial Legislature on the subject.

"The Committee of the Privy Council can make no objection to that course "being taken. They do not, however, see that such legislation can in any way "affect the power of Her Majesty through Her representative to appoint her own "counsel, and to grant them commissions as such, and they cannot recommend the "surrender or relinquishment of the prerogative of appointment.

"The Executive Council of Ontario recommend a reference of this question "to the Judicial Committee of the Privy Council.

"Had this suggestion been made before the assumption of the power of "appointment by the Provincial Government, it might properly have been adopted, "but under present circumstances it would seem that the question should be dealt "with in the first instance by the Courts of Ontario.

"The Committee of Council do not apprehend that any inconveniences or "complications can arise from the Queen's representative exercising the Royal "prerogative in making such appointments.

"It is obvious that when the Supreme Court, or other Dominion Courts are "established, Commissions issued by the Lieutenant-Governor would not, as of "right, give precedence or position in those Courts. At the same time it might be "advisable that such commissions should be recognized.

"The Committee of Council are therefore, on the whole, of opinion, that His "Excellency the Governor-General as the Queen's representative, should not refrain "from appointing Her Majesty's Counsel; but they think that an arrangement "might advantageously be made between the Government of the Dominion and the "several Provinces, by which Queen's Counsel, appointed by the Governor-General, "would receive proper status and position in the Provincial Courts, and com-"missions issued under statutory authority by the Lieutenant-Governors would be "recognized in the Courts of the Dominion."

WM. A. HIMSWORTH,
C. P. C.

And the same was transmitted to the Government of Ontario.

No. 12. Appointment of Queen's Counsel by Governor-General of Canada, 13th Dec., 1872. 18th Dec., 1872. 28th Feb., 1873.

VIII. It appears by the *Canada Gazette*, and for the purposes of this case is to be assumed, that the Governor-General by letters patent in Her Majesty's name and under the Great Seal of Canada purported to appoint to be Queen's Counsel in and for Ontario the following members of the Provincial Bar:—

On the 13th December, 1872:

Daniel McMichael, Christopher Salmon Patterson, Edmund Burke Wood, John T. Anderson, Thos. Moss.

And on the 18th of December, 1872:—

Robert Stuart Woods, James A. Henderson, D'Arcy Boulton, Alexander Leith, Thomas Robertson, The Honourable John O'Connor, Hector Cameron, James Beaty (Junior), George A. Drew, James Maclennan, David Tisdale, D'Alton McCarthy, Hewitt Bernard.

RECORD.

And on the 28th of February, 1873:—

Angus Morrison, G. R. VanNorman, George E. Henderson, Edward Fitzgerald, Thomas Hodgins, John Hoskin.

No. 13. Statute of Ontario Legislature, 36 Vict., ch. 3, 29th Mar., 1873.

IX. On the 29th of March, 1873, the following Act (being chapter 3 of 36 Victoria) was passed by the Legislature of Ontario:

"An Act respecting the Appointment of Queen's Counsel."

(Assented to 29th March, 1873).

Whereas, in the course of the administration of justice matters between the Crown and the subject are brought, some in Her Majesty's name and some in the name of the Attorney-General for Ontario, before Her Majesty's Courts in Ontario, by the direction and under the control and management of the Provincial Government; and whereas the Lieutenant-Governor of right ought to have the power to appoint from among the members of the Bar of Ontario, provincial officers who may assist in the conduct of such matters on behalf of the Crown, under the name of Her Majesty's Counsel learned in the law, for the said province; and whereas doubts have been cast on the power of the Lieutenant-Governor to make such appointments; and it is expedient to remove such doubts;

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. It was and is lawful for the Lieutenant-Governor by Letters Patent, under the Great Seal of the Province of Ontario, to appoint from among the members of the Bar of Ontario, such persons as he may deem right to be, during pleasure, provincial officers under the names of Her Majesty's Counsel learned in the law for the Province of Ontario.

No. 14. Statute of Ontario Legislature, 36 Vict., ch. 4, 29th Mar., 1873.

X. On the same day the following Act (being chapter 4 of 36 Victoria) was passed by the Legislature of Ontario:

An Act to regulate the Precedence of the Bar of Ontario.

(Assented to 29th March, 1873.)

Whereas, the regulation of the Bar of Ontario is vested in the Provincial Legislature, and it is expedient for the orderly conduct of business before the Provincial Courts that provision be made for the order of precedence of the members of the said bar in the said courts:

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. The following members of the bar of this province shall have precedence in the said courts in the following order:—

(1) The Attorney-General of the Dominion for the time being;

(2) The Attorney-General of the Province for the time being,

(3) The members of the said bar, who shall have filled the offices of Attorney-General of the late Province of Canada, or Attorney-General of the Dominion of Canada, or Attorney-General of this Province according to seniority of appointment as such Attorney-General.

No. 14. Statute of Ontario Legislature, 36 Vic., ch. 4, 29th Mar., 1873 —*continued.*

(4) The members of the said bar who have filled the office of Solicitor-General of Upper Canada according to seniority of appointment as such Solicitor-General; and,

(5) The members of the bar who were before the first day of July, in the year of our Lord one thousand eight hundred and sixty-seven, appointed Her Majesty's Counsel for Upper Canada, so long as they are such counsel, according to seniority of appointment as such counsel.

2. It is lawful for the Lieutenant-Governor by letters patent under the Great Seal of Ontario to grant to any member of the bar a patent of precedence in said Courts.

3. Members of the bar from time to time appointed after the first day of July, in the year of our Lord one thousand eight hundred and sixty-seven, to be Her Majesty's Counsel for the Province, and members of the bar, to whom from time to time patents of precedence are granted, shall severally have such precedence in the said Courts, as may be assigned to them by letters patent which may be issued by the Lieutenant-Governor under the Great Seal.

4. The remaining members of the bar shall, as between themselves, have precedence in the Courts in the order of their call to the bar.

5. Nothing in this Act contained shall in anywise affect or alter any rights of precedence which may appertain to any member of the bar, when acting as Counsel for Her Majesty, or for any Attorney-General of Her Majesty, in any matter depending in the name of Her Majesty or of the Attorney-General before the said Courts, but such right and precedence shall remain as if this Act had not passed.

No. 15. Revised Statute of Ontario, ch. 139, 31st Dec., 1877.

XI. The said two Acts are consolidated into and form part of chapter 139 of the Revised Statutes of Ontario passed on 31st December, 1877, which is as follows:—

"An Act respecting Barristers-at-Law."

(31st December, 1877.)

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Subject to any rules, regulations or by laws made by the Benchers of the Law Society of Upper Canada under the Act respecting the Law Society of Upper Canada, the following persons, and no others, may be admitted to practice at the Bar in Her Majesty's Courts of Law and Equity in Ontario—

(1) Any person of the age of twenty-one years, who, having been entered of and admitted into the "Law Society of Upper Canada" as a student of the laws, has been standing on the books thereof for five years, and has conformed himself to the rules of the society. C.S.U.C. c. 34, s. 1 (1).

(2) Any person who has been admitted into and stands on the books of the Law Society of Upper Canada as a student of the laws for three years, and has conformed himself to the rules of said society, and has, prior to the date of his admission to the said society, and to the books of the said society, as a student, actually taken and had conferred upon him the degree of bachelor of arts or bachelor of law in any of the Universities of the United Kingdom of Great

RECORD.

No. 15.
Revised Statute of Ontario, ch. 139, 31st Dec., 1877
— *continued.*

Britain and Ireland, or of any university or college in this province or in the Province of Quebec having power to grant degrees. 23 V. c. 47, s. 2.

(3) Any person who has been duly called to the bar of any of Her Majesty's Superior Courts in England, Scotland or Ireland, not being courts of merely local jurisdiction. C.S.U.C., c. 34, s. 1 (3).

(4) Any person who has been duly authorized to practice as an advocate, barrister, attorney, solicitor and proctor of law in all courts of justice in Quebec, or who has been found capable and qualified and entitled to receive a diploma for that purpose under the provisions of the Acts respecting the incorporation of the bar of Quebec, or who has been duly registered as a clerk and studied during the periods for study respectively required under the provisions of the said Acts, or producing sufficient evidence thereof, and also on producing testimonials of good character and undergoing an examination in the law of Ontario to the satisfaction of the Law Society of Upper Canada, and upon his entering himself of the said society and conforming to all the rules and regulations thereof. C.S.C. c. 75, s. 1.

(5) Any person who has been duly called to the bar of any of Her Majesty's Superior Courts in any of Her Majesty's provinces of North America in which the same privilege would be extended to barristers from Ontario, and who produces sufficient evidence of such call and testimonial of good character and conduct to the satisfaction of the Law Society. C.S.U.C. c. 34, s. 1 (4).

Queen's Counsel.

2. It was and is lawful for the Lieutenant Governor by letters patent under the Great Seal of the Province of Ontario, to appoint from among the members of the Bar of Ontario, such persons as he may deem right to be, during pleasure, provincial officers under the names of Her Majesty's Counsel learned in the law for the Province of Ontario. 36 V. c. 3, s. 2.

3. The following members of the bar of this province shall have precedence in the courts of this province in the following order:—

(1) The Attorney-General of Canada for the time being ;

(2) The Attorney-General of Ontario for the time being ;

(3) The members of the said bar who have filled the offices of Attorney-General for the late Province of Upper Canada, or Attorney-General of the Dominion of Canada, or Attorney-General of this Province, according to seniority of appointment as such Attorney-General.

(4) The members of the said bar who have filled the office of Solicitor-General for Upper Canada according to seniority of appointment as such Solicitor-General; and

(5) The members of the bar who were, before the 1st day of July, in the year of our Lord, one thousand eight hundred and sixty-seven, appointed Her Majesty's Counsel for Upper Canada, so long as they are such counsel, according to seniority of appointment as such counsel. 36 V. c. 4, s. 1.

No. 15. Revised Statute of Ontario, ch. 139, 31st Dec., 1877 —*continued.*

4. The lieutenant-governor by letters patent under the Great Seal of Ontario may grant to any member of the bar a patent of precedence in the said courts. 36 V. c. 4, s. 2.

5. Members of the bar from time to time appointed after the first day of July, in the year of our Lord, one thousand eight hundred and sixty-seven, to be Her Majesty's Counsel for the province, and members of the bar to whom, from time to time, patents of precedence are granted shall severally have such precedence in the said courts as may be assigned to them by letters patent, which may be issued by the lieutenant governor under the Great Seal. 36 V. c. 4, s. 3.

6. The remaining members of the bar shall, as between themselves, have precedence in the said Courts in order of their call to the bar. 36 V., c. 4, s. 4.

7. Nothing in this Act contained shall in any wise affect or alter any rights of precedence which may appertain to any member of the bar when acting as Counsel for Her Majesty, or for any Attorney-General of Her Majesty, in any matter depending in the name of Her Majesty, or of the Attorney-General before the said Courts, but such right and precedence shall remain as if this Act had not been passed. 36 V., c. 5, s. 5.

No. 16. Appointments of Queen's Counsel by Lieut.-Governor of Ontario, 11th Mar., 1876, 13th Mar., 1876.

XII. The Lieutenant-Governor of Ontario, by Letters Patent, issued in Her Majesty's name under the Great Seal of Ontario, purported to appoint to be Queen's Counsel for Ontario, the following members of the Provincial Bar, on the 11th of March, 1876:

Robert S. Woods, James A. Henderson, Alexander Leith, Thomas Robertson, John O'Connor, Hector Cameron, James Beaty, the younger, George A. Drew, James Maclennan, David Tisdale, D'Alton McCarthy, Hewitt Bernard, Angus Morrison, George R. VanNorman, George E. Henderson, Edward Fitzgerald, Thomas Hodgins, John Hoskin.

And on the 13th March, 1876:—

Richard Martin, Thomas Scatcherd, Robert Lees, Francis R. Ball, Honourable Alexander Morris, Frederick Davis, Edward Martin, Henry B. Beard, Thomas Wadlaw Taylor, Francis McKelcan, William Kerr, Byron Moffatt Britton, Edmund J. Senkler, Malcolm Colin Cameron, Honourable Timothy Blair Pardee, William Hepburn Scott, William Ralph Meredith, Warren Rock, William Lount, John Galloway Scott, James Bethune, James Kirkpatrick Kerr, Britton B. Osler, Thomas Deacon, James S. Sinclair, Thomas Ferguson, John Alexander Boyd, James F. Dennistoun, Hugh McMahon, David Glass, John Idington, Arthur Sturgis Hardy, Honourable Christopher Findlay Fraser, Donald Ban Maclennan, Donald Guthrie.

RECORD.

No. 16A. Form of Letters Patent appointing Queen's Counsel by Lieut.-Governor of Ontario.

XIII. The Letters Patent issued to each of the appointees of the Lieutenant-Governor of Ontario named in this case throughout were in the form following:—

(Great Seal of Ontario.)

(Sgd.) (By the Lieutenant-Governor of the Province.)

Province of Ontario.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, etc., etc., etc.

To of Osgoode Hall, Esquire, Barrister-at-Law, and to all whom these presents shall come, greeting: Know ye, that reposing trust and confidence in your loyalty, integrity and ability, we have assigned, constituted and appointed, and by these presents do assign, constitute and appoint you the said to be one of our counsel, learned in the law, in and for our Province of Ontario; to have, hold, exercise and enjoy the said office unto you the said for and during our pleasure and your residence within our said province, together with the rank and precedence and all and singular the rights, fees, profits, privileges and advantages unto the said office belonging or in anywise appertaining, having and taking such rank and precedence as such counsel from the day of the date of these presents in all of our Courts in our said Province of Ontario.

In testimony whereof we have caused these our letters to be made patent and the Great Seal of our said Province to be hereunto affixed.

Witness the Honourable Donald Alexander Macdonald, Lieutenant-Governor of our said Province of Ontario, at Toronto, this day of in the year of our Lord

By command, (Sgd.) ECHART, Secretary.

No. 17. Revised Statutes of Canada, ch. 135, clause 16, 8th April, 1875.

XIV. On the eighth day of April, 1875, the Supreme and Exchequer Court Act, being 38 Victoria, Chapter 11 was passed by the Parliament of Canada, establishing the Supreme Court and the Exchequer Court of Canada, and containing a clause 76 which is substantially contained in the Revised Statutes of Canada, chapter 135 as clause 16 as follows:—

"All persons who are barristers or advocates in any of the provinces may "practice as barristers, advocates and counsel in the Supreme Court."

