Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Attorney General for the Dominion of Canada v. *The Attorney General for the Province of Ontario, from the Court of Appeal for Ontario; delivered 8th December* 1897.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
LORD DAVEY.
SIR HENRY DE VILLIERS.
SIR HENRY STRONG.

[*Delivered by Lord Watson.*]

On the 29th of March 1873, the Legislature of the Province of Ontario passed two Acts, entitled respectively, "An Act respecting the appointment "of Queen's Counsel," and, "An Act to regulate "the precedence of the bar of Ontario." These statutes were consolidated, and their provisions re-enacted by Cap. 139 of the Revised Statutes of Ontario, passed on the 31st December 1877. The Act of 1877 makes regulations for the qualification of barristers-at-law, and their admission to practice at the bar in Her Majesty's Courts of Law and Equity in Ontario. It declares that it "was and is lawful for the Lieutenant

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" 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." It also enacts that 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 Courts of Ontario. In virtue of the authority thus conferred upon him, the Lieutenant Governor has, from time to time, exercised the right of issuing letters patent, in Her Majesty's name, to members of the provincial bar.

By the Canadian Act, 38 Vict. Cap. 11, which established a Supreme Court, and a Court of Exchequer for the Dominion, all persons who are barristers or advocates in any of the provinces were permitted to practise as barristers, advocates or counsel in the Supreme Court; and the same enactment has been repeated in section 16 of Cap. 135 of the Revised Statutes of Canada. The Governor General of Canada has, on various occasions between May 1879 and January 1890, issued letters patent, in Her Majesty's name, under the Great Seal of Canada, by which he appointed certain members of the provincial bar of Ontario to be Queen's Counsel; and, on these occasions, the letters patent did not specify any territory or Court for which the appointment was made, or in which it was to receive effect. The Government of Ontario does not appear to have at any time disputed that it was within the exclusive competency of the Governor General of Canada to appoint members of the bar to the rank of Queen's Counsel in the Courts of the Dominion; but it has carefully refrained from making the concession that the

Governor General has any right to appoint Queen's Counsel for the Province from the provincial bar. On the other hand, the Dominion Government has persistently maintained, that the appointment of Queen's Counsel to represent Her Majesty, whether in the Canadian or in the provincial Courts, involves an exercise of the Royal prerogative, which belongs to the Governor General of the Dominion. The main reason put forward in this appeal, by the Attorney General for the Dominion, is to the effect that, "the "Lieutenant Governor of Ontario does not "entirely represent the Crown in respect of the "prerogative right of the Crown; and in par- "ticular does not represent the Crown in respect "of the prerogative right or power of appointing "Queen's Counsel for Ontario, or granting "patents of precedence in the Courts of "Ontario."

In order to ascertain whether he was legally justified in issuing these patents, the Lieutenant Governor, availing himself of the provisions of the Provincial Act, 53 Vict. cap. 13, referred five separate questions to the Court of Appeal for Ontario, for hearing and consideration. The Attorney General for the Dominion, who is the Appellant to this Board, appeared and took part in the discussion; and, on the 10th November 1896, the Court, consisting of Chief Justice Hagarty, with Justices Burton, Maclennan, and Street, answered four of the queries in the affirmative, with the effect of sustaining the legality of the action of the Lieutenant Governor. No answer was made to the fifth query, which is framed upon the assumption of the other queries being answered in the negative.

In order to explain the issue raised by this appeal, it is sufficient to refer to the terms of the first query, which are as follows:—

"(I.) Whether 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
" 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."

The second and third queries relate to the validity of the rights conferred upon the patentees, and present the same questions in a different aspect. The fourth query relates to the question of precedence, in the Courts of Ontario, between those members of the bar who are the holders of patents of precedence and those who are not. The points thus referred to the determination of the Court of Appeal do not directly raise any controversy in regard to the jurisdiction and power of the Governor General of Canada; they are strictly limited to the rights of the Lieutenant Governor of Ontario to appoint Queen's Counsel from the provincial bar, whose functions are limited to the province, and to grant patents entitling the holder to take precedence at the bar of the provincial Courts.

The appointment of Counsel for the Crown, and the granting of precedence at the bar to certain of its members, are matters which do not appear to their Lordships to stand upon precisely the same footing. In England the first of these rights has always been matter of prerogative in this sense, that it has been personally exercised by the Sovereign, with the advice of the Lord Chancellor, the appointment being made by letters patent under the sign manual. In early times the appointment was accompanied with a fee or retainer of moderate amount, but

that formality has long since fallen into abeyance. The terms of the patent have been limited to appointing the grantees to be of counsel for the Sovereign, subject to the condition that they are to take precedence *inter se* according to the priority of their appointment. Royal patents of precedence *inter se* were in use to be granted to serjeants-at-law who did not derive their position from the Crown (see Note 16 C. B., N. S. 1). Beyond these limits the Sovereign has never, in modern times, professed to confer upon Crown Counsel, or other members of the bar, a right of precedence or pre-audience in the Courts of England. These are matters which have been regulated in practice, either by the discretion of the bench, or by the courtesy of the profession. The effect of an appointment as Queen's Counsel is, that the holder cannot appear in Court, as counsel for any party litigating with the Crown, unless he has obtained a license from Her Majesty.

