# PRIVY COUNCIL JUDICIAL COMMITTEE*

## Its Value to the Colonies and to the Empire Considered.

By WALLACE NESBITT, K.C.

THE Judicial Committee of the Privy Council is the court of last resort for all that portion of the British Empire situated outside the United Kingdom. It sits as a committee of advice to the Crown, and its jurisdiction is founded solely on the royal prerogative.

From the beginning of our national existence the King has been accustomed to act with the advice of the magnates or great men of the realm, and at an early period exercised legislative, executive, and judicial authority, especially of an appellate character, from the shire and hundred courts. I have been unable to ascertain when appeals to the Privy Council were first instituted, but there is no doubt that from the earliest times petitions for justice were presented to the King in Council, especially when the courts were liable to be intimidated by an influential suitor, it being an ancient rule of our Constitution that the subject who failed to obtain justice in the ordinary courts might in all cases petition to the King to exercise his royal prerogative in his behalf. As the Empire increased, this right has been gradually extended to all the King's subjects. Those residing in the United Kingdom have apparently found the custom of presenting their petitions to the King in Parliament the most convenient, and this practice is now confirmed by statute, the House of Lords being the court of last resort for the United Kingdom. The King's subjects beyond the seas, on the other hand, found that their petitions were more speedily heard if addressed to the King in Council, which has thus gradually become the tribunal of final appeal for India and the Colonies. The statutes which have been enacted from time to time regulating the power and procedure of the Council are of a most interesting character and clearly reflect the popular opinion of the day. One of the most interesting is that of 24 Henry VIII, passed in 1532, which provides

> "That appeals in such cases as have been used to be pursued to the See of Rome, shall not be from henceforth taken, but within this realm."

The power thus conferred upon the Council of hearing appeals in all cases was greatly abused, and by Statute I, Charles I, Chapter 10, passed in the year 1646, it is enacted that neither His Majesty nor Privy Council have any jurisdiction or power to draw into question any matter of any of the subjects of this Kingdom, but that the same ought to be tried in ordinary courts of law, thus transferring the appellate authority of the King in the United Kingdom from the Council to the Parliament or House of Lords. It will be noticed that the words of this statute do not apply to the King's subjects outside the United Kingdom, and in the same year we find mention made in the records of the Council of proceedings in a matter from the Island of Guernsey. The Council was put on its present basis and the Judicial Committee formed by Statute 3 and 4, William IV, 1833, and by subsequent statutes jurisdiction has been given to the Judicial Committee in matters within the United Kingdom in Ecclesiastical, Admiralty and Patent cases.

Owing to the great expansion of our Empire, which is mainly due to the acquisition of new territory, the laws administered by this Council are of the most diverse and complex character, and the judicial enquiry entered into by it, of the most cosmoplitan description. It is laid down by most eminent authority that all territory which is newly acquired, whether by conquest, colonisation, or peaceful annexation, is acquired for the benefit of the Crown. If an uninhabited country is discovered and peopled by English subjects, they are supposed to possess themselves of it for the benefit of their sovereign, and carry with them such portions of the English common law as are necessary and applicable to their situation. In the case of possessions acquired by conquest or annexation, the sovereign, unless he has limited his prerogative by the articles of capitulation or treaty, has the inherent power to make new laws for the conquered country, but until he sees fit to do so the laws in force in the newly acquired territory at the time of the capitulation or annexation, remain in force and equally affect all persons and property. It has been the almost universal custom of our Empire to refrain from interfering with the laws and institution which have been in force in those countries which have been added to it. As an illustration of the extent of jurisdiction, Sir Frederick Pollock, when in Toronto in 1905, stated that, whilst proceeding on the tour which he was then completing, he had left Liverpool and had visited Gibraltar, Minorca, South Africa, India and Canada, all countries under the rule of the British Empire, and all, with scarcely an exception, under laws which differed. Go into the Judicial Committee of the Privy Council for a single week and watch its operations. You will see it deciding on one day a question according to the Roman Dutch law; on another a question according to the French law as it prevailed before the Revolution, modified by subsequent Canadian statutes; and on another day according to the common law of England, as modified by Australia or New Zealand legislation; and at the end of the week according to the customs of the Hindu or Mohammedan law. The truth of these observations may be readily understood by perusing a list of the different territories from which appeals may be taken to this court. The number is upwards of 150, and occupies in one work on the subject over seven printed pages. If Europe is taken as an example, appeals lie from six different principalities, and the laws administered range from the ancient customs of the Isle of Man to those in force in the Island of Cyprus. Other interesting examples may be given in the Leeward Islands, composed of Montserrat, Saint Kitts, and Ben Nevis, where it administers the common law introduced by Royal Proclamation in 1764, and Newfoundland, which is our oldest colony. In Asia, besides India, appeals lie from the courts of twenty-four separate principalities, differing from the Bombay High Court to the Consular Court in China and Corea.