No. 18. *Canada Gazette.* Appointments of Queen's Counsel by Governor-General, 19th May, 1879, 11th Oct., 1880.

XV. It appears by the *Canada Gazette*, and for the purposes of this case is to be assumed, that the Governor-General by Letters Patent in Her Majesty's name and under the Great Seal of Canada purported to appoint to be Queen's Counsel (without any specification of any Province or Territory in respect of which the appointment was made) the following members of the Bar of Ontario:—

On the 19th day of May, 1879:—

Zebulum Aiton Lash.

On the 11th day of October, 1880:—

Thomas M. Benson, Francis Mackelcan, William R. Meredith, James Bethune, W. H. Scott, Martin O'Gara, Thomas Ferguson, B. B. Osler, James A.

Miller, John A. Boyd, James F. Dennistoun, George A. Kirkpatrick, Alfred Hoskin, Richard T. Walkem, John O'Donohoe, besides others, members of the Bars of other Provinces of Canada.

No. 19. *Canada Gazette.* Governor-General purporting to confer rank and precedence in all Courts, 11th Oct., 1880.

XVI. It appears from the *Canada Gazette*, and for the purposes of this case is to be assumed that, with reference to the persons so appointed on the 11th day of October, 1880, the Governor-General purported to confer rank and precedence in the following words:—

Rank and precedence are conferred upon the above named gentlemen, respectively from the date of their appointments in all courts established or to be established under the authority of any Act of the Parliament of Canada, next after the following persons, namely:—

1. Those persons who, prior to the 1st day of July, 1867, received appointments as Her Majesty's Counsel, learned in the law, within any of the late Provinces of Canada, New Brunswick, Nova Scotia, Prince Edward Island or British Columbia.

2. Those persons who, since the 1st day of July, 1867, were appointed Her Majesty's Counsel, learned in the law, under the Great Seal of the Dominion of Canada.

Futhermore, rank and precedence are conferred upon the gentlemen above named from the date of their appointments in all courts in the province of the bar of which they now are respectively or may hereafter respectively become members next after the following persons, namely:—

1. Those members of such bar who, prior to the 1st July, 1867, received appointments as Her Majesty's Counsel, learned in the law.

2. Those members of such bar who, since the 1st July, 1867, were appointed as Her Majesty's Counsel, learned in the law under the Great Seal of the Dominion of Canada.

3. Those members of such bar, if any, who may lawfully be entitled to rank in precedence over the respective gentlemen above appointed.

No. 20. Letters Patent by Lieut.-Governor of Ontario purporting to grant precedence in Provincial Courts, 8th April, 1881.

XVII. On the 8th of April, 1881, the Lieutenant-Governor of Ontario by Letters Patent in Her Majesty's name and under the Great Seal of Ontario purported to grant precedence in the Provincial Courts to certain members of the Provincial Bar hereinbefore named, as follows:—

(Seal) JOHN BEVERLEY ROBINSON.

Province of Ontario.

Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c.

To Daniel McMichael, John T. Anderson, Robert S. Woods, James A. Henderson, Alexander Leith, Thomas Robertson, The Hon. John O'Connor, Hector Cameron, James Beatty the younger, George A. Drew, James Maclennan, David Tisdale, D'Alton McCarthy, Hewitt Bernard, Angus Morrison, George R. Van Norman, George E. Henderson, Edward FitzGerald, Thomas Hodgins, John Hoskin, Richard Martin, Robert Lees, Francis R. Ball, The Honourable Alexander

RECORD.

No. 20. Letters Patent by Lieut.-Governor of Ontario purporting to grant precedence in Provincial Courts, 8th April, 1881 —*continued.*

Morris, Edward Martin, Henry B. Beard, Thomas Wardlaw Taylor, Francis McKelcan, William Kerr, Byron Moffatt Britton, Malcolm Colin Cameron, The Honourable Timothy Blair Pardee, William Hepburn Scott, William Ralph Meredith, Warren Rock, William Lount, John Galloway Scott, James Bethune, James Kirkpatrick Kerr, Britton, B. Osler, Thomas Deacon, Thomas Ferguson, John Alexander Boyd, James F. Dennistoun, Hugh McMahon, David Glass, John Idington, The Honourable Arthur Sturgis Hardy, The Honourable Christopher Finlay Fraser, Donald Ban Maclennan and Donald Guthrie, of Osgoode Hall, Esquires, barristers-at-law.

Whereas by the Revised Statute of the Province of Ontario respecting barristers-at-law it is amongst other things enacted that the Lieutenant-Governor of our said province by Letters Patent under the Great Seal of Ontario may grant to any member of the bar of the said province a patent of precedence in the Courts of such province.

And whereas our said Lieutenant-Governor doth think fit to grant to you the said Daniel McMichael, John T. Anderson, Robert S. Woods, James A. Henderson, Alexander Leith, Thomas Robertson, The Honourable John O'Connor, Hector Cameron. James Beatty the younger, George A. Drew, James McLennan, David Tisdale, D'Alton McCarthy, Hewitt Bernard, Angus Morrison, George R. Van Norman, George E. Henderson, Edward Fitzgerald, Thomas Hodgins, John Hoskin, Richard Martin, Robert Lees, Francis R. Ball, The Honourable Alexander Morris, Edward Martin, Henry B. Beard, Thomas Wardlaw Taylor, Francis McKelcan, William Kerr, Byron Moffat Britton, Malcolm Colin Cameron, The Honourable Timothy Blair Pardee, William Hepburn Scott, William Ralph Meredith, Warren Rock, William Lount, John Galloway Scott, James Bethune, James Kirkpatrick Kerr, Britton, B. Osler, Thomas Deacon, Thomas Ferguson. John Alexander Boyd, James P. Dennistoun, Hugh McMahon, David Glass, John Idington, The Honourable Arthur Sturgis Hardy, The Honourable Christopher Finlay Fraser, Donald Ban Maclennan and Donald Guthrie respectively the precedence in the said Courts hereinafter assigned to you respectively.

Now know ye that reposing trust and confidence in your loyalty, integrity and ability we do grant and assign to you and each of you precedence in our said Courts of Ontario over every member of the Bar of Ontario except those members of the bar who are or shall be entitled to precedence over you under and by virtue of the third section of the said Revised Statute or otherwise.

And we hereby assign to you the said Daniel McMichael, John T. Anderson, Robert S. Woods, James A. Henderson, Alexander Leith, Thomas Robertson, The Honourable John O'Connor, Hector Cameron, James Beatty the younger, George A. Drew, James Maclennan, David Tisdale, D'Alton McCarthy, Hewitt Bernard, Angus Morrison, George R. Van Norman, George E. Henderson, Edward Fitzgerald, Thomas Hodgins, John Hoskin, Richard Martin, Robert Lees, Francis R. Ball, The Honourable Alexander Morris, Edward Martin, Henry B. Beard, Thomas Wardlaw Taylor, Francis McKelcan, William Kerr, Byron Moffatt Britton, Malcolm Colin Cameron, The Honourable Timothy Blair Pardee, William Hepburn Scott, William Ralph Meredith, Warren Rock, William Lount, John Galloway Scott, James Bethune, James Kirkpatrick Kerr, Britton B. Osler, Thomas Deacon, Thomas Ferguson, John Alexander Boyd, James F. Dennistoun, Hugh McMahon,

No. 20. Letters Patent by Lieut.-Governor of Ontario purporting to grant precedence in Provincial Courts, 8th April, 1881 —*continued.*

David Glass, John Idington, The Honourable Arthur Sturgis Hardy, The Honourable Christopher Finlay Fraser, Donald Ban Maclennan and Donald Guthrie among yourselves precedence in our said Courts in the order in which you are respectively named in these our letters patent.

In testimony whereof we have caused these our letters to be made patent and the Great Seal of our said Province of Ontario to be hereunto affixed. Witness, the Honourable John Beverley Robinson, Lieutenant-Governor of our said Province of Ontario, at our Government House in our City of Toronto, this eighth day of April, in the year of our Lord, one thousand eight hundred and eighty-one, and in the forty-fourth year of our reign.

By Command.

(Sgd.) ARTHUR S. HARDY,
Secretary.

No. 21. *Canada Gazette.* Appointments of Queen's Counsel by Governor-General of Canada, 13th Aug., 1881, 14th July, 1883, 21st Oct., 1884, 23rd Oct., 1885.

XVIII. It appears by the *Canada Gazette*, and for the purposes of this case it is to be assumed, that the Governor-General by Letters Patent in Her Majesty's name and under the Great Seal of Canada purported to appoint to be Queen's Counsel (without any specification of any province or territory for which the appointment was made) the following members of the Bar of Ontario:—

On the 13th day of August, 1881:—

Richard Martin, Esq., Samuel Smith McDonnell, The Honourable Alexander Morris, Allan R. Dougall, John Charles Rykert, John Creasor, Samuel Jonathan Lane, Thomas Wardlaw Taylor, George D'Arcy Boulton, Henry Burkett Beard, Byron Moffatt Britton, William Lount, William H. R. Allison, Robert Smith, The Honourable William McDougall, James Kirkpatrick Kerr, Thomas Deacon, Alexander Shaw, George Dean Dickson, John McIntyre, Adam Hudspeth, John Edward Rose, Charles Moss.

And on the 14th day of July, 1883:—

Valentine Mackenzie, Richard Bayley, Salter Jehoshaphat Vankoughnet, James Tilt, William Purvis Rochford Street, George Milnes Macdonell, John Bain, Frederick Drew Barwick, Hugh McKenzie Wilson, Robert C. Smyth, James Joseph Foy, Walter Gibson P. Cassels, Norman Fitzherbert Paterson, Thomas Horace MacGuire, Henry J. Scott.

And on the 21st day of October, 1884:—

John Macpherson Hamilton.

And on the 23rd day of October, 1885:—

Ephriam Jones Parke, James Henry Morris, Edward Martin, Charles Richard Atkinson, Samuel Hume Blake, Alexander Bruce, William Douglas, William Nicholas Miller, William Alexander Foster, James Frederick Smith, James Peter Woods, John Wesley Beynon, Hugh McMahon, John Idington, William Laidlaw, William Albert Reeve, Robert Cassels, Donald Guthrie, James Hershaw Fraser, Henry Becher, Edmund Meredith, Alexander James Christie, Colin Macdougall, Henry Hatton Strathy, James Thompson Garrow, James Holmes Macdonald, Edward Handley Smythe, William Glenholme Falconbridge, James Masson, Alfred Passmore Poussette, Charles Henry Ritchie, Charles Oakes Zaccheus Ermantinger.

RECORD.

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886.

XIX. On the 22nd day of January, A.D. 1886, in pursuance of a request from the Government of Canada, the Lieutenant-Governor of Ontario transmitted to the Secretary of State a list of certain Queen's Counsel, with a despatch in the following words:—

5. The Lieutenant-Governor to the Secretary of State.

Government House,
Toronto, 22nd January, 1886.

Sir,—With reference to your despatches of 28th September, and 5th and 30th December, 1885, I have the honour to enclose a list, believed to be correct, of the Queen's Counsel appointed for Upper Canada before confederation; omitting those who have since died and those who are now judges.

Your despatch of 28th September did not suggest any desire or occasion for haste; the information you requested, not being found in any department of my Government, had to be obtained elsewhere, and, other public business pressing, the preparation of the list was not completed until after your latest despatch.

I likewise send a list of those members of the Ontario Bar who hold commissions as Queen's Counsel from the Lieutenant-Governor, and not also from the Dominion. Three of these gentlemen are members of my Government; a fourth was for some years Deputy Attorney-General and is now Master of Titles under the recent Land Titles Act; the others have been much employed in Crown business for the province; and all stand high professionally and personally, in their respective localities. They received their commissions as Queen's Counsel in 1876, and have ever since been recognised as such in all Provincial Courts, without objection or question by the bench or from other counsel at the bar.

You state that the object of obtaining a list of the appointments before July, 1867, is to transmit it through the proper channel to the Right Honourable the Secretary of State for the Colonies for his information and that of the Judicial Committee of the Privy Council; and I understand from your despatch that you contemplate transmitting also the names of the gentlemen who have been appointed Queen's Counsel by the Dominion Government; you do not ask for a list of those appointed by the Lientenant-Governor; and it is presumed, therefore, that you intend to ignore these, and to treat as *ultra vires* the Ontario Statutes (passed in 1873) under which the provincial commissions were granted. My Government respectfully protest against this course, as misleading to their Lordships of the Judicial Committee, as unjust to Provincial Queen's Counsel, and as proceeding on an erroneous conception of the B. N. A. Act, which involves other matters of great moment to the provinces.

I beg to remind you that the Provincial Statutes which your Government propose treating as invalid, were passed in accordance with the repeatedly expressed opinions of your premier, and it may even be said at his suggestion. The Ontario Government have always claimed for the Lieutenant-Government the power *virtute officii* under the B. N. A. Act to issue such commissions; but there being a difference of opinion on that point, and there being on the other hand a consensus of opinion, Imperial federal and provincial, that a Statute by a Provincial Legislature providing for such appointments would be valid, the Ontario Government, to prevent any possible doubt as to the validity of provincial

commissions, procured the passing of the Acts referred to. These Acts were acquiesced in by the Dominion authorities at the time, and no communication on the subject has since been made to the Ontario Government, except in your recent despatches.

My Government insist that the Ontario Legislature had a right to pass these Statutes, and that, if the premier of your Government and his colleagues now regard the Acts and commissions as *ultra vires*, this changed view ought not to be acted upon in your intended communication or otherwise, unless and until the invalidity of the Acts is established by judicial authority, after full argument, in some proceeding to which this province is a party. For this purpose the Ontario Government proposed as long ago as 1872, "that the opinion of the Judicial "Committee of the Privy Council should be taken on a joint case to be argued on "behalf of the respective Governments." This proposal had reference to the power of the Lieutenant-Governor to make such appointments without previous legislation. The proposal was then declined. My Government would still gladly concur in a reference of the whole matter to their Lordships on a joint case to be agreed to and argued on behalf of the respective Governments.

It may here be useful to recall the history of this matter of appointing Queen's Counsel in the Dominion, and in the provinces which constitute the Dominion.

