PRIVY COUNCIL APPEALS IN EARLY CANADA

A MILD flutter has recently been caused in legal and other circles in Ontario by a suggestion that appeals to the Judicial Committee of the Privy Council might well be abolished. It may be interesting to some to know about the practice in regard to such appeals in early British Canada, as well as about the first proposals to abolish them.

After the surrender of Quebec in 1759, and of Montreal in 1760, Canada was governed for some time as a conquered country; the Courts were presided over by military officers who administered law by their own conception of right. This *régime militaire* has been much maligned, but nothing has appeared to indicate aught but good will on the part of the military authorities toward the conquered people and a sincere desire to do justice and right.

When by the Treaty of Paris, concluded in February, 1763, "Canada with all its dependencies" was ceded by His Most Christian Majesty Louis XV to the Most Serene and Most Potent Prince George III, a time limit of eighteen months was fixed for the emigration from Canada of those who desired to retain their former allegiance to France¹.

Canadians having become British subjects *de jure* by the operation of the treaty, it was of course recognized that civil government must be provided in the place of the existing military government.

The King, by the Royal Proclamation of October 7, 1763, formed a "Government of Quebec" of the territory from the River St. John west to a line drawn from the south end of Lake Nipissing to the point at which the parallel of 45 degrees north latitude crosses the St. Lawrence;² and General James Murray was ap-

¹ Shortt and Doughty (eds.), *Documents relating to the Constitutional History of Canada, 1759-1791*, second edition, Ottawa, 1918, pp. 97 sqq.

² *Op. cit.*, pp. 163 sqq. The western limit of Quebec was fixed thus far east because it was intended to place the vast territory to the west under a separate administration, for the Indians and others to hunt in, and open to all the British Colonies. The southern boundary was fixed at 45° north latitude because it was intended to divide the territory with the colonies of New York and New England.

pointed governor¹ with carefully drawn commission and instructions. By these instructions he was directed with his Council to erect courts of judicature and to provide that "appeals should be allowed in all Civil Causes from the Courts".²

Of course, civil government could not come fully into force until the eighteen months had elapsed, on August 10, 1764; but on September 10, 1764, an Ordinance was passed erecting two courts—one the Court of King's Bench, with full civil and criminal jurisdiction, and the other a Court of Common Pleas, with full civil jurisdiction over £10.³ From the Court of King's Bench there was an appeal to the Governor and Council in cases above £300 sterling, and thence to the King and Council in cases involving £500 sterling and upwards. From the Court of Common Pleas, there was an appeal to the Court of King's Bench in cases of £20 currency (£18 sterling) and upwards, to the Governor and Council in cases over £300 sterling, and thence in cases of £500 sterling and upwards to the King and Council.

When, in 1768, Sir Guy Carleton became governor, his commission and instructions were much to the same effect; but he was instructed specifically to limit the right to appeal to the King to cases above £500 sterling.⁴ There was also a direction that an appeal should be allowed unto "Us in Our Privy Council" "in all cases of Fines imposed for Misdemeanours" amounting to £100 sterling.⁵

There had been a very considerable complaint of the administration of justice, arising in great measure from the uncertainty of the law. The Proclamation of 1763 had purported to introduce the English law in both civil and criminal matters; the Ordinance of September, 1764, had directed the Court of King's Bench to "hear and determine all criminal and civil causes agreeable to the laws of England and to the ordinances of the Province"; the judges of the Court of Common Pleas were to determine agreeable to equity, "having regard nevertheless to the Laws of England as

¹ *Op. cit.*, pp. 173, 181 sqq.

² *Op. cit.*, p. 188: Article 17.

³ *Op. cit.*, pp. 205 sqq. Justices of the peace decided cases up to £30 Quebec currency (£27 sterling). One justice could dispose of cases up to £5, two up to £10, and the Quarter Sessions up to £30, with an appeal to the Court of King's Bench.

⁴ *Op. cit.*, pp. 307-8: "the taking or demanding any Duty payable to Us or to any Fee of Office, or Annual Rent, or other such like matter or thing where the Rights in future may be bound" (Article 16).

⁵ *Op. cit.*, p. 308: Article 17.

far as the Circumstances and present Situation of Things will admit". In the Court of King's Bench, the chief justice presided, an English barrister who followed the law of England closely; in the Court of Common Pleas were lay judges of little or no legal knowledge, whose views of equity were not fixed. It sometimes happened that the judges of the Court of Common Pleas, deciding on their own ideas of equity, were reversed by the chief justice on the law of England; sometimes he was reversed by the Governor and Council, and an appeal to the Privy Council was not always successful.

