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THE PRIVY COUNCIL.[1]

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In point of history, the Privy Council, as a judicial tribunal, is, perhaps, unique among existing courts, and that history has, from its beginning, an absorbing interest for the student of constitutional law. But it is with the founding of the great colonies and plantations in America, at the beginning of the seventeenth century, that the Privy Council, charged with the supervision of the overseas dominions of the Crown and invested with the authority of the Crown, legislative, executive and judicial, over the colonies, assumes a capital importance in relation to the evolution of government on this continent. Long before, the supreme judicial authority, within the narrow seas, had passed to Parliament—an authority which eventually became exercisable by the House of Lords exclusively, just as the House of Commons successfully appropriated the Power of the Purse, the exclusive authority to levy taxes.

Through the seventeenth and eighteen centuries, down to the separation of the thirteen colonies, the judicial authority of the Privy Council was regularly exercised, principally in deciding appeals from the colonial courts, along with a legislative and executive authority which made itself felt chiefly in the disallowance of colonial legislation. These judicial activities possess in one particular a special historic interest for lawyers. The Privy Council, in its judicial capacity, did not hesitate to disregard—that is to say, to treat as invalid and void—the ordinances and statutes of colonial legislatures, when those ordinances and statutes exceeded the ambit of the powers committed to the legislature or when the legislature had failed to observe some inhibition found in the charter or other

[1] Portion of a speech delivered by the Right Honourable Mr. Justice Duff, P.C., at the Annual Dinner of the Ontario Bar Association, 22nd May, 1925.

instrument of colonial government. This is the first practical application to the statutes of a legislature of the doctrine which, in modern times, has come to be known as the doctrine of *ultra vires;* and, acting on the precedent set by the Privy Council, it not seldom happened that the colonial courts themselves refused effect to legislation enacted in disregard of some restriction or of some rule or principle the legislature was under a legal obligation to observe.

In fact, there appears to be little doubt that it was this practice of the Privy Council and of the colonial courts which prepared the way for the ultimate adoption by the people of the United States of the principle and practice of the judicial review of legislation—the principle, that is to say, which recognizes the jurisdiction of the courts to disregard as a legal nullity any enactment of a legislative body which is obnoxious to a limitation affecting the powers of the legislature and imposed upon it by superior authority. In the colonial days, the superior authority was the Sovereign in Council or the Sovereign in Parliament. After the revolution, the sovereignty of the people was substituted for the sovereignty of the Crown; and the limitations and restrictions imposed by the new sovereign, and expressed in the form of a constitutional instrument, came to be regarded in the same light as those expressed in the colonial charters. This last step was by no means universally accepted as an obvious one, and the authority of the courts to examine the validity of legislation, especially the legislation of Congress, was vigorously assailed. But powerful influences had been at work. Coke, in Dr. Bonham's case had pronounced the dictum, "when an Act of Parliament is against common right and reason . . . the common law will control it, and adjudge such act to be void." To the same effect there were dicta of Hobart and of Holt. Whatever the words were meant to convey, they became a formidable weapon in the hands of American revolutionary lawyers, who were assailing the authority of Parliament as touching taxation in America. And it was the doctrine expressed in these words of Coke which provided Otis and the other lawyer leaders of the American Revolution with the substance of their appeal, addressed on purely legal grounds, as they conceived it, to the people of the colonies. The doctrine, as they expounded it, was, that, for all Englishmen there was a "fundamental law," which no Parliament could take away. Blackstone had been widely sold and read, especially in New England, and through Blackstone American lawyers were familiar with the principle of Parliamentary sovereignty established by the Settlement of 1688; but there can be little doubt that

it was this appeal of James Otis and his associates, addressed to a people who were familiar with the conception of a delegated and limited legislative power, and with the idea of courts endowed with jurisdiction to treat as invalid attempts to transcend the limits of that power, it was this appeal, falling on such ears, that created a profound distrust of an uncontrolled legislature, as a menace to individual liberty; and that, as I have said, prepared the way for the rejection of parliamentary sovereignty, and the ultimate adoption of the principle of judicial review, which is a corner-stone of American polity.