Before confederation such appointments were from time to time made in each of the provinces by the Governor-General or Lieutenant-Governor by the advice and at the instance of his Executive Council; and from the time of responsible government being conceded, no appointments of Queen's Counsel were made otherwise; Her Majesty's advisers in England took no part therein.

Some years after confederation the question as to the proper authority for then making such appointments arose on the occasion of additional Queen's Counsel being wanted in New Brunswick. An *ex parte* case was thereupon prepared by Sir John Macdonald, then as now the Dominion Premier, and then also Minister of Justice, for the opinion of the Law Officers of the Crown in England.

This case was in the form of a report to His Excellency the Governor-General and was dated 3rd January, 1872. The case so prepared and reported stated (among other things), that the question had been raised by the Government of Nova Scotia, as to whether they had the power of appointing Queen's Counsel for their province, their own opinion being (the case stated) that they had no such power. The minister was "of opinion that as a matter of course Her Majesty "had directly, as well as through her representative the Governor-General, the "power of selecting from the bars of the several provinces her own counsel, and "as *fons honoris* of giving them such precedence and pre-audience in her courts "as she thought proper." He stated that it was "held by some that Lieutenant-"Governors of the provinces, as they are now not appointed directly by "Her Majesty, but by the Governor-General under the B. N. A. Act, 1867, do "not represent her sufficiently to exercise the royal prerogative without positive "statutory enactment." The case further stated that this seemed "to have been "the view of Her Majesty's Government in 1864, when they refused to confer "the pardoning power on the Lieutenant-Governors"; but that on the other

RECORD.

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 — *continued.*

hand it was "contended that the 64th and 65th clauses of the Act continued to "the Lieutenant-Governors the power of appointing Queen's Counsel which they "exercised while holding commissions under the Great Seal of England"; and that "reference was also made to the 63rd section by which the Lieutenant-"Governors of Ontario and Quebec appoint Attorneys-General, and the Lieutenant-Governor of Quebec, also a Solicitor-General." The Minister further observed that, "however this might be, it would be seen that by the 92nd section of the "Act, it is provided that the Legislature of each province may make laws in "relation to the administration of justice in the province, including the con-"stitution, maintenance and organisation of Provincial Courts, both of civil and "criminal jurisdiction, and including procedure in civil matters in those courts"; and that under this power he was "of opinion that the Legislature of a province, "being charged with the administration of justice and the organisation of the "courts," might "by statute provide for the general conduct of business before "those courts," and might "make such provisions with respect to the bar, the "management of criminal prosecutions by counsel, the selection of those counsel, "and the right of pre-audience," as such Legislature should see fit; that such an enactment must "be subject to the exercise of the royal prerogative, which is "paramount and in no way diminished by the terms of the Act of Confederation." The report concluded by stating the questions, to which answers by the Law Officers of the Crown in England were desired.

It is to be observed that the case thus prepared and reported did not represent the matter as one of difference between the Dominion and the provincial authorities. On the contrary, the report stated that the Government of Nova Scotia were of opinion that they had no such power of appointment; and no other province was mentioned in the case; the opposite contention would naturally be supposed by the Law Officers in England to be by irresponsible persons whose contention was entitled to little consideration; and the case mentioned three sections only of the Act, as those on which the provincial right, if any, was contended for by these persons.

If before preparing the case, communication had been had with Ontario and the other provinces of the Dominion, it would have been ascertained, and the Imperial Law Officers would have been informed, that whatever opinion the Government of Nova Scotia entertained on the point, the Government of Ontario, and probably the Governments of all the other provinces, claimed for the Lieutenant-Governors the power referred to, and that the claim was founded, not on the three sections mentioned but on the whole scope of the Act, as well as on other grounds which I shall state hereafter.

This very imperfect case was transmitted on the 4th January, 1872, to the Right Honourable the Secretary of State for the Colonies; and the Earl of Kimberley, who then held that office, replied by a despatch dated 1st February of the same year. In this despatch his Lordship stated that, in compliance with the request made to him, he had taken the opinion of the Law Officers of the Crown; that he was "advised that the Governor-General has now power as Her Majesty's "representative to appoint Queen's Counsel, but that a Lieutenant-Governor "appointed since the union came into effect has no such power of appointment;" that he was further "advised that the Legislature of a province can confer by

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 —*continued.*

" statute on its Lieutenant-Governor the power of appointing Queen's Counsel, " and that with respect to precedence or pre-audience in the Courts of a province, " the Legislature of the province has power to decide as between Queen's " Counsel appointed by the Governor-General and Lieutenant-Governor, as above " explained."

The opinion intimated on behalf of the Dominion Government that a Provincial Legislature had power to pass such Acts as those in question was therefore the opinion likewise of the Law Officers of the Crown in England, and was adopted by Her Majesty's Secretary of State for the Colonies and transmitted to His Excellency the Governor-General for the information and guidance of all whom the matter might concern.

This despatch was not communicated to the Government of Ontario; and, not being aware of it, the Lieutenant-Governor, on the 16th of March, 1872, issued commissions appointing certain members of the bar of the province, to be Queen's Counsel therein, and their appointments appeared in the "Ontario " Gazette" immediately afterwards. On the 28th September, 1872, the Minister of Justice reported to His Excellency the Governor-General that it appeared by the " Ontario Official Gazette " that these appointments had been made; and the Minister stated (amongst other things) that, "being of opinion that, in the " absence of legislation on the subject, the Lieutenant-Governor of a Province of " the Dominion had not, since the 1st July, 1867, the right to exercise the Royal " prerogative in the appointment of Queen's Counsel, but that such power was " vested in the Governor-General, as Her Majesty's representative," he had made a report to that effect; that this report had been transmitted for the opinion of the Law Officers of the Crown on the subject; "that by a despatch, dated 1st " February last, Lord Kimberley had informed Lord Lisgar that the Governor- " General had the power, but that a Lieutenant-General appointed since the " union came into effect had not the power of appointment;" that under the circumstances great doubt must exist as to the validity of the commissions issued to the gentlemen named; that by the law of Upper Canada, Queen's Counsel can, in certain cases, at the request of a Judge of the Superior Courts, perform certain judicial duties, such as the trial of criminal cases; that their authority to act might be disputed, and that if it were eventually decided to be illegal, a failure of justice would be the consequence; and, " under these circumstances, as " the gentlemen mentioned are fully qualified to perform the duties of Her " Majesty's Counsel," the Minister recommended "that commissions should be " issued by the Government of Canada to those gentlemen, or to such of them as " desired to receive the same."

The Minister thus in his report again intimated the opinion that such Provincial Acts as those in question were within the competence of a Provincial Legislature. The appointment of a Queen's Counsel by a Judge to perform judicial duties, it may be observed here, is of very rare occurrence.

The Committee of Council submitted the Minister's recommendation for His Excellency's approval, and it was approved accordingly. Letters were thereupon addressed to each of the gentlemen who had been appointed by the Lieutenant-Governor offering, "in order to remove all possible doubt as to the legality of " his status as one of Her Majesty's Counsel for the Province of Ontario," that, if

RECORD.

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 —*continued.*

he desired, "a commission would be issued under the Great Seal of Canada "appointing him Queen's Counsel for Ontario."

One of these letters having been communicated to the Ontario Government, the Committee of the Executive Council made a report thereon to the Lieutenant-Governor (23rd October, 1872), in which (amongst other things) they expressed regret that the Government of Canada, entertaining the view that the opinion of the Imperial law officers referred to in this letter was applicable to Ontario, should not have thought fit to transmit a copy of it for his honour's information; that, although his honour's Government was of the opinion that his honour is invested with the power to make such appointments without legislation, yet had they been made aware of the view of the law officers, they would have thought it proper to propose the legislation requisite for the removal of any possible doubt on the subject; and, having now become aware of it, it was their intention to propose such legislation during the Session which was to commence within a few weeks. The Committee further stated that they purposely abstained from entering into any discussion of the constitutional point, but that they were bound to state that, in their opinion, the matter involved questions of local and federal jurisdiction far wider than the single question under discussion, and that this rendered them the more anxious that the course they proposed should commend itself to his Excellency the Governor-General.

The report was approved by the Lieutenant Governor; a copy was immediately transmitted to the then Secretary of State of Canada; and the Committee of the Dominion Privy Council made a report thereon (13th December, 1872). In this report they set forth (amongst other things) the opinion obtained through the Colonial Secretary; and the statement of the Ontario Government that, although they were still of opinion that the Lieutenant Governor had the power to grant such commissions, it was their intention, in order to remove all doubt, to submit a measure to the provincial legislature on the subject; and the report stated that the Committee could make no objection to that course being taken, and were on the whole of opinion as follows: "That his Excellency the Governor-"General, as the Queen's representative, should not refrain from appointing "Her Majesty's Counsel; but they think that an arrangement might "advantageously be made between the Government of the Dominion and the "several provinces, by which Queen's Counsel, appointed by the Governor-General, "would receive proper status and position in the provincial courts, and "commissions issued under statutory authority by the lieutenant governors "would be recognised in the courts of the Dominion."

Following the course affirmed by the Imperial and Dominion authorities to be proper and competent, the Ontario Legislature in the following Session passed two Acts, forming chapters 3 and 4 of the statutes of 1873; one, providing for the appointment of Queen's Counsel; and the other, regulating the precedence of the bar of the province. The first of these two Acts recited, that "in the course of the administration of justice, matters between the Crown "and the subject are brought, some in her Majesty's name and some in the name "of the Attorney-General for Ontario before her Majesty's courts in Ontario, "by the direction and under the control and management of the provincial "Government; and that the Lieutenant Governor of right ought to have the power

" to appoint from among the members of the bar of Ontario, provincial officers " who may assist in the conduct of such matters on behalf of the Crown, " under the name of her Majesty's Counsel learned in the law for the said province; " and that doubts have been cast on the power of the Lieutenant Governor " to make such appointments; and it is expedient to remove such doubts.

" Therefore Her Majesty, by and with the advice and consent of the Legis- " lative Assembly of the Province of Ontario, enacts as follows: It was and is " lawful for the Lieutenant-Governor by letters patent, under the Great Seal of " the Province of Ontario, to appoint from among the members of the Bar of " Ontario, such persons as he may deem right, to be, during pleasure, Provincial " Officers under the name of Her Majesty's Counsel, learned in the law, for the " Province of Ontario."

The second of the Ontario Acts recited that " the regulation of the Bar of " Ontario is vested in the Provincial Legislature, and it is expedient for the " orderly conduct of business before the Provincial Courts that provision be made " for the order of precedence of the members of the said bar in the said courts."

" Therefore Her Majesty, by and with the advice and consent of the Legis- " lative Assembly of the Province of Ontario," provided for the precedence of the bar in the Provincial Courts in the order therein mentioned, and further provided that " nothing in this Act contained shall in any wise affect or alter any rights of " precedence which may appertain to any member of the bar, when acting as " counsel for Her Majesty, or for any Attorney-General of Her Majesty, in any " matter depending in the name of Her Majesty or of the Attorney-General before " the said courts, but such rights and precedence shall remain as if this Act had " not been passed."

These Acts were allowed by His Excellency the Governor-General to go into operation. Some time afterwards commissions for the province were issued by the Lieutenant-Governor to several gentlemen as Queen's Counsel, including all to whom commissions had previously been granted by the Dominion Government. Acts similar to the Ontario Acts were passed by the other confederated provinces, and these also were allowed by the Dominion Government to go into operation without objection.

I am not aware that any question was raised as to the validity or construction of any of these Provincial Acts, until a question was suggested by Mr. Ritchie, a member of the Nova Scotia Bar, who had received a patent as Queen's Counsel from the Dominion Government before the passing of the Nova Scotia Acts. Letters Patent issued by the Lieutenant-Governor of Nova Scotia purported to give to certain of the Queen's Counsel thereby appointed precedence over Mr. Ritchie. To this he objected and the question came before the Supreme Court of Nova Scotia, consisting of five judges, all of whom held the Provincial Acts in question to be valid Acts, and the objection to them to be quite untenable; but four of the five held that, according to the true construction of these Acts, it was not intended to disturb the precedence of barristers theretofore appointed Queen's Counsel; and from this judgment an appeal was taken to the Supreme Court of Canada. The appeal was heard on the 30th January, 1879, by five of the judges, the Chief Justice not being present. On this occasion the validity of the Provincial Acts was strongly contested by counsel for the

RECORD.

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 —*continued.*

Respondent; and counsel for the appeal not having anticipated any difficulty on that point, had not prepared himself to argue it, and confined his attention to other points involved. The following statement was made by him to the court, and is given in the official report of the case: "I find the "responsibility unexpectedly thrown upon me of defending the status hitherto "claimed and enjoyed by Lieutenant-Governors and Provincial Legislatures, and "I therefore do not profess to do so. As the subject was not discussed in the "argument before the Superior Court of Nova Scotia, it was quite unexpected by "me, and apparently also by the Respondent, who, in his factum, has given no "authority or reference on this point except the Governor-General's Commission, "which as respects these questions is the same as before the union." (3 Supreme Court Can. Reports, pp. 594, 595.)

Ontario or the other provinces of the Dominion (except Nova Scotia) were not parties, and were not represented on the argument; nor were any of the Queen's Counsel who had been appointed in the provinces other than Nova Scotia.

While, from the absence of argument by counsel in support of the Provincial Acts, some of the judges formed and expressed opinions against the validity of these Acts, the only point actually decided by the Court was, that the Acts, did not affect a Queen's Counsel previously appointed by the Governor-General. Three of the five judges who heard the appeal concurred in the opinion of the Court below, that these Acts, according to the true construction of them, were not intended to affect such a case, and therefore that the appeal did not call for any decision on the constitutional question. One of the three, however, formed and expressed an opinion that the Acts were invalid, and two others gave their decision for the respondent on the express ground that the Acts were invalid. The opinion against their validity was, therefore, was the opinion of three only of the six judges of the Court. It was an opinion not necessary for the decision; it was opposed to the unanimous opinion of the five learned judges of the Court appealed from; and was arrived at after an argument which the counsel for the appellants was unprepared for, and in a case in which the other provinces of the Dominion— Ontario, Quebec and New Brunswick—were not parties and were not represented.