If we should now examine the actual working of this Council, we find that the governments of the various dependencies as a general rule have the power to legislate and limit the right of the subject to carry his case to the foot of the Crown. They cannot, however, legislate with regard to the right of the Sovereign to hear those appeals. As a general rule, legislation has been passed restricting the right of appeal to cases when the matter in controversy exceeds a certain value. If the matter is not of sufficient importance to comply with the regulation in force in the particular territory in which the suit is instituted, an application may be made to the Council itself for special leave to appeal. The application is made by way of petition, which must set out the facts of the case, the portion of the judgments in the courts below which are said to be erroneous, and the reasons upon which counsel base the application. The statements contained in the petition must be characterised by the utmost frankness and good faith, and a *prima facie* case must be made out. The committee in granting the petition will be greatly influenced by the wishes of the colony as expressed by its legislation. The exercise of the prerogative will not be recommended except in cases of general importance, and will only be granted (1) where constitutional questions are in controversy, (2) where there is an important point of law involved and the amount in controversy is large. The Privy Council, in deference to the wishes of our government, have laid down the rule in criminal cases that they will not interfere to grant special leave unless the clearest injustice has been done. Two cases of recent years excited great interest. In Riel's case, where, following the North-West Rebellion, Riel was convicted of high treason, leave to appeal was refused. In Gaynor and Green's case, where the United States were petitioners, leave to appeal was granted, and upon the argument being heard an order was made favourable to your government.

Where, however, the local legislature does not prohibit the appeal, the appellant proceeds to the Privy Council as of right, and no leave is necessary.

The first step in the appeal is the printing of the record, which contains the pleadings, the judgments delivered by the courts below, and such parts of the evidence as may be necessary for the determination of the matters in dispute. Each counsel then prepares his case, which should contain a short statement of the facts relied on by counsel in support of his contentions, and a memorandum of the points to be argued. It is not customary to cite authorities in the case. Indeed, it is not considered to be in good taste, as owing to the great learning and vast experience of the members of the Board, they are usually familiar with such as have a bearing on the matters in question. The Privy Council does not sit as a court, but as a commmittee, and the argument takes place in a chamber in the Colonial Office in Downing Street. Only the other day Viscount Wolverhampton, a solicitor who for many years was head of the Incorporated Law Society, and who has been elevated to the peerage and made a member of the committee, sat along with the law lords. He would not have been entitled to appear as an advocate or to don a wig and gown in court in the United Kingdom, and yet he was sitting as a judge in this committee. I fancy it was the only occasion when such a thing has happened. Of course, many of the solicitors in England are probably as great lawyers as are to be found anywhere in the world, but they cannot, under the English system, appear in court or be created judges. The lords appear in their ordinary street attire, and are seated round a table at one end of the room. When the court opens, the doors are unbarred, counsel are allowed to enter and take their places in a small railed enclosure at the other end of the room. They are expected to wear the ordinary court attire, which includes a wig and gown. There is a small reading desk on which the counsel addressing the court may place his documents and other papers. If an authority is cited to their Lordships, usually an attendant of the court is directed to obtain the report, which is perused by their Lordships at the time. Judgment is delivered, or counsel may be requested to withdraw while their Lordships deliberate. Counsel are then admitted and and judgment is delivered, or judgment may be reserved.

The Council is not a court, and the judgment is delivered by one of the judges on behalf of the whole committee, no dissenting view being expressed, it being the duty of each Privy Councillor not to disclose any advice that he may have given to the Crown.

During a recent stay in London I more than once visited the council rooms, and was astonished by the variety and magnitude of the business transacted. On one day their Lordships were engaged in a reference from the Colonial Office as to the conduct of the Chief Justice of Grenada. On the next day their Lordships heard argument in a case from Ceylon, where two native ladies of high rank were appealing in an endeavour to quash a conviction for the alleged crime of beating a servant to death. The next case concerned the question of the pedigree of an Indian Rajah, and the right of succession to his vast estate, in which Sir Robert Finlay, ex-Attorney-General of England, was opposed to distinguished members of the Indian Bar, several Parsee lawyers acting as junior counsel on either side. On the next day, a dispute involving the title to a Cobalt mining claim was heard, and in the afternoon a question as to the title to a piece of foreshore in the eastern part of Quebec was disposed of. I have seen their Lordships dispose of five petitions for special leave to appeal one morning in less than an hour, and these petitions originated from places as distant from one another as Gibraltar, India, the Straits Settlements, and Canada, and apparently with a full appreciation of the law and facts involved in each case. I supposed the petitions had carefully perused before the committee met.

There has been some discussion looking towards abolishing the Judicial Committee, or amending its constitution. Objection has been taken that the highest appellate courts of the great federated and self-governing colonies should be the courts of last resort for such colonies, and suggesting that the existence of the court is a reflection on the ability and learning of their own judges; also objections based upon the delay and expense. The subject was fully discussed on the occasion of the debate in the House of Commons of England on the Commonwealth of Australia Constitution Bill. The various criticisms were well answered by Mr. Faber, who has been Registrar of the Privy Council for nine years. Any person interested should consult that memorandum.

The court, of course, is only human, and, like all other things, must sometimes make mistakes, but as a general rule its decisions disclose a depth of learning and breadth of character which are not surpassed by those of any other forum in the world. Being far removed from the cause of litigation, their judgments are not affected or tainted with local spirit or prejudice. It is unfortunate that it sometimes happens that they are misunderstood by even learned members of our legal profession. Their Lordships

* A paper read before the New York State Bar Association a few days ago.