In 1767 the Privy Council sent a request to Carleton for information as to the defects in the administration of law, asking for a report from the governor, the chief justice and the attorney-general.¹ Carleton replied showing the defects just mentioned, and added, "The People notwithstanding continue to regulate their transactions by these ancient laws though unknown and unauthorized in the Supreme Court [the Court of King's Bench] where most of these transactions would be declared invalid."²

Francis Maseres, the attorney-general, submitted a report for the governor in February, 1769, but it did not recommend itself to Carleton: Maseres recommended *inter alia* that from the courts of the province "there should be an appeal to the Governor and Council of the Province and from thence to Your Majesty in Your Privy Council. One great use of the appeal . . . would be to preserve an uniformity in the law throughout the Province . . . and . . . precedents . . . to determine any subsequent disputes . . . should be ascribed only to those cases which had been decided by the Governor and Council . . . or by your Majesty's Self in Your Privy Council."³

The strong agitation for the reintroduction of the former French-Canadian law led to much consideration by the Privy Council and the administration. An order-in-council of June 14, 1771, followed by another of July 31, 1772, directed the British attorney-general, solicitor-general, and advocate-general to report on the communication as to the laws, etc., of Quebec. The report of Thurlow, the attorney-general, and Wedderburn, the solicitor-general, has been lost. Only certain extracts therefrom are now available; and in the parts that are extant nothing is said of the

¹ *Op. cit.*, p. 285.

² *Op. cit.*, p. 288; Carleton to Shelburne, December 24, 1767.

³ *Op. cit.*, pp. 360 sqq.

Privy Council except in general terms. Wedderburn recommends that "in all cases of superior value the Party aggrieved ... may ... be at liberty to appeal to His Majesty in Council."² The advocate-general, James Marriott, published his report in 1774³; in it he says, "That no appeal should be to the King and Council under £500 is thought by some persons a hardship and that it leaves no check upon the Governor and Council in less sums of great value in so poor a colony"; but he expresses no opinion in regard to the matter.

When in 1774, the Quebec Act, 14 George III, c. 83, came to be passed, reintroducing the former French-Canadian law in civil matters, it was silent as to appeals to the Privy Council.³

This Act necessitated further legislation in the colony, and the Ordinance of February 25, 1777, was passed at Quebec.⁴ A change in the courts was made by this ordinance. A Court of Common Pleas was erected for each of the two districts of Quebec and Montreal with civil jurisdiction; one judge for cases up to £10 sterling and two for other cases. In cases of £10 and upwards and certain special cases an appeal lay to the Governor and Council; in cases over £500 sterling an appeal lay to the King and Council. The Court of King's Bench became a criminal court solely.⁵

The Quebec Act pleased the French Canadians in most respects, and it angered most of the English Canadians in equal measure. Agitation was met by counter-agitation, complaint by counter-complaint. The English as a rule desired the reintroduction of the English civil law, the French opposed it.

William Dummer Powell, afterwards chief justice of Upper Canada, who was then practising in Montreal, was one of the leaders of the English faction. Many reforms were desired and urged by this faction, and at length in 1783 Powell, with his two French-Canadian colleagues, Adhémar and De Lisle, went to England with a petition. In this petition, as in a similar petition in 1784, there was contained a request "That appeals from the Courts of Justice in this Province to the Crown be made to a Board of Council or Court of Appeals composed of the Right Honourable the Lord Chancellor and the Judges of the Courts of

¹*Op. cit.*, p. 436.

²*Op. cit.*, pp. 445 sqq.

³*Op. cit.*, pp. 576 sqq.

⁴*Op. cit.*, pp. 679 sqq.; 17 Geo. III, cc. 1, 2.

⁵*Op. cit.* pp. 690-691.

Westminster Hall."¹ This was plainly intended to cause cases from the province to be decided as far as possible by the laws of England. The French Canadians were not blind to this object. They held meetings to discuss the matter, and they represented "That up to the present time we have made appeals to the King and Council who have taken our laws as the guide of their decisions. But what will become of our rights when brought before a Court which will deviate in nothing from the British Laws and Constitution?"²

The Ordinance of Quebec of 1787, 27 George III, c. 4, continued the right to appeal to the King and Council³, and when the matter came to be dealt with by the Home authorities, the request in the petition was dealt with summarily: "The 13th Article desires a Court of Appeal from the Judicature of the Province to be composed of the Lord Chancellor and the 12 Judges. This Article appears to cast a reflection wholly unmerited on the decisions of the Privy Council, and the proposal is certainly incompatible with the other duties of the persons named."⁴

The Canada or Constitutional Act of 1791, 31 Geo. III, c. 31, is silent as to such appeals, and there is no record of any further objection to the appellate jurisdiction of the Privy Council until a comparatively modern day.

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¹*Op. cit.*, pp. 742 sqq.; especially p. 745: Article 13.

²*Op. cit.*, pp. 754 sqq.

³*Op. cit.*, pp. 858 sqq.; especially p. 859.

⁴*Op. cit.*, p. 982.