It is a well-known fact that, notwithstanding this case, all but one of the Queen's Counsel appointed by the Ontario Government continued to claim under their commissions the status, and to exercise the rights and privileges, of Queen's Counsel in all Provincial Courts, and without objection from the Provincial Bench or Bar. Had any opportunity occurred, it was the intention of this Government to obtain a judicial decision on the question by the Provincial Courts, from which at the instance of any party dissatisfied, there might be an appeal to the Supreme Court of Canada, and also to Her Majesty in Council; but the rights of the Provincial Queen's Counsel having been exercised in all the Courts without objection, there have hitherto been no opportunity of obtaining an appealable decision. The Dominion Government have within the last few weeks given Commissions as Queen's Counsel to several of the gentlemen who until then had held Provincial Commissions only; and the chance is not great of the question coming soon before our Courts, except on a case agreed upon for the purpose.

But as my Government concur with the Ontario Government of 1872, in regarding the matter as involving questions of legal and federal jurisdiction far

wider than the single question under discussion, they feel it their duty to the province not to leave the intended communication to the Colonial Secretary, and the Judicial Committee of the Privy Council, to be made without protest, and a formal statement of the provincial view.

I am advised that the whole argument against the provincial view is founded on the doctrine, that the appointment of Queen's Counsel is matter of prerogative, and that the Crown cannot be divested by statute of any matter of prerogative, except by express words or necessary implication. It has even been affirmed that the Sovereign's "prerogative rights are rights inherent in the person of the "Sovereign himself, which he alone, and without advice or consent, may exercise "how and when he pleases." But my Government claim that this is not the constitutional rule as now recognized; that prerogative is not for the personal advantage of the Sovereign, but is a trust for the people; that at the present day the Sovereign exercises no prerogative right without the advice or consent of ministers who have the confidence of the people's representatives.

My Government further insist that the Queen's prerogative, so far as they affect Canada, are trusts for the benefit, not of the people of England, but of the people here; that the theory of the B. N. A. Act is, that the confederated provinces may be better legislated for and better governed by their own representatives, than from the other side of the Atlantic; that the contrary notion had long before been exploded as regards these and other colonies of the empire, with respect not only to Queen's Counsel but also to matters of much greater importance.

My advisers observe that it is incorrect to speak of the Provincial Acts as "divesting" the Crown of its prerogative. These Acts merely provide for the manner of exercising the prerogative in a constitutional way. Appointments of Queen's Counsel by His Excellency the Governor-General are made not of his own motion, nor at the instance of Her Majesty personally, nor of Her Majesty's Imperial advisers; they are made on the advice and at the instance of His Excellency's Canadian advisers; and appointments by the Lieutenant-Governor since confederation have been of precisely the same character. The question at issue is not between Her Majesty and the provinces, nor between Her Majesty's Ministers in England and the provinces, nor between the Governor-General personally and the provinces. On the contrary, the question is entirely between the local advisers of the Governor-General on the one hand, and the local advisers of the Lieutenant-Governors on the other; or in other words between the Federal Government and the Provincial Governments. Accordingly, in the report of the Minister of Justice of 29th September, 1872, and the Order in Council made thereon, the commissions are expressly stated to be issued by the "Government" of Canada. It is plain that the Sovereign, personally has not for a purpose of this kind, and cannot have, the necessary knowledge of the bar of even the United Kingdom, and still less of the bar of the colonies. Appointments of Queen's Counsel in the United Kingdom are made in the Queen's name, on the advice and at the instance of Ministers responsible to the representatives of the people in the British Parliament. In this country they are made in the Queen's name by federal or provincial ministers responsible to the Federal Parliament or to the Provincial Legislatures. The Acts in question provide for the appointment of

RECORD.

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 —*continued.*

Queen's Counsel for the business of Provincial Courts being made by the Lieutenant-Governor, to whom the Queen, by assenting to the B. N. A. Act, has assigned all other executive authority in provincial affairs.

My Government hold that the Provincial Acts in question are authorised in the B. N. A. Act, both by express words, and by words involving such authority by necessary implication; but they also insist that the rule of interpretation as to matters of prerogative is much less stringent than the argument against the provinces assumes. There are numerous exceptions to the rule. The Crown is said to be "bound by statutes of certain kinds, though it is not named in them." Thus, the Crown is said to be bound, even when it is not named, by all statutes passed with the object of preventing or suppressing wrong or of advancing right; by statutes made for the public good; or for the advancement of religion and justice. The Crown is bound by the general provisions of the Magna Charta: by the Act *de donis;* and by various other Acts without being named. In view of the exceptions, it has been said to be "not easy to discover any method of "defining or classifying those Statutes which bind the Crown without express "words, and which form the exceptions to the general rule." My Government do not question that "it is a well established rule, generally speaking, in the "construction of Acts of Parliament, that the King is not included unless there "be words to that effect; for it is inferred *prima facie* that the law made by the "Crown with the assent of Lords and Commons is made for subjects and not for "the Crown." (Wilberforce's Statute Law 37, 40 *et seq*; 1 Black Com. 262 Bowyer, 167, etc.) But what they claim is, that this reason does not apply to an Act the express object of which is to grant a constitution, a Legislature and an executive, to colonies of the empire. My Government insist that all Government all executive authority are matter of prerogative, and that in a sense legislation is so likewise, for the Royal assent is necessary to legislation. In the case, therefore, of a constitutional Act there is no presumption that general provisions contained in it were not intended to include any matter of prerogative, which, in the absence of the rule of interpretation referred to, would be covered by the general words employed. My Government inform me that they are not aware of any judicial authority for applying the rule, and they claim that it is not applicable, to an Act, by which, "Her Majesty, by and with the advice and "consent of the Lords Spiritual and Temporal and Commons in Parliament "assembled," grants to one of Her Colonies a constitution for regulating its own affairs in legislation and government. Such a constitution cannot be created without dealing with prerogative. The B. N. A. Act from beginning to end deals with matters of prerogative, and mostly without any express naming of the Queen.

My Government claim that the anti-provincial view overlooks the nature and principle of government and legislation. A Colonial Legislature when acting within the limits prescribed by Imperial authority "has and is intended to have "plenary powers of legislation as large, and of the same nature, as those of "Parliament itself," and when a question arises whether the prescribed limits have been exceeded, the only way in which that question can be determined "is by looking at the terms of the instrument by which affirmatively, the "legislative powers were created, and by which negatively, they are restrained. "If what has been done is legislation within the general scope of the affirmative

"words which give the power, and if it violates no express condition or "restriction, by which that power is limited, it is not for any Court of Justice to "enquire further or to enlarge constructively those conditions and restrictions." (*Queen* v. *Burah*, 3 App. 904.) It has never been suggested, in maintaining the anti-provincial view of the present question, that the Provincial Acts violate any "express condition or restriction by which" the provincial powers are limited; and on the other hand I am advised that these Acts are beyond controversy "within the general scope of affirmative words which give" those powers.

These considerations appear to my Government to destroy the foundation on which the anti-provincial arguments rests, and to constitute a conclusive answer to that argument.

Another answer to the anti-provincial view is, that the B. N. A. Act plainly intended to confer on the Governments and Legislatures thereby provided for, all the powers which the Governments and Legislatures of the provinces possessed before being confederated (unless certain restrictions imposed on the Dominion Parliament for the protection of the provinces *inter se* should be considered as exceptions). The purpose of the Act was to extend, and not to limit, the powers of the people in Canada in legislation and Government. These powers are distributed by the Act between the Government and Parliament of the Dominion on the one hand, and the Governments and Legislatures of the provinces on the other, the powers of the Dominion Parliament being expressly limited to subjects not assigned to the Provincial Legislatures. The Governments of the provinces before confederation possessed and exercised the power of appointing Queen's Counsel; it is not pretended that this subject falls within any of the enumerated classes of federal jurisdiction; and it certainly does fall within the general terms of several classes of subjects assigned to the Provincial Legislatures. The result seems to my Government to be inevitable, that, so far as regards matters of provincial jurisdiction, the power of providing by Statutes for Queen's Counsel belongs to the Provincial Legislatures.

I am advised that the authority of a Provincial Legislature to pass such Acts as those in question is to be found in no fewer than four of the articles enumerated in section 92 as belonging to Provincial Legislatures, viz., Articles 4, 13, 14, 16.

Of these the 4th article gives to Provincial Legislatures exclusive jurisdiction to make laws respecting "the establishment and tenure of provincial offices, and "the appointment and payment of provincial officers." In maintaining the anti-provincial view of the present question, the fact has been overlooked that the appointment of all officers, and not of Queen's Counsel only, is matter of prerogative. The Dominion Government can have no right to say what members of the bar shall be Queen's Counsel in provincial business with which the Government has nothing to do; and it is therefore admitted that the Lieutenant-Governor in council has the right of selecting from the bar such members of it as he may think fit for the actual conduct of such Crown business as belongs to provincial jurisdiction.

The office of Queen's Counsel is said to be one of honour; but I am advised that in the books of authority it is expressly said that it is not an office of honour only; it gives an important privilege, viz. pre-audience in the Courts, etc. The Sovereign is in law the fountain, not of honour only, but of office also. "The King is

RECORD.

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 —*continued.*

the fountain of honour, office and privilege . . . From the same principle" as the prerogative in regard to honours, "arises the prerogative of erecting and disposing "of offices; for honours and offices are in their nature convertible and synonymous. "All offices under the Crown carry in the eye of the law, an honour along with "them, because they imply a superiority of parts and abilities being supposed to "be always filled with those that are most able to execute them, and on the other "hand all honours in their original had duties or offices annexed to them." (1 Blackstone's Com. 271, *et seq.*, etc.)

My Government claim that to construe the 4th article as excluding any one class of provincial officers on the ground of prerogative, is to adopt an utterly unwarranted construction. The office of Queen's Counsel is the only office which is said to be excluded. The jurisdiction of the province in regard to all other provincial offices—whether connected with the Civil Government of the Province or the Administration of Justice, and whether since confederation there has been any provincial legislation regarding such offices or not—has never been questioned on the ground of prerogative or any other ground. Many of these offices are more important than the office of Queen's Counsel. Amongst the offices in Ontario conceded to belong to provincial jurisdiction are the offices of the Masters of the Courts, the Registrars and Clerks of the Crown, Sheriffs, Police and Stipendiary Magistrates, Justices of the Peace, Coroners, County Crown Attorneys, Registrars of Deeds, etc.

I am not aware that it has been said to be inaccurate to speak of the "office" of Queen's Counsel or to speak of Queen's Counsel as "officers." There is certainly no ground on which such an assertion could be made. The Statute, 6 Anne, c. 7, s. 24, provided that if any member "shall accept of any office of "profit from the Crown during such time as he shall continue a member, his "election shall be and is hereby declared void;" and under this Statute an appointment as Queen's Counsel was repeatedly held to be an "office."

The provincial right under the 4th article seems to my Government to be perfectly clear and unanswerable, without the aid of any other Article; but they maintain that other articles and provisions of the Act establish the same conclusion.

Of these I have mentioned article 13. By that article Provincial Legislatures have jurisdiction to make laws in relation to "property and civil rights "within the province." The right to plead in the Courts, and the right of pre-audience there, are certainly civil rights. The words "property and civil rights" are those chosen by the British Parliament in 14 Geo. 3, c. 83, s. 8, as the most extensive possible: "In all matters of controversy relating to property and civil "rights, resort shall be had to the laws of Canada as the rule for the decision of "the same." Under the same words in the Upper Canada Act, 33 Geo. 3, chap. 1, the whole law of England, except the criminal law (which was the subject of another enactment), was held to be introduced; and no distinction has been drawn between laws limiting the prerogative and any others.

It has been said that several of the articles which are enumerated in sec. 91 as belonging to federal jurisdiction, necessarily interfere more or less with civil rights; but in the present case it has never been suggested that any article in that section gives to the Federal Parliament jurisdiction in this matter. There being therefore no clashing between the article as to civil rights and any article

No. 22.
Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886
—*continued.*

of federal jurisdiction, there is no reason why, as respects the present question, this article should not receive its full significance.

The 14th Article of provincial jurisdiction is also referred to. It gives to the provinces exclusive jurisdiction to make laws in relation to the "adminis- "tration of justice of the province, including the constitution, maintenance, and "organization of Provincial Courts both of civil and criminal jurisdiction." Now, I am advised that the whole subject of the administration of justice and of the creation of courts is (like the appointment of officers) matter of Royal prerogative. "The prerogative of creating courts and offices has been im- "memorially exercised by the Kings of England, and is founded on the capacities "of executive magistrate and distributor of justice, which the constitution of the "country has assigned to the sovereign." (Chitty on Prerogative, 75.) The King "has alone the right of erecting courts of judicature; for though the constitution "of the kingdom has entrusted him with the whole executive power of the laws, "it is impossible as well as improper that he should personally carry into execu- "tion this great and extensive trust. It is consequently necessary that courts "should be erected to assist him in executing this power; and equally necessary "that, if erected, they should be erected by his authority. And hence it is, that "all jurisdiction of courts are either mediately or immediately derived from the "Crown, their proceedings are generally in the King's name, they pass under his "seal, and are executed by his officers." (1 Blackstone's Com. 267.)

The appointment of Queen's Counsel is immeasurably less important than the prerogative rights which the 14th Article undeniably gives to the Provincial Legislatures; and is in fact a mere incident of the Royal jurisdiction in the administration of justice. Where the latter subject is given generally there can be no presumption that this minor and incidental prerogative of appointing Queen's Counsel was withheld; the greater power must be taken to include and carry with it the less.

I am advised that writers on constitutional law deal with the subject of Queen's Counsel under the heads of "Courts," the "judicial power and juris- "diction," "judicial offices," and the like. The subject is treated of by Sir William Blackstone in the chapter entitled, "Of Courts in General." The learned author speaks *inter alia* of attorneys, barristers and sergeants, etc.; and, referring to barristers and serjeants, he says: "From both these degrees some "are usually selected to be Her Majesty's Counsel learned in the law, the "principal of whom are called her Attorney and Solicitor-General." In Bowyer on Constitutional Law, the subject of Queen's Counsel is treated in the chapter on "The Judicial Power in General"; and in Cox on the Institutions of the English Government, in the chapter on "Judicial Offices."

I am referred also to the 16th Article, which gives to the Provincial Legisla- tures jurisdiction generally in all matters "of a purely local or private nature in the "province." The appointments in question relate to matters of a merely local nature.