With the secession of the thirteen colonies, the responsibilities of the Privy Council on this continent were, of course, enormously reduced, in importance as well as in extent; but, mainly through the genius of Pitt, who, with Oliver Cromwell, is entitled to be called one of the founders of the British Empire—through the genius and energy of Pitt, in the meantime vast possessions had been added to the dominions of the Crown: India, with her teeming millions, her immemorial customs and rites; Canada, with her French population, governed by the custom of Paris; innumerable islands of the sea; later the Cape of Good Hope, with her Dutch population, under the sway of the Roman-Dutch law; the Australasian colonies; the settlements in Indo China and in the China Sea. These vast possessions fell under the guardianship of the King in Council, and at length, in the reign of William IV., a little less than a century ago, the Judicial Committee received statutory recognition and became a court in the ordinary sense. And at this point begins the history of the Judicial Committee as we know it to-day.

You will recall the incident of Coke reminding James I. that he could not be permitted personally to take his seat in one of his own courts, or to intervene personally in the administration of justice by his judges. It is in this sense that the Judicial Committee is a court. The formal order of the Privy Council is, of course, an order made by His Majesty on the advice of his Council as a whole. But just as the King can do no executive act effectively without the advcie of a competent Minister, so the King in Council can do no judicial act constitutionally except upon the advice of his Judicial Committee.

The responsibility of exercising this jurisdiction has always been an onerous one. It has been undertaken by the eminent men who have exercised it during the last century, in response to a sense of duty to the people of the British dominions throughout the world. And it has been exercised, as a rule, by men who, on account of their character, on account of their learning, on account of their professional eminence, on account of their political experience, have been

qualified for that duty in a unique degree. Glance at the Privy Council reports, and consider a few of the names. There you will find Lord Brougham, that man of vast and varied powers, who, in the Queen's case, gave an imperishable example of professional intrepidity; whose eloquence and energy roused the nation to the necessity of a sweeping reform of the law; who, notwithstanding many faults and imperfections, was a leader of infinite power and resource in all the humane and progressive causes of his time.

There you will see the name of Lord Lyndhurst, who, the son of an artist was born in Boston in 1774, and whose talents and force of character brought him rapidly to the forefront of English public life, made him three times Lord Chancellor, and for two generations one of the dominating influences in the Tory party in England. The cynical Lord Westbury declared his deliberate conviction that Lord Lyndhurst's was the finest judicial intellect our race has produced. He was careless of his professional reputation, and it was said he was not a "lawyers' judge." His oral judgments were masterpieces and models; but he was more concerned with the practical application of the broad principles, to the precise facts and equities of the case in hand, than with abstract legal discussion. His written judgments, as a rule, did not reach the same standard of excellence, having usually been written, it is believed, by somebody else. At his death it was said, such was his judicial reputation in England, that, if a wise man had a good cause, he would, before all other men, wish to have Lord Lyndhurst for his judge. Walter Bagehot, though he detested the politics of Lord Lyndhurst, and did not hesitate to charge him with insincerity and tergiversation, declared that he was the greatest magistrate who had ever adorned the English Bench, and Bagehot probably expressed the opinion of instructed Englishmen of his time.

There, also you will observe a long succession of great lawyers. Parke and Willes, each a living carnation of the common law; Dr. Lushington, whom Westbury placed only second to Lord Lyndhurst in intellectual power and scope; Lord Kingsdown, who, according to the tradition at Downing Street, was three times offered the Lord Chancellorship, which he as often refused. For years after the termination of his practice at the Bar, Lord Kingsdown sat regularly in the Judicial Committee, bringing all of the wealth of his learning and of his ripe judgment and experience and his powers of industry to bear upon the decision of colonial appeals, and, like most of his colleagues, with no reward except the approbation of the profession of which he was so distinguished an ornament.