The exact position occupied by a Queen's Counsel duly appointed is a subject which might admit of a good deal of discussion. It is in the nature of an office under the Crown, although any duties which it entails are almost as unsubstantial as its emoluments; and it is also in the nature of an honour or dignity, to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred. But it does not necessarily follow that, as in the case of a proper honour or dignity, the elevation of a member of the bar to the rank of Queen's Counsel cannot be delegated by the Crown, and can only be effected by the direct personal act of the Sovereign. Even in the case of titles of honour, it does not appear to be doubtful that the Sovereign may, with the assistance of an Act of the Legislature, exercise the prerogative in a manner which would, but for its provisions,

be unconstitutional. It was adjudged by the House of Lords, in the case of the Wensleydale Peerage, that it was beyond the constitutional right of the monarch to confer upon a life-peer of any rank whom Her Majesty might chose to create the privilege of sitting and voting in parliament. But life peerages carrying that privilege have since then been created by the Crown, under the authority of, and to the extent permitted by the "Appellate Jurisdiction Act 1876."

In the Province of Ontario, the right of appointing Queen's Counsel has been committed to the Lieutenant Governor by an Act passed by the Provincial Parliament, with the sanction of the Crown. Assuming it to have been within the competency of the Provincial Legislature to vest that power in some authority other than the Sovereign, the Lieutenant Governor appears to have been very properly selected as its depositary; seeing that, by Section 65 of the British North America Act, he is entrusted with the whole executive powers, authorities and functions, which before the Union had been vested in or were exerciseable by the Governor or Lieutenant Governor of the Province of Canada, in so far as these powers, authorities and functions may be necessary for the government and administration of the new province of Ontario.

The next, and only other point requiring to be considered in this case is, whether the Legislature of Ontario had jurisdiction to confer upon the Lieutenant Governor those powers which are now embodied in the revised statute of December 1877. That is a question which can only be solved by reference to the provisions of the Imperial Act of 1867; and there are three of the enactments of Section 92 which appear to their Lordships to have an immediate bearing upon it. The first head of that clause gives to the Legisla-

ture of each province exclusive authority to make laws, from time to time, for the amendment of the constitution of the province, "except as "regards the office of Lieutenant Governor." by (4) of the same clause, "the Establishment "and tenure of provincial offices, and the "payment of provincial officers." Again by the 14th head, the Legislature is empowered to make laws in relation to the administration of justice in the province," including the "constitution, maintenance and organization of "provincial Courts, both of civil and criminal "jurisdiction, and including procedure in civil "matters in these Courts."

By the combined effect of these enactments it is entirely within the discretion of the provincial legislature to determine by what officers the Crown, or in other words the executive government of the province, shall be represented in its Courts of law, or elsewhere; and to define by Act of Parliament the duties, whether substantial or honorary, which are to be incumbent upon these officers, and the rights and privileges which they are to enjoy. The revised statute of 1877, in so far as it relates to the appointment of Queen's Counsel, is, in the opinion of their Lordships, within the limits of that legislative authority; and, that being so, there appears to them to be no ground for the suggestion that its provisions, when given effect to by the Lieutenant Governor, will constitute an encroachment upon the prerogative of the Crown, or upon the rights of any representative of the Crown to whom, by the terms of his commission, the right of appointing counsel to represent the Sovereign may have been delegated.

On the other hand the enactments of Section 92 (14) confer upon the provincial legislature, in wide and general terms, power to regulate the

constitution and organization of all Courts of law in the province, civil or criminal. It is no doubt true, that with two exceptions, these being the Courts of Probate in Nova Scotia, and New Brunswick, the appointment of the Judges of the Superior, District, and County Courts in each province is committed to the Governor General of Canada by Section 96, subject to the condition that, until the laws of the Provinces are made uniform, these judges must be selected from the bar of the province in which the appointment is made. And, by Section 100, the right to fix the salaries, allowances and pensions of these judges, except in the case of the Courts of Probate in Nova Scotia and New Brunswick, is vested in the Parliament of Canada, upon which there is also imposed the duty of providing the salaries, allowances and pensions so fixed. But in all other respects the Courts of each province, including the judges and the officials of the Court, together with those persons who practise before them, are subject to the jurisdiction and control of the provincial legislature; that legislature and no other, has the right to prescribe rules for the qualifications and admission of practitioners, whether they be pleaders or solicitors. Their Lordships, in these circumstances, do not entertain any doubt that the Parliament of Ontario had ample authority to give the Lieutenant Governor power to confer precedence by patent upon such members of the bar of the Province as he may think fit to select.

For these reasons, their Lordships will humbly advise Her Majesty to affirm the decision appealed from. Following the rule which has been hitherto adopted in similar cases, they will make no order as to costs.