Besides these four articles under which the appointment of Queen's Counsel legitimately falls, I am advised that various other of the articles assigned to provincial jurisdiction involve matters of prerogative, though the Queen is not mentioned; and that these articles therefore afford further illustrations of the position, that matters of prerogative were intended to be dealt with throughout the Act.

RECORD.

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 — *continued.*

Thus, by virtue of her prerogative the property of the State is vested in Her Majesty; but by the B. N. A. Act all the Crown lands in each province, and all mines, minerals, and royalties, are to belong to the province; and laws as to the management and sale of the public lands, and the timber and wood thereon, are specially assigned by the 5th Article to provincial jurisdiction. So, public prisons are at common law the property of the Sovereign, and the Sovereign is their governor (Chitty on Prerogative, 103), but the establishment, maintenance, and management of public and reformatory prisons are expressly assigned to the exclusive jurisdiction of the provinces. Again, the prerogative of the Crown to institute corporations is undoubted (Chitty on Prerogative, 122, B.N.A. Act, secs. 92, 109); and yet the incorporation of all companies with provincial objects is assigned to provincial jurisdiction.

Section 129 may also be referred to for the same purpose. This section provides that, "except as otherwise provided by this Act, all laws in force in "Canada, Nova Scotia, or New Brunswick, at the union, and all courts of civil "and criminal jurisdiction, and all legal commissions, powers and authorities, and "all officers, judicial, administrative and ministerial, existing therein at the union, "shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick, respectively, "as if the union had not been made, subject nevertheless (except with respect to "such as are enacted by or exist under Acts of the Parliament of Great Britain, or "of the Parliament of the United Kingdom of Great Britain and Ireland) to be "repealed, abolished, or altered by the Parliament of Canada, or by the Legislature "of the respective provinces, according to the authority of the Parliament or of "that Legislature under this Act." This section obviously embraces matters of prerogative as well as other matters. It is by the Crown, through its ministers, that "commissions" are issued, and that "officers, judicial, administrative, and "ministerial," are appointed. I have already observed that the establishment of courts, also, is a matter of prerogative. The whole section shews that the laws which were to continue in force included those relating to the Crown, as well as other laws; and the section provides in regard to all without exception, that they may be "repealed, abolished or altered" by the Parliament of Canada or by a Provincial Legislature, according to the authority belonging to the one or the other under the Act.

It is thus manifest that the whole scope of the Act is opposed to the exclusion of matters of prerogative from provincial jurisdiction, and to the notion that any prerogative right fairly falling within the general language employed is not to be included.

I am also advised that the powers given to Colonial Legislatures have from the earliest times been expressed in general terms, and have never been assumed on that account to exclude matters of prerogative. The provision formerly contained in the Commissions of Instructions to Governors and Lieutenant-Governors appointed in England, that all Bills involving the prerogative should be reserved, is itself a standing proof of the view that, if assented to under the constitution of the colony, such Bills, though involving matter of prerogative, would be valid and binding laws. My Government maintain that the doctrine on which the validity of the Provincial Acts in question is denied, is in opposition to the practice under (so far as known) all the constitutions of all the Colonies of the Empire; and that on such a point this practice is absolutely conclusive as to

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 —*continued.*

the proper interpretation in this respect of the general powers of the Provincial Legislatures under the B. N. A. Act.

To maintain the validity of the commissions issued to Queen's Counsel by the Lieutenant-Governor of this province since confederation, nothing more is needed than the authority of the Provincial Acts which I have mentioned; but my Government insist further, that the Lieutenant-Governor *virtute officii*, and without such legislation, had authority to make such appointments. No opinion on this point was expressed by the Nova Scotia Judges; the opinion on it of the English Law Officers was formed on an *ex parte* case which omitted all mention of the grounds that sustain the right of the Lieutenant-Governor; and in the Dominion Supreme Court the point was understood to be conceded at the bar.

The position of my Government is, that the Lieutenant-Governor is entitled *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters over which Provincial Legislatures have jurisdiction; as the Governor-General is entitled *virtute officii* and without any statutory enactment, to exercise all prerogatives incident to executive authority in matters within the jurisdiction of the Federal Parliament; that a Lieutenant-Governor has the administration of the Royal prerogatives as far as they are capable of being exercised in relation to the Government of the province, as the Governor-General has the administration of them, so far as they are capable of being exercised in relation to the Government assigned to the Dominion.

The B. N. A. Act does not expressly define all the powers either of the Governor-General or of the Lieutenant-Governor. It is presumed that as a matter of law the Crown might delegate to either of these officers any of the powers of the Crown for which express provision is not made by the B. N. A. Act, or by authorised Dominion or provincial legislation. But in the absence of any such express delegation or legislation, my Government insist that the Governor-General and Lieutenant-Governors have respectively under their commissions, all powers incident to their respective offices, all powers necessary and proper for the administration of their respective Governments, all powers usually given to or exercised by Colonial Governors.

The argument by which my Government maintain this position may be briefly stated:—

My ministers affirm the intention of the B. N. A. Act to have been, beyond all doubt or question, that Provincial Governments should have the executive duty and authority generally which may be incident to matters falling within the legislative jurisdiction of the provinces. They assert this to have been the undoubted and unquestioned understanding on which the subject of confederation was considered, on which the resolutions which formed the basis of the B. N. A. Act were framed and accepted, and was the understanding which, without any express provision to this effect in the Act, has been acted upon as of course by the Dominion and provincial authorities ever since confederation; and it may be observed here, that the work of administration incident to the subjects of legislative authority has involved large annual expenditure by every province. The whole prerogative subjects of the administration of justice and enforcement of the laws, have ever since confederation been left to the executive of the provinces; and in all the provinces executive authority has been exercised, and justice has been

RECORD.

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 —*continued.*

administered, in the Queen's name, since confederation as before. The Sovereign has been regarded as still, constitutionally, the supreme executive magistrate, a party to all legislation, and the administrator of the laws, as the Sovereign was before confederation. But Her Majesty's prerogatives in all these respects are exercised in provincial matters, as in federal and Imperial matters, through constitutional advisers, ministers, judges and other officers. As before confederation, all provincial proclamations are in her name; all grants of provincial lands and property; all suits on behalf of the province in cases in which by the constitution and practice of England and of the provinces before confederation this would have been their form; all commissions to judicial and administrative offices including masters, stipendiary magistrates, police magistrates, justices of the peace. coroners, sheriffs, registrars and Crown attorneys. The power of a province to make these appointments may as well be denied as the power of appointing Provincial Queen's Counsel. They are all matters of prerogative. In a word, wherever before confederation the Queen's name was used in regard to any matter now belonging to provincial jurisdiction, it has ever since been used in all the provinces. Hardly a day passes in which the Lieutenant-Governor does not exercise or in which there is not exercised in his name, one or other of the Royal prerogatives having reference to provincial matters. Provincial Government could not be carried on without this being done; and the propriety of this mode of exercising executive powers, performing executive functions, and carrying on proceedings generally, has ever since confederation been assumed to be the proper and necessary course by the Dominion and Provincial Governments, the courts, the legal profession and the public.

This practical exposition of the Act by those who respectively had to do with the negotiations, the discussions, the framing of the Act, the procuring of it and since with the working of it, should not and cannot be open to question now.

If the question were open now, and had to be considered without the light of what has taken place, my Government insist, that looking at the whole scope of the Act, the propriety of the practical interpretation which it has received appears clearly from reasons which I shall now state.

Each province as well as the Dominion has by the B. N. A. Act a Great Seal, which is declared to be the emblem of sovereignty.

Again: The 9th section of the Act is as follows: "The Executive Govern- "ment and authority of and over Canada is hereby declared to continue and be "vested in the Queen." No class of matters to which Her Majesty's authority had before extended is excepted. My advisers are aware that this declaratory enactment has been said to have by implication the effect of excluding the Queen from the jurisdiction which she had previously possessed in regard to matters assigned by the Act to the provinces; but my Government say that this construction not only disregards, but reverses, the maxim on the application of which the whole argument for the anti-provincial view is built; and they also deny the alleged implication, and hold the suggested construction to be unsupported by either authority or reason. They insist that this section, on all accepted principles of interpretation, is as applicable to matters of provincial as to matters of federal jurisdiction; and that the provincial construction of the section is in accordance with the general doctrine, that the Sovereign is "not only the chief, but properly

" the sole magistrate of the nation ; all others acting by commission from " and in due subordination to him." My Government maintain that a lieutenant-governor acts by commission from Her Majesty when he acts by commission issued in her name under the authority of an Imperial statute to which Her Majesty is a party.

The Executive Government, distributed by the Act between the federal and provincial authorities, requires for its exercise both a governor-general and lieutenant-governors. The Act does not provide the manner of appointing the governor-general, no provision for that purpose being needed; Her Majesty could appoint the governor-general without statutory authority, on the advice of her ministers in England. But it was intended that for the future the lieutenant-governors should be appointed directly by the governor-general, acting under the advice of the "Queen's Privy Council in Canada;" this required statutory enactment; and accordingly, under the heading " Provincial Constitutions " —Executive Power," the Act provides that, for each province " there shall be " an officer styled the lieutenant-governor." The Act also contains the expressions: " Government of the Provinces," "the Executive Government" of a province, and "Executive Authority" therein; and the "provisions of the Act referring " to the lieutenant-governor" are declared to " extend and apply to the lieutenant-" governor for the time being of each province, or the other chief executive officer " or administrator for the time being carrying on the Government of the " province."

My advisers point out that, as it is a principle in British constitutional law that all government and all executive authority are matters of prerogative, the lawful appointment of a governor or lieutenant-governor carries with it by implication the rights incident to such an office, or usually belonging to it. On this subject, I am referred to a judgment of the Privy Council containing the following passage: " Implied powers may be given to an office as incident, either " because they are necessary to its due execution, or because they are such as " have been usually exercised by those who have borne it." (*Cameron* v. *Kyte*, 3 Knapp, 345, 346.)

So, in some of the old proprietary colonies the governors or lieutenant-governors were, under the Royal Charters, appointed by the proprietors. They were not appointed by the Crown in Virginia, Massachusetts, Connecticut, Rhode Island, Maryland, the Carolinas, or Pennsylvania. In all these colonies, therefore, the governors or lieutenant-governors, though appointed, not by the Sovereign, but by the proprietors, were constitutionally the King's representatives. I am further informed that in "Chitty on Prerogative" it is said that the form of government in most of the chartered governments " is borrowed from that of " England. They have a governor named by the king (or in some proprietary " colonies by the proprietor) who is his representative or his deputy." There is thus no distinction made in this respect between governors named by the king and governors named by the colonial proprietors. *A fortiori* must this character of being the Queen's representative in provincial matters apply to a lieutenant-governor appointed under Imperial Statute by a governor-general, the Queen's representative for this purpose, appointed by Her Majesty, and acting by the advice of the Queen's Privy Council for Canada.

RECORD.

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 —*continued.*

My Government hold, that, in matters of provincial jurisdiction, the Lieutenant-Governor represents the Queen as regards matters of prerogative and otherwise, as certainly as Her Majesty is represented by the Governor-General when acting within the scope of his powers. Both the appointment of the Governor-General and that of the Lieutenant-Governor are made by commissions in the Queen's name; and the special provisions of the Act in regard to the two officers closely correspond. The Lieutenant-Governor is to take the same oaths as the Governor-General. Like the Governor-General, he is to have an advisory council composed of such persons as he sees fit. He is to call the Provincial Legislature together in the Queen's name by an instrument under the Great Seal of the province, as the Governor-General is to call the Federal Parliament in the Queen's name and under the Great Seal of the Dominion. If legislative councillors are to be appointed in a province, the Lieutenant-Governor is to appoint them in the Queen's name, as the Governor-General appoints senators. The constitution of the executive authority in Nova Scotia and New Brunswick was to continue until altered under the authority of the Act, and under this constitution the Lieutenant-Governor was wont to call together the Assembly in the Queen's name, to appoint legislative councillors in her name, and generally in her name to carry on the whole business of government. I have already mentioned that all powers, authorities and functions previously given by statute to the former Governors or Lieutenant-Governors are expressly vested in the Governor-General so far as the same relate to the Federal Government, and in the Lieutenant-Governors so far as the same relate to the Provincial Governments

The Acts of the Ontario Legislature ever since confederation, like the Acts of most of the other provinces of the Dominion and of the Empire, have always been in the name of the Queen. I am informed that in a recent case (*Therberge* v. *Landry*, 2 App. Cas. p. 102), Lord Cairns, in delivering the judgment of their lordships of the Judicial Committee of the Privy Council, expressly referred to the subject, observing as to the Act of the Province of Quebec there in question, that it was "an Act which had been assented to on the part of the Crown and to "which the Crown therefore is a party." The assent by the Lieutenant-Governor and the acquiescence in the Act by the Governor-General were treated as an assent by the Crown. In that case an intention that there should be no appeal to Her Majesty in Council as to the matter in question was held sufficiently shown, though the Crown or prerogative was not mentioned in connection with the provision, their lordships being of opinion (in effect) that such was the intention and was the fair construction of the Act.

Further: Both the Imperial and Federal Governments have recognised the possession by the Lieutenant-Governor of implied powers in matters of prerogative, where the implication was less "necessary" than in the case under discussion. In 1876, the then Minister of Justice, representing in this matter the Dominion Government of that time, thought that the Lieutenant-Governor so clearly had expressly or impliedly, all the prerogative powers incident to the administration of provincial affairs, that it was objectionable to continue in the commissions to the Governors-General the clause, which such commissions had theretofore contained, purporting to give to the Lieutenant-Governors the power of proroguing and dissolving Provincial Legislatures. So also, before confederation,

commissions to the Governors-General of Canada had contained a clause purporting to give them powers with respect to marriage licenses, letters of administration, probates of wills, and the custody and management of lunatics and idiots and their estates, the last of these subjects being matter of undoubted prerogative, and all of them having theretofore been so regarded in colonial affairs. It was pointed out by the Minister of Justice that the subjects so mentioned were within the exclusive control of the several provinces, and were dealt with under local legislation, the Governor-General and his advisers having (as he said) no concern with such matters. He in consequence suggested, not that future commissions should give these powers to the Lieutenant-Governors, but that the clause should be wholly omitted. A Lieutenant-Governor's power in regard to these prerogative matters was thus assumed to be implied as belonging to him *virtute officii* under the B. N. A. Act and his commission. These suggestions on behalf of the Federal Government were acquiesced in by Her Majesty's Government in England, and the clauses so objected to have been omitted from the commissions since issued.