There you will meet the name of Jessel, the Jewish son of a

fishmonger. He obtained a seat in the House of Commons, made a few political speeches, that attracted precisely the attention they deserved, which was none. But one day a legal question arose, that greatly interested Mr. Gladstone, who was then Prime Minister. On that question Jessel made a speech, and, a vacancy having occurred shortly afterwards in the office of Solicitor General, Jessel was at once appointed on the initiative of the Prime Minister himself. The great Liberal leader used to say that Jessel, speaking in the House of Commons on a legal question, spoke in the accents of an angel; while on politics he was incapable of anything but partisan commonplace. Mr. Gladstone was not particularly fond of lawyers as a profession. He always objected to the salaries of the judges as much too high. He was horrified at the fees earned by the law officers of the Crown. He used jocularly to say, glancing at those same fees, that lawyers in public life had one sovereign infirmity—they could never keep their hands out of the till; and, he was wont to add, there was one exception, and that was Jessel, the Jew. Jessel was the darling of solicitors. He despatched judicial business with miraculous rapidity. Only once, it is said, in his judicial career did he reserve a judgment. Never, I believe, was he reversed.

Then, to turn to the later Lord Chancellors and Lords of Appeal, what a succession of giants! Lord Cairns, with hardly a peer in mastery of the whole field of jurisprudence, with gifts of character and intellect and a power of speech that made him a parliamentary force only inferior to Gladstone and Disraeli; Lord Selborne, whose name is always rightly coupled with that of Lord Cairns in judicial renown; Westbury, whom all men of his time counted a genius; Watson and Macnaghten, the Scotsman and the Scotch-Irishman, both endowed with statesmanlike insight and, at the same time, possessed by the very genius itself of law and judicature.

These are a few of the men who, during the past century, wielded the authority of the Judicial Committee of the Privy Council. I have said that the jurisdiction exercised by that tribunal is unique in its range. In its scope it embraces the legal interests of one-fifth of the human race. It is concerned with almost every known system of jurisprudence, and with juridical institutions of every type, and with every kind of dispute. In the course of a single year, the ancient legal institutions of Hindus and Mahometans, the political constitutions of great modern states like Canada and Australia, are the subjects of its deliverances. Yes, and the customs, just taking form as organized law, of some African people only now emerging into a

rudimentary civilization. Imagination without actual experience is hardly adequate to realize the infinite variety of it all. . . . .

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It will occur to almost anyone who thinks of the vast scope of this jurisdiction of the Judicial Committee that occasions must arise when something more is called into play than learning and mastery of legal principle, something more than sound judgment and single-eyed rectitude of intention.

And there are times unquestionably when the chief desideratum is something akin to statemanship. And it is a fact that the members of the tribunal have in the past possessed, and do to-day possess this important qualification for their high duty—they are for the most part men experienced and practised in public affairs.

The Lord Chancellor and the ex-Lords Chancellor are all men who spent many years in the House of Commons and in active political life. All, while still members of the House of Commons, held high office, some as law officers of the Crown, some as heads of the great Departments of State. Behind every one of them, lie long years of conspicuous service in statecraft.

And all this is equally true of others of the Law Lords — Lord Dunedin, Lord Atkinson, Lord Shaw and Lord Carson, who have not held the office of Lord Chancellor. Let me not be misunderstood: the Judicial Committee has never been wanting in great lawyers whose working lives and whose great gifts have been devoted exclusively to the Law, such as, to mention two shining instances, Lord Parker and Lord Sumner. But I believe it is in no small degree because the Judicial Committee has always included among its members so many men who, acknowledged masters and leaders of their profession, have also enjoyed a wide experience in the active conduct of public business—I believe it is largely due to this, that this body of judges, sitting now as the House of Lords and now as the Judicial Committee, possesses a weight and efficiency as a supreme Judicial tribunal unequalled in the history of judicial institutions.