The opinions expressed in the case before the Supreme Court form the only known ground for the anti-provincial view. It should be remembered in connection with the other considerations presented in this despatch, that the subject in some of its most important aspects was new to the Court; and hence, in the absence of argument for the provincial view, one of the three learned judges said that he had not "been able to suggest to himself the arguments by which such an opinion [an opinion that the Provincial Acts were valid] could be supported." Another had to treat the 14th article in section 92 (the article mentioned in the report of the Minister in 1872) as the only one on which an argument, however feeble, could proceed; and a third was led from the same cause to say, that "there is not a single clause, a single word of the B. N. A. Act upon which it can seriously be contended that the Lieutenant-Governors are vested with Her Majesty's prerogative rights of conferring such honours and dignities;" that "nowhere in the Act can a single expression be found to sustain the contention that a Lieutenant-Governor has such a power;" and that "the creation and appointment of Queen's Counsel has never been considered as a part of the administration of justice." My Government gladly recognise the great ability and general accuracy of all three judges; but it would be manifestly most unjust to them, as well as to the provinces, that they should be held to be bound by opinions formed under all the disadvantages which these observations illustrate. Those opinions cannot be acquiesced in by the provinces without accepting an interpretation of the B. N. A. Act which would go far to deprive them of the whole executive authority which it was intended they should possess, and which they have hitherto exercised.

My Government claim for the Lieutenant-Governor, both under the Provincial Statutes on this subject and independently of them, the power of selecting Queen's Counsel *eo nomine* from the bar of the province, with the rights incident to the office of Queen's Counsel; and they claim for the Lieutenant-Governor in like manner the power of determining the right of pre-audience amongst the members of the provincial bar in all courts and matters over which the Provincial Legislatures have jurisdiction.

RECORD.

No. 22. Despatch, Lieut.-Governor of Ontario to Secretary of State of Dominion, 22nd Jan., 1886 —*continued.*

I have the honour to request that, in case there is transmitted to England any list of Queen's Counsel which omits the names of Queen's Counsel holding provincial commissions only, or any document questioning their status, one of the accompanying printed copies of this despatch be also transmitted for the information of the Right Honourable the Secretary of State for the Colonies, and of their Lordships of the Judicial Committee of the Privy Council; and that a copy of the other documents transmitted to England be sent to me for the information of my Government.

I have, etc.,

(Signed) JOHN BEVERLEY ROBINSON,
Lieutenant-Governor of Ontario.

To the Honourable
The Secretary of State,
Ottawa.

No. 23. Despatch, Secretary of State to Lieut-Governor, Ontario, in reply, 27th Sept., 1886.

XX. On the 27th day of September, A.D. 1886, the Secretary of State replied to the said despatch as follows:—

[11. The Secretary of State to the Lieutenant-Governor.]

Department of the Secretary of State,
Ottawa, 27th September, 1886.

Sir,—I have the honour to acquaint you, for the information of your Government, that His Excellency the Administrator of the Government has had under his consideration in Council your despatch of the 22nd January last, on the subject of the appointment of Queen's Counsel and containing the views of your Government respecting the power of a Lieutenant-Governor to appoint Queen's Counsel, the argument being mainly directed against the judgment of the Supreme Court of Canada in Lenoir *v.* Ritchie (3 Can. S. C. R. 571; 1 Cart. 488). I have now to state that His Excellency is advised respecting several grounds of contention brought forward in your despatch as follows:

1. With respect to the objection that no province, except Nova Scotia, and no Queen's Counsel, except Queen's Counsel for that province, were represented in the argument of the case above mentioned, it must be remembered that the case was argued in January, and the considered judgment of the court was not rendered until the November following. It is equally true that the Government of Canada was not represented in the argument. It must happen that the validity of Acts of Parliament and of the Legislatures of the provinces will constantly be in question in the ordinary litigation between private persons, and it is, His Excellency is advised, neither convenient nor necessary for the Government of Canada, and of the provinces, to intervene and become parties to such litigation in all cases in which such questions arise. It is open to them to adopt such a course if they see fit, but it is not the practice even in cases for some special reason. With reference to the propriety of referring such questions to the Supreme Court or to the Privy Council, His Excellency's advisers, while not thinking that such questions should never be presented in that manner, are of the opinion expressed by the Minister of Justice in 1876, that some inconvenience may be expected to arise therefrom and that the more correct mode of obtaining

the decision of the court, is by appeal in the ordinary way. The case of Lenoir *v.* Ritchie was one which, when before the courts, attracted considerable attention, and there can be little doubt that your Honour's Government could, if they so desired, have taken steps to have their views presented to the Supreme Court of Canada. It cannot be admitted, however, that because they did not do so, they are not therefore in the administration of public affairs, bound to respect the decision of the court in the same manner as the Government of Canada is bound, though also unrepresented at the argument of the case, to respect the decision until it is overruled by competent authority.

2. With reference to the statement that the opinion expressed in that case, that the Act of Nova Scotia authorizing the Lieutenant-Governor to appoint Queen's Counsel was *ultra vires*, was the opinion of three only of the six judges, it is necessary in order to avoid misapprehension, to observe that while it is true that the Supreme Court consists of six judges, it is not a fact that the court on the hearing of the case in question was composed of six judges, but of five only, the Chief Justice Sir William Ritchie taking no part in the case, on the ground, it is assumed (though not so stated in the case), of his relationship to the respondent.

In view of the fact that three of the five judges who held the Act referred to as invalid, gave their reasons at length with at least equal facilities as your honour's advisers for arriving at a sound conclusion, his excellency observes that the statement that it would be manifestly most unjust to such judges to hold them bound by the opinion formed by them, is a statement which cannot be accepted.

3. Your honour's government in the main, base their contention of the validity of the Act of the Legislature, vesting in the lieutenant-governor power to appoint Queen's counsel, on the following articles of the 92nd section of the British North America Act:

" 4. The establishment and tenure of provincial offices and the appointment " of provincial officers.

" 13. Property and civil rights in the provinces.

" 14. The administration of justice in the province, including the con- " stitution, maintenance and organisation of provincial courts both of civil and " criminal jurisdiction, and including procedure in civil matters in those courts.

" 16. Generally, all matters of a merely local or private nature in the " province."

" The 14th Article, his excellency is advised, is fully discussed by each of the three judges referred to, and as to the fourth they appear to have agreed that Queen's counsel in the proper sense of the term, were not provincial officers, though Mr. Justice Taschereau is the only one of the three who specially refers to that view of the case. With reference to the application of articles 13 and 16, his excellency is advised that the authority of the decision is not lessened by the fact that it did not on the hearing of the case occur to counsel to argue or to the judges in giving judgment, to discuss the proposition that the exercise of the Crown's prerogative of appointing Queen's counsel was either a matter of property of civil rights in the province, or one of a merely local or private nature therein. Although, as is evident from the despatch under consideration, your honour's advisers are of opinion that the Acts authorising the lieutenant-governors to appoint Queen's counsel are beyond controversy within the general scope of

RECORD.

No. 23. Despatch, Secretary of State to Lieut.-Governor, Ontario, in reply, 27th Sept., 1886 —*continued.*

the affirmative words of the 92 section of the British North America Act, that a construction of the fourth article of that section which excludes the power to appoint such counsel, is an utterly unwarranted construction, and that the provincial right thereunder it perfectly clear and unanswerable. His Excellency is advised that so long as the judgment in Lenoir *v.* Ritchie is not revised, it is the duty of governments and individuals in Canada to respect and conform to that judgment. No inconvenience has been occasioned by the judgment, nor has anything occurred since it was rendered, so far as His Excellency's advisers are aware, which renders it necessary or desirable for His Excellency after the lapse of seven years to facilitate a review of such judgment by a reference of the question involved to the Lords of the Judicial Committee of Her Majesty's Privy Council, and finally the question being settled so far as the Supreme Court of Canada can settle it, His Excellency is advised that it is not necessary to discuss anew the grounds on which the decision of the Court rests.

I have, etc.,
(Signed) THOS. WHITE,
For the Secretary of State.

His Honour
The Lieutenant-Governor of Ontario,
Toronto, Ontario.

No. 24. *Canada Gazette.* Appointments of Queen's Counsel by Governor-General, 2nd Dec., 1889.

XXI. It appears by the *Canada Gazette*, and for the purposes of this case is to be assumed, that on the 2nd day of December, 1889, the Governor-General by letters patent in Her Majesty's name and under the Great Seal of Canada, purported to appoint to be Queen's Counsel (without any specification of any province or territory for which the appointment was made) the following members of the Bar of Ontario:—

James Robert Gowan, James Henry Flock, Rupert Mearse Wells, Ward Hamilton Bowlby, Nicol Kingsmill, Alexander John Cattanach, Huson William Munro Murray, Joseph Deacon, Duncan McMillan, John Davidson, James Edward Farewell, Alexander Millar, Nicholas Murphy, George Moncrieff, Robert Vashan Rogers, Arthur Ratcliffe Boswell, John Burnham, William Henry Walker, David Hiram Preston, Henry William Christian Meyer, Joseph Jamieson, Joseph Harry Ferguson, Frederick John French, Archibald Henry Macdonald, Thomas Dawson Delamere, Francis Arnoldi, George Langrish Tizard, William Frederick Walker, James Muir, William Robert White, James McPherson Reeve, Joseph James Gormully, Colin George Snider, Adam Rutherford Creelman, Francis Edward Philip Pepler, Nelson Gordon Bigelow, Alexander Ferguson, Dennis Ambrose O'Sullivan, Albert Romain-Lewis, James Leitch, William Hale Kingston, James Scott Fullerton, Alfred Henry Marsh, George Tate Blackstock, John Austin Worrell, Edward Sydney Smith, Alphonse Basil Klein.

No. 25. Appointments of Queen's Counsel by Lieut.-Governor of Ontario, 4th Jan., 1890.

XXII. On the 4th day of January, A.D. 1890, the Lieutenant-Governor of Ontario, by letters patent in Her Majesty's name and under the Great Seal of Ontario purported to appoint to be Queen's Counsel for Ontario the following members of the Provincial Bar, and to direct that they do take precedence in the Courts of Ontario as between themselves in accordance with the dates of their being respectively called to the bar, but next after Her Majesty's Counsel for the Province of Ontario, appointed by the Lieutenant-Governor on the 13th day of March, 1876:—

Larrat William Smith, John Leys, Richard Snelling, James David Edgar, William Mulock, William Barclay McMurrich, William Mortimer Clarke, John Robinson Cartwright Newman Wright Hoyles, Thomas Langton, Charles Robert Webster Biggar, George Hughes Watson, Edward Douglas Armour, George Fergusson Shepley, Daniel Edmund Thompson, Allen Bristol Aylesworth, John James Maclaren, and Ebenezer Forsyth Blackee Johnston, Stephen Franklin Lazier, The Honourable John Morison Gibson, John Crerar, Henry Carscallen, John Wallace Nesbitt, James Vernal Teetzel, James Magee, George Christie Gibbons, The Honourable David Mills, Francis Henry Chrysler, Alexander Fraser McIntyre, Duncan Byron McTavish, Samuel Barton Burdette, Roger Conger Clute, John Wedgewood Bowlby, Alfred John Wilkes, John Maules Machar, William Hugh McClive, John Farley, John Elley Harding, John Fisher Wood, John King, Henry Robertson, Duncan John McIntyre, John Augustus Barron, Hugh O'Leary, Amzi Lewis Morden, Hammel Madden Deroche, Elgin Myers, James Frederick Lister, James Robb, George Washington Wells, Hamilton Parke O'Connor, Richard Harcourt, Warren Totten, Ashton Fletcher.

No. 26. *Canada Gazette.* Appointments of Queen's Counsel by Governor-General, 6th Jan., 1890.

XXIII. It appears by the *Canada Gazette* and for the purposes of this case is to be assumed that on the 6th day of January, 1890, the Governor-General by letters patent in Her Majesty's name and under the Great Seal of Canada, purported to appoint to be Queen's Counsel (without specification of any province or territory for which the appointment was made) the following members of the Bar of Ontario:—

Charles Edward Pegley, James Robb, John James McLaren, John King, William Fitzgerald, George Oscar Alcorn, Charles Robert Webster Biggar, John Alexander Macdonell, James Bond Clarke, John Pleny Whitney, John Wallace Nesbitt, Edward Campion James Alexander McGillivray, Daniel O'Connor, George Fergusson Shepley, George Washington Wells, Allen Bristol Aylesworth Matthew Wilson, John Boyd, Alfred Boultbee, Ashton Fletcher, Stephen Franklin Lazier, Wintringham Clifton Loscombe, Duncan Chisholm, William Drummond Hogg, John Fisher Wood, John Bergin.

RECORD.

No. 27.
Questions submitted by Attorney-General for Ontario to Court of Appeal for Ontario.

Questions.

The matters and questions arising on the foregoing case and which are to be referred for hearing and consideration by the Court of Appeal for Ontario, pursuant to Chapter 13 of 53 Victoria, Ontario, 1890, are the following:—

(1) Whether since the 29th of March, 1873, it has been and is lawful for the Lieutenant-Governor of Ontario by letters patent, in the name of Her Majesty, under the Great Seal of Ontario,

(*a*) to appoint from among the members of the bar of Ontario such persons as he deems right to be during pleasure Her Majesty's Counsel for Ontario,

(*b*) to grant to any member or members of the bar of Ontario a patent or patents of precedence in the Courts of Ontario.

(2) Whether appointments of Queen's Counsel and grants of precedence such as are in the case stated to have been made by the Lieutenant-Governor of Ontario since the said date are and would be valid and effectual to confer on the holders thereof the office and precedence thereby purported to be granted.

(3) Whether members of the Bar of Ontario from time to time appointed, or to be appointed as aforesaid by the Lieutenant-Governor of Ontario by letters patent in Her Majesty's name under the Great Seal of Ontario to be Her Majesty's counsel for Ontario, and members of the Bar of Ontario to whom from time to time patents of precedence in the courts of Ontario have been or may be granted by the Lieutenant-Governor of Ontario as aforesaid in conformity with the limitations of the revised statute of Ontario, ch. 139, ante p. 11, have or shall become entitled to such precedence in the courts of Ontario as have been or may be assigned to them by such letters patent after the several persons or classes referred to in the *3rd, 5th and 7th sections of the said revised statute of Ontario.

*Section 3rd at page 12. Section 5th at page 13. Section 7th at page 13.

(4) Whether the position as to precedence in the courts of Ontario of the remaining members of the Bar of Ontario not comprised within the classes referred to in the said * 3rd, 5th and 7th sections, and not holding patents issued by the Lieutenant-Governor of Ontario conferring on them the office of Queen's counsel for Ontario, or granting to them precedence in the courts of Ontario, is as between them and those holding such patents as aforesaid subsequent to those holding such patents, and as between themselves in the order of their call to the Bar of Ontario.

(5) In case the answer to any of the said questions be in the whole or in part negative, or in case an affirmative answer shall appear to the court not to be a complete exposition of the matters involved, then what is the true state and condition of the matters involved in such questions.

O. MOWAT,
Attorney-General for Ontario.

No. 28.
Reasons for Judgment.
Chief Justice, Ontario, 10th Nov., 1896.

Reasons for Judgments of the Court of Appeal.

In re Queen's Counsel.

November 10th, 1896. Hagarty, C.J.O.:—

The judgments of the Privy Council, especially in the case of Liquidators of the Maritime Bank *v.* Receiver-General of New Brunswick, [1892] A. C. 437, have defined the peculiar relative positions of the Dominion and Provincial Governments. They have decided that the Lieutenant-Governor is the representative of the Queen, and not, as once contended, merely of the Governor-General. In Lord Watson's words: "A Lieutenant-Governor, when appointed, is as much "the representative of Her Majesty for all purposes of provincial government as "the Governor-General himself is for all purposes of dominion government."

Again: "So far as regards those matters which, by section 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the dominion, and as supreme as it was before the passing of the Act."

I think the only proper conclusion to be drawn from the principles laid down in our ultimate Court of Appeal is that as the Lieutenant-Governor before the union of the provinces, had and exercised the power of appointing Queen's Counsel, while each province was separately and independently governed, and the same official representing the Queen under the Federation Act of 1866, has, and since his appointment has had, the right to appoint such counsel.

In 1872, the Imperial Law Officers gave their opinion that the Governor-General had the right to appoint Queen's Counsel, but that a Lieutenant-Governor appointed since the union had no such power, but that the Legislature of a province can confer by statute on its Lieutenant-Governor the power of appointing Queen's Counsel, and with respect to precedence or pre-audience in the courts of the provinces the Legislature of the province has power to decide as between Queen's Counsel appointed by the Governor-General and the Lieutenant-Governor.

In 1872 the then Lieutenant-Governor made several appointments of Queen's Counsel.

In 1873 the Ontario Act, 36 Vict. ch. 3, was passed, declaring that it was and is lawful for the Lieutenant-Governor to appoint Queen's Counsel.

For the reasons already given, I think the power to appoint was in the Lieutenant-Governor without the aid of the statute.

The statute when passed, would, if constitutional, regulate, as it professed, the mode and limit of such power.

Under the authority placing in the charge of the Provincial Government "the administration of justice in the province, including the constitution, maintenance and organisation of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts," I think such appointment within the scope of the Lieutenant-Governor's power.

I answer all the questions submitted, as I understand them, in the affirmative.

I wish to add that I must not be understood as expressing any opinion on certain matters referred to in the argument as to appointments of Queen's Counsel made, or to be made, by the Governor-General since confederation.

RECORD.

No. 28.
Reasons for Judgment.
Burton, J.A., 10th Nov., 1896
—*continued.*

Burton, J.A.:—

It is, I think, much to be regretted that this question had not been settled by judicial decision before any appointments were made, either by the Dominion or Provincial Government. There have been so many appointments now made by both governments that the subject has ceased to be a matter of much public interest, although perhaps at any time it would not have been one in which any great interest would have been taken by the public, and had the question been one merely involving pre-audience in the courts, it would, perhaps, be of too trifling importance to warrant its discussion at this late day; but it has another aspect, and that a very grave one, which cannot be overlooked. By statute a judge of a superior court in Ontario has the power of deputing any of Her Majesty's Counsel to perform his judicial duties, both civil and criminal, at the assizes. Serious consequences might ensue, as, in the event of a Queen's Counsel being so deputed who did not hold his commission from the proper authority, all the proceedings would be illegal and *coram non judice*, and convictions, even in capital cases, invalidated.

But the importance of the general question as to the respective powers of the federal and provincial executives and legislatures cannot be overrated, and it is in that view and with a view to obtaining an accurate and authoritative defining of those powers that this discussion becomes important.

It was strenuously urged by counsel that the case of *Lenoir* v. *Ritchie*, 3 S. C. R. 575, really decided all the points submitted for our consideration, and, so long as that case remained unreversed, it was binding upon this court, and that it was our duty, therefore, to follow that decision, leaving it to some higher tribunal to overrule it.

Before considering that case and stating my reasons for holding that it is not binding upon us, it may be well to refer to the origin of the provincial legislation mentioned in the case submitted.

In January, 1872, the Dominion Government, without any communication with the Government of Ontario, submitted an *ex parte* case to the Secretary of State for the Colonies, in order to obtain the opinion of the law officers of the Crown in England as to the right of the Governor-General or the Lieutenant-Governor to appoint Queen's Counsel.

That opinion, thus obtained, was adverse to the right of Lieutenant-Governors to make such appointments since the Confederation Act, but the same opinion proceeded to state that the Legislature of a province could confer by statute upon the Lieutenant-Governor power to appoint Queen's Counsel, and of settling the practice as to precedence or pre-audience in the courts of the province.

The Provincial Government accordingly passed the Acts in question, which were not vetoed, but, on the contrary, approved of by the Dominion authorities, and no question was apparently raised as to their validity or construction until Mr. Ritchie raised the question of precedence as between him and Mr. Lenoir under a similar Act of Parliament in Nova Scotia; Mr. Lenoir, appointed by the province, claiming precedence over Mr. Ritchie, who had previously been appointed by the Dominion Government.

When the case was before the Court in Nova Scotia, all the five judges constituting that court held the enactment valid, but four of them held that it

was not intended to disturb the precedence of Queen's Counsel appointed before the Act, and upon this point the appeal was taken to the Supreme Court of Canada.

Counsel appears to have been taken by surprise at the *ultra vires* question being raised in the Supreme Court, and said he did not come prepared to argue it and did not profess to do so.

In that court the Chief Justice took no part. Mr. Justice Fournier thought the case not appealable. Mr. Justice Strong and Mr. Justice Taschereau deemed it unnecessary to express any opinion on the validity of the Act, and all three were of opinion that the Act was not retrospective; and that as Mr. Ritchie's commission was granted before the Act, it could not be affected by the subsequent appointment under the Act; but three of the learned judges, Henry, Taschereau and Gwynne, did unquestionably hold that the power of appointing was a part of the royal prerogative, which could only be exercised by the Queen herself, or by the Governor-General as her representative, and that the Provincial Act was *ultra vires* so far as it affected the rank and precedence of Mr. Ritchie. This left the question in a very unsatisfactory state, but as regards those judgments which proceeded on the ground that the prerogative could only be exercised by the Governor-General that view may be considered as completely overruled by the Judicial Committee of the Privy Council in Liquidators of the Maritime Bank *v.* Receiver-General of New Brunswick, [1892] A. C. 437, decided in July, 1892. In this state of things, we have no option in my opinion, but to state our own views notwithstanding the decision in *Lenoir* v. *Ritchie*, 3 S. C. R. 575.

In January of that year, I ventured to express my opinion in Attorney-General for Canada *v.* Attorney-General of Ontario, 19 A. R. 31, at p. 38, in these words: "I do not agree with the construction placed upon the Confederation "Act by the learned counsel for the Appellant, as I have always been of opinion "that the legislative and executive powers granted to the provinces were "intended to be co-extensive, and that the Lieutenant-Governor became entitled "*virtute officii*, and without express statutory enactment, to exercise all prerogatives "incident to executive authority in matters in which provincial legislatures have "jurisdiction; that he had in fact delegated to him the administration of the "Royal prerogatives as far as they are capable of being exercised in relation to "the government of the provinces, as fully as the Governor-General has the "administration of them in relation to the government of the Dominion."

This opinion seems to have been fully sustained and confirmed by the subsequent decision of the judicial committee, to which I have referred.

Lord Watson, in delivering the judgment, refers to the Confederation Act as nowhere professing to curtail in any respect the rights and privileges of the Crown or to disturb the relations then subsisting between the Sovereign and the provinces; the object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest—each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers executive and legislative, and all public property and revenues which had previously

RECORD.

No. 28.
Reasons for Judgment.
Burton, J.A., 10th Nov., 1896
—*continued.*

belonged to the provinces, so that the Dominion should be vested with such of these powers, properties and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. And in a subsequent part of the judgment, he adds: "And a lieutenant-governor, when appointed, is as "much the representative of Her Majesty for all purposes of provincial govern- "ment as the Governor-General himself is for all purposes of Dominion "government."

Before the Act of 1867, each Provincial Governor exercised the prerogatives of the Crown, and they are reserved to them by the Act.

It was further urged by Mr. Scott, who argued the case for the Dominion with his usual ability, that the prerogative right in this case was one inherent in the Sovereign herself, which she alone, and without advice or consent, might exercise how and when she pleases, but I apprehend that that argument was advanced simply because it had been relied on by the Government of the Dominion in its discussion of the question, and not because he himself had much confidence in it. It is, perhaps, sufficient to say that such a contention is somewhat inconsistent with the view that it had been delegated to the Governor-General, and that so far as the prerogative affects Canada, it must be regarded as a trust for the benefit of the people of Canada, to be exercised on the advice of the constitutional advisers of His Excellency the Governor-General or of the Lieutenant-Governor, as the nature of the case may require. I need not, I think, elaborate the question as to the power of the Legislature to deal with the matter as coming within section 92 of the Confederation Act. I refer particularly to sub-sections 4, 13 and 14.

The first of these gives to the Provincial Legislature exclusive jurisdiction to make laws respecting the establishment and tenure of provincial offices, and the appointment and payment of provincial officers, and it has been held that although the appointments of sheriffs and justices of the peace were made by the Crown as part of the prerogative, the right to make them in this province rests with the executive.

Sub-section 13 gives exclusive power to deal with civil rights, one of which is manifestly the right of precedence and pre-audience in the courts.

Sub-section 14 is also very wide, giving to the local legislature exclusive jurisdiction to make laws in relation to the administration of justice in the province, including the constitution, maintenance and organisation of provincial courts, both of civil and of criminal jurisdiction, all of which would be apart from the statute, matter of royal prerogative.

These powers, if they do not include the appointment of Queen's Counsel, are of infinitely more importance than the mere appointment of such an officer, and should, I think, be presumed to include the less.

It would seem to fall within one or other of the sub-sections I have quoted, and the powers of the Dominion Parliament are limited to subjects not assigned to the Provincial Legislature.

If there exists any doubt of its falling within these sub-sections, then I incline to the view that it falls within sub-section 16, as being a matter of a merely local or private nature in the province.

No. 28.
Reasons for Judgment.
Burton, J. A., 10th Nov., 1896
—*continued.*

The question is, to my mind, concluded by the decision in the Privy Council, and I answer the questions as follows:—

1. I am of opinion that since the 29th of March, 1873, it has been and is lawful for the Lieutenant-Governor of Ontario, by letters patent under the great seal in Her Majesty's name, to appoint from among the members of the bar of Ontario such persons as he deems right to be Her Majesty's Counsel for Ontario, or to grant to any such member or members a patent or patents of precedence in the courts of Ontario, and

2. That all such appointments and grants as have been made are valid and effectual.

I answer questions 3 and 4 in the affirmative, and in answer to question 5 I may add that in my opinion, from the reasons given, it follows that such right of appointment in the courts of this province is vested exclusively in the Lieutenant-Governor of Ontario.

Maclennan, J.A.

Maclennan, J.A.:—

This case was stated for the opinion of the Court on the 20th of April, 1892, but was not argued until the 8th of September last, because until then no counsel appeared to contest the validity of the appointments in question. It has now been argued before us by counsel on behalf of the Dominion and Provincial Governments, respectively.

The questions for the opinion of the Court, depend on the validity of the Provincial Statutes, 36 Vict. cc. 3 and 4, now embodied in R. S. O. (1887) ch. 146, entitled an Act respecting Barristers-at-Law.

On the 2nd of July, 1892, after the case had been stated, the case of Liquidators of the Maritime Bank *v.* Receiver-General of New Brunswick, was decided in the Privy Council, [1892] A. C. 437, affirming the same case in the Supreme Court of Canada, 20 S. C. R. 695. That judgment determined conclusively that the Crown stands in the same relation to the several provinces of the Dominion as to the dominion itself, with respect to powers of legislation and government; and that Her Majesty is a part of the government of the provinces in the same sense as she is part of the government of the Dominion. That being so, it follows that those perogatives of the Crown which properly belong or relate to the portion of legislation and government assigned to the provinces, are to be exercised by the respective Lieutenant-Governors as representing Her Majesty, precisely as those belonging to the dominion are to be exercised by the Governor-General. In short the effect of the British North America Act is to distribute prerogative powers as well as powers of legislation between the Dominion and the provinces.

I am of opinion that this decision of the Supreme Court, affirmed as it has been by the ultimate Appellate Court, and the reasons assigned therefor in both courts, oblige us to answer the questions submitted to us in the affirmative, notwithstanding the previous decision in the case of Lenoir *v.* Ritchie, 3 S. C. R. 575, which was relied upon by Mr. Scott. That case certainly involved the same question as the present, and if it had remained unshaken by the judicial committee, we should be obliged to follow it. I think, however, that the ground upon which it was rested by a majority of the court, has now been declared untenable, and that we can no longer regard the case as an authority binding

RECORD.

No. 28. Reasons for Judgment. Maclennan, J.A., 10th Nov., 1896 —*continued.*

upon us; but that we are bound to apply and follow the decision and the reasons of the higher Court. Lenoir *v.* Ritchie, was decided by a bench of five judges, of whom three only concurred in a reason for judgment affecting the present case. That reason was, as expressed in the headnote of the case: "That the "British North America Act has not invested the legislatures of the provinces "with any control over the appointment of Queen's Counsel, and as Her Majesty "forms no part of the provincial legislatures as she does of the Dominion Parliament, no Act of any such local legislature can in any manner impair or affect "her prerogative right to appoint Queen's Counsel in Canada, directly or through "her representative, the Governor-General, or vest such prerogative right in the "Lieutenant-Governors of the provinces."