This is not the occasion for discussing proposals which are sometimes advanced touching the abrogation or the curtailment of the right of appeal to the Privy Council from the courts of this country. The responsibility of judicature is one of the most essential responsibilities of government. And in a country with a constitution such as ours, perhaps the weightiest of all responsibilities of judicature, is that of interpreting and applying the provisions of the organic statute touching the distribution of legislative and executive powers. The

duty of finally determining such questions is one which the people of this country have not borne upon their own shoulders. We have looked to the Mother Country to provide for the discharge of that great responsibility. We have looked to them, and by our desire they have made provision for the discharge of that duty, and for that purpose we have had the services, as I have said, of a tribunal supremely equipped for the task—equipped for it in unexampled degree. It will, I am convinced, be many a long year before we shall bring ourselves to abandon entirely the privilege of invoking the aid of the Judicial Committee in the determination of justiciable disputes—especially in the region of constitutional law. But the time may arrive when the people of this country will conclude that this responsibility, the burden of which has been so long and so generously borne by others, should, in great degree at all events, be assumed by ourselves. When that time comes, be it soon or late, I am confident that we shall act in a manner not unbecoming a great people, that we shall not be unmindful of the great, disinterested services of which we have been the beneficiaries. As I have said, I am not discussing the merits of the question, and of course I express no opinion upon it. But of this I am confident, and I am sure you will agree with me, that, if this change is to take place, and if the responsibility for this high duty is to be assumed mainly or exclusively by the legal profession of Canada, then, whatever be the method of its constitution, the tribunal upon whom the responsibility shall fall can set before itself no loftier aim, can be actuated by no higher, no more exacting ambition, than to walk worthily in the spirit of the great judicial tradition of which it has received the keeping.

Just now I spoke of the Bar of Canada as a whole, as if, in its professional capacity, it should be considered a unit, and I did so designedly. Here, we have flourishing side by side as living systems by which the business of men is governed, the two great systems of law which, roughly speaking, divide between them jurisdiction over the civilized world. Yet our experience has shewn that there is no impassable chasm separating practitioners in these two systems. Counsel disciplined in the common law find themselves at home in causes in which the principles of the civil law are to be applied. Mr. Lafleur is constantly briefed in appeals to the Supreme Court of Canada from the common law provinces. In that court, judges trained in the common law sit together with those trained in the civil law, and these judges deliver judgment indifferently, now in common law appeals, and now in civil law appeals. Lawyers of this country are coming to think, and as time goes on, more and more will come

to think, in terms not of the civil law only, or of the common law only, but in terms as well of the broader principles upon which both structures are reared. This is a fact of great professional significance in many points of view. It justifies hopes and predictions as to the development of law in this country; it justifies hopes and predictions as to the role the legal profession of this country may be expected to play in the great field of international jurisprudence. But, Mr. President, I do not dwell upon that. The habitual co-operation of the whole Bar of this country, without distinction of locality or race, is a fact of far more than professional importance. It is not the language of rhetoric, but only the language of sober truth, to say that the legal profession has given a great example of co-operation and of the fraternal concord which such co-operation may generate. It is no exaggeration to say that the legal profession has been and is a powerful agency of union and harmony.

And this brings me to the single observation I desire to make before I take my seat. We have been accustomed to predictions that the presence of the two great historic races, especially in these central provinces, will become in increasing degree an occasion of division and a source of weakness, that we have here the factors of another "irrepressible conflict," which must ultimately prove fatal to the integrity of this country. That this racial diversity has in many ways complicated our national problems, no honest or patriotic man would be so foolish as to deny. But, Mr. President, difficulty does not necessarily mean disaster. A strong nation, as a strong man, augments its strength by conquering its difficulties. No nation was ever "swaddled and dandled" into greatness. It was indeed out of this same situation that the Union of Canada was born. Mr. President, I, for one, decline to believe that in a long view there is necessarily any disadvantage in the fact that the two nations which, directly or indirectly, have been the greatest humanizing agencies in modern Europe, are represented as they now are in the citizenship of Canada. On the contrary, that circumstance ought to prove in the future a source of power and not of weakness; but if this country is to rise to the height of her great mission, and a great mission I sincerely believe it to be, we must accustom ourselves to think in terms of the whole country, and nothing less than the whole country. We British have no desire to forget that we are of Norman, as well as of Saxon, stock; or that Norman French was the nursing tongue of the common law. And we gladly pay our homage to France—France, who held the pass for centuries against the onset and menace of barbarism; France, who has ever held aloft the torch of enlightenment. Something, my