A perusal of the judgments of those learned judges, I think, shows that their decision rested on a view of the relation of the Crown to the provinces which the judicial committee has decided to be erroneous. At p. 622, Mr. Justice Taschereau says: "Her Majesty does not form a constituent part of the provincial "legislatures, and the Lieutenant-Governors do not sanction their bills in Her "Majesty's name." At p. 634, Mr. Justice Gwynne, in like manner, says:— "The Queen forms no part of the provincial legislatures as she does of the "Dominion Parliament. The provincial legislatures consist, in some provinces, "of such subordinate executive officer, and of a legislative assembly; and in "others of such executive officer, and of a legislative council and assembly." And at p. 635, he says:—"Nothing can be plainer, as it seems to me, than that "the several provinces are subordinated to the Dominion Government, and that "the Queen is no party to the laws made by those local legislatures, and "that no Act of any of such legislatures can in any manner impair or affect "Her Majesty's right to the exclusive exercise of all her prerogative powers, "which she continues to enjoy untramelled, except in so far as we are obliged "to hold that, by the express terms of the British North America Act, or by "irresistible inference from what is there expressed, she has, by that Act, "consented to being divested of any part of such prerogative." Although not indicated with the same clearness, it is evident that Mr. Justice Henry rested his judgment on the same ground, that the appointments in question were an exercise of the royal prerogative, and to be exercised by the Sovereign through the governor-general only. The view of the relation of the Crown to the provinces, expressed in those reasons, can now no longer be upheld.

In the Maritime Bank case, at p. 441, Lord Watson, delivering the opinion of their lordships, says: "The object of the Act (of Confederation) was neither to "weld the provinces into one, nor to subordinate provincial Governments to a "central authority, but to create a federal Government in which they should all be "represented, entrusted with the exclusive administration of affairs in which they "had a common interest, each province retaining its independence and autonomy. "That object was accomplished by distributing, between the Dominion and the "provinces, all powers executive and legislative, and all public property and "revenues which had previously belonged to the provinces; so that the Dominion "Government should be vested with such of these powers, property, and revenues "as were necessary for the due performance of its constitutional functions, and that "the remainder should be retained by the provinces for the purposes of provincial

"Government. But, in so far as regards those matters which, by section 92, are "specially reserved for provincial legislation, the legislation of each province "continues to be free from the control of the Dominion, and as supreme as "it was before the passing of the Act." He then quotes the well known passage from Hodge *v.* The Queen, 9 App. Cas. 117, declaring that within the assigned limits of subject and area, the local legislatures are supreme, and have the same authority as the Imperial Parliament or the Parliament of the Dominion. He then deals with the relation of the Crown to the provinces, and declares (p. 443) that "a Lieutenant-Governor, when appointed, is as much the "representative of Her Majesty for all purposes of provincial Government as the "Governor-General himself is for all purposes of Dominion Government."

Such being the executive and legislative powers of the provinces, if this matter of the appointment of Queen's Counsel is a provincial matter, I think it follows that it can be dealt with by the Government and legislature of the province. In my judgment it is a provincial matter. In Lenoir *v.* Ritchie, 3 S. C. R. at p. 631, Mr. Justice Gwynne described the nature of the office in question as follows: "It was not disputed, as indeed it could not be, that the "right to appoint Queen's Counsel is a branch of the royal prerogative, that it "(equally with the power to grant letters patent of precedence. to make "sergeants-at-law, judges, knights, baronets, and other superior titles of dignity "and honour) flows from the fountain of honour which has its seat and source in "the person of royalty. In England, in point of form, a Queen's Counsel is the "standing counsel of the Queen, retained by her to be of her counsel in all "matters in which she may require his services. Substantially, the title is one "of honour and professional rank, conferring precedence upon the person "invested with the honour. Though, in point of fact, the recipients of this "honour are nominated and selected by the Chancellor for the time being, yet, in "point of form, the Queen's pleasure is taken upon their appointment.

"In the Colonies the appointments were made sometimes, I believe, under the "royal sign-manual, but more usually by letters patent under the great seal of "the particular province of whose bar the recipient is a member, signed by Her "Majesty's representative within the province in virtue of the authority vested in "him by his commission appointing him Her Majesty's representative, and in "pursuance of royal instructions from time to time given to him, governing him "in the execution of the powers vested in him in respect of matters in which the "royal prerogative is concerned.

"An Act of Parliament passed by the old legislatures of the respective "provinces which now constitute the Confederated Provinces of the Dominion of "Canada, under the constitutions which they had before confederation, of which "legislatures Her Majesty was an integral part, as she is of the Imperial "Parliament, upon being assented to by the Crown, was competent to divest "Her Majesty of the right to exercise within the province any portion of her "royal prerogative."

Now, whether we regard the appointment as a retainer by the Queen of a standing counsel to be of counsel for Her Majesty in all matters in which she may require his services; or whether we regard it as a mark of honour and professional rank, conferring precedence upon the person invested with the honour,

RECORD.

No. 28.
Reasons for Judgment. Maclennan, J.A., 10th Nov., 1896 —*continued.*

inasmuch as Her Majesty is a part of the provincial Government, she must have power, as part of such Government, to make the appointment through the Lieutenant-Governor, and the Legislature must have power, with her assent, to legislate on the subject. The questions submitted to us do not involve the right of the Dominion Government to make appointments, and I express no opinion on that right, but to my mind the right and power of the provincial Government and Legislature are clear. If the appointment be regarded as a general retainer, as it was for a long time, and as I think it still is in England, the provincial Government must have the right and power to make it, for that Government, in the conduct of its affairs, and particularly in the administration of the criminal law, has constant occasion to employ counsel; and if it be regarded as a title of honour and professional rank, the same conclusion follows. The ordinary civil and criminal courts are provincial; legal education is provincial; the bar is provincial. The selection of Queen's Counsel is made from the bar, a class which is provincial. During the union of Upper and Lower Canada, before confederation, the appointments were provincial, and were expressed to be for Upper or Lower Canada, according to the bar of which the appointee was a member. If the appointment be a mark of distinction for eminence in the profession of the law, and at the bar, then, inasmuch as each province has its own system of laws, and its own class of men learned in those laws, and qualified and authorized to act as counsel, it is surely the provincial Government which is best qualified in every case to say who those members of their respective bars may be, who by their learning and ability, and by their professional eminence, are most entitled to the distinction of being appointed Queen's Counsel.

I think when it is established that the Queen is a part of the provincial Government, all doubt whatever of the right and power of the Government and Legislature of the province in this matter is removed.

I think it comes distinctly within sub-sections 4, 13 and 14 of section 92 of the British North America Act. I think it is and always has been a provincial office, confined in all its functions within the same territorial limits as the office of barrister. The Queen's Counsel, indeed, is merely a superior kind of barrister; and if as a barrister he is a provincial officer, which cannot be disputed, it is not easy to see how when he is merely promoted to a higher rank or grade in his profession, he is not still a provincial officer.

I do not say there may not be Dominion Queen's Counsel. There are Dominion Courts, and parliament can determine who shall act as counsel in such Courts. This has been done by the Supreme and Exchequer Courts Act, R. S. C. ch. 135, sub-sections 16 and 18, and the Maritime Court Act, R. S. C. ch. 137, section 11. The effect of these Acts is to make all provincial barristers dominion barristers as well, for the limited purpose of conducting business in the Dominion Courts.

Then I think the office is a civil right in the province. It is a civil right undoubtedly; and inasmuch as its exercise is confined within the provincial limits, and as the office has no significance or force whatever outside the province, it comes, as it seems to me, literally within sub-section 13.

I think also it comes within sub-section 14. The office has no meaning

whatever except as it relates to the administration of justice, and the constitution and organisation of the courts of the province and the procedure therein. The right of audience and pre-audience in the courts of the province is unquestionably a matter for the government or legislature of the province alone to regulate, and being involved in the appointment of Queen's Counsel, must equally be of provincial jurisdiction. It is said that inasmuch as the appointment of the judges of provincial courts is a Dominion matter, and as Queen's Counsel have long been eligible to be called upon in emergency to act as judges, the provinces can have no authority. The answer to that is that but for the express authority given to the Dominion Government to appoint the judges, their appointment would also have been a matter within sub-sections 4 and 14 of section 92. The administration of justice, and the constitution, maintenance and organization of provincial courts both of civil and of criminal jurisdiction being expressly assigned to the province, the judges of those courts and their appointment would plainly be within sub-section 4, but for the express enactment to the contrary in section 96.

If the present subject had not come expressly, as I think it does, within sub-sections 4, 13 and 14, I should have thought it would have come within sub-section 16 as a matter of a merely local nature in the province. But it seems to be determined by the judicial committee that the function of sub-section 16 is to cover matters, in a provincial sense local, which have been omitted from the previous enumeration: Attorney-General of Ontario *v.* Attorney-General for Canada, [1896] A. C. 348, at p. 365.

The result is, therefore, in my opinion, that the provincial government and legislature have jurisdiction over the subject of the appointment of Queen's Counsel from among the members of the Bar of Ontario, and that we ought to give an affirmative answer to the questions in the case stated.

Street, J.:— Street, J.

I entirely concur in the view of the Chief Justice and the other members of the Court that Lenoir *v.* Ritchie, 3 S. C. R. 575, should no longer be looked upon as a binding authority by reason of the later decisions of the Privy Council to which they have referred, and I agree generally in the conclusions at which they have arrived.

The case submitted to us, however, states that certain members of the bar of this province have, since the British North America Act came into force, received patents from the Dominion Government purporting to create them Queen's Counsel with precedence in the courts, and I think the fourth question submitted to us requires that we should determine their standing in the provincial courts under such patents.

The question thus raised is one which seems to me to admit of as little doubt, bearing in mind the effect of the Privy Council decisions referred to, as the other questions. Certain of Her Majesty's Courts are constituted by the authority of the Dominion Legislature under the powers committed to it by the British North America Act: certain others of Her Majesty's Courts are constituted by the authority of the Ontario Legislature under the powers committed to it by that

RECORD.

No. 28. Reasons for Judgment. Street, J., 10th Nov., 1896 —*continued.*

Act: neither legislature has the right to interfere with the procedure or practice in the Courts constituted by the other. There is but one way to prevent the clashing, in any of these courts, of conflicting claims to precedence, and that is to treat the patents of the Dominion as regulating precedence in the courts of the Dominion, and the patents of the Province of Ontario as regulating precedence in the courts of the province. So far as the title of "Queen's Counsel" is concerned, I agree that, as the Queen is a constituent part of the legislature of this province, as well as of that of the Dominion, the title may be conferred by the Lieutenant-Governor, her representative here, as well as by the Governor-General, her representative in the Dominion.

Therefore I am of opinion that all four questions submitted should be answered in the affirmative.

No. 29. Judgment of the Court of Appeal for Ontario, 10th Nov., 1896.

In the Court of Appeal for Ontario.

Tuesday the 10th day of November, 1896.

In the matter of the appointing of Queen's Counsel for the Province of Ontario, and of the precedence or pre-audience of members of the bar of the province in the provincial courts.

Referred for hearing and consideration to the Court of Appeal for Ontario under 53 Victoria, chapter 13, by the Lieutenant-Governor of Ontario by Order in Council on the 16th day of April A.D. 1892.

This is to certify that the case in the above matter referred by the Lieutenant-Governor of Ontario to the Court of Appeal as aforesaid, and the matters and questions arising therein as set forth in the said case being the following:—

1. Whether since the 29th of March 1873 it has been and is lawful for the Lieutenant-Governor of Ontario by letters patent in the name of Her Majesty under the great seal of Ontario.

(A) To appoint from among the members of the bar of Ontario such persons as he deems right to be during pleasure Her Majesty's Counsel for Ontario.

(B) To grant to any member or members of the bar of Ontario a patent or patents of precedence in the Courts of Ontario.

2. Whether appointments of Queen's Counsel and grants of precedence such as are in the case stated to have been made by the Lieutenant-Governor of Ontario since the said date, are and would be valid and effectual to confer on the holders thereof the office and precedence thereby purported to be granted.

3. Whether members of the Bar of Ontario from time to time appointed as aforesaid by the Lieutenant-Governor of Ontario by Letters Patent in Her Majesty's name under the Great Seal of Ontario to be Her Majesty's Counsel for Ontario and members of the Bar of Ontario to whom from time to time patents of precedence in the Courts of Ontario have been or may be granted by the Lieutenant-Governor of Ontario as aforesaid in conformity with the limitations of the Revised Statute of Ontario (ch. 139) have or shall become entitled to such precedence in the Courts of Ontario as have been or may be assigned to them by

No. 29.
Judgment of the Court of Appeal for Ontario, 10th Nov., 1896 —*continued.*

such Letters Patent after the several persons or classes referred to in the 3rd, 5th and 7th sections of the said Revised Statute of Ontario.

4. Whether the position as to precedence in the Courts of Ontario of the remaining members of the Bar of Ontario not comprised within the classes referred to in the said 3rd, 5th and 7th sections and not holding patents issued by the Lieutenant-Governor of Ontario conferring on them the office of Queen's Counsel for Ontario or granting to them precedence in the courts of Ontario, is as between them and those holding such patents as aforesaid subsequent to those holding such patents and as between themselves in the order of their call to the Bar of Ontario,—came on to be argued before this court on the 8th and 9th days of September 1896, and upon hearing counsel as well for the attorney-general of the province of Ontario, as for the attorney-general of the Dominion of Canada, this court was pleased to direct that the matters and questions arising on the said case should stand over for judgment, and the same having come on this day for judgment, it was ordered and adjudged that each of the said questions should be answered in the affirmative.

(Sgd.) A. GRANT,
Registrar.

Issued 16th January, 1897.

In the Privy Council.

No. 3 of 1897.

On Appeal from the Court of Appeal for Ontario.

BETWEEN

THE DOMINION OF CANADA *Appellant,*

AND

THE PROVINCE OF ONTARIO

Respondent.

RECORD OF PROCEEDINGS.

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