

# A LAYMAN'S VIEW OF THE PRIVY COUNCIL

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HAVING been engaged for some years past in the collection of material to be used as evidence for Newfoundland in the famous Labrador Boundary case, I had an opportunity to attend the hearing and to be in court for the whole of the trial, not as a mere spectator, but as one in close touch with the proceedings from day to day. This is an experience that rarely falls to a layman. It was one, moreover, which I particularly welcomed, because I could thus see this tribunal at work, observe the institution itself, the personnel of its judiciary, and the effect of its labours on the empire as a whole.

As a journalist and a legislator, I know how in some parts of the overseas possessions a feeling exists that appeals to the Privy Council should be abolished. It is held incompatible with the status of self-governing Dominions that they should go beyond their borders to secure a final arbitrament in cases of importance. Consequently, I followed with special interest the proceedings in this Labrador case, and others that succeeded it, so as to form a considered judgment on the working of the tribunal in regard to matters submitted to it from other parts of the empire.

Those well-informed as to this unique body are aware that its official designation is "The Judicial Committee of the Privy Council". Its status is that of a bench of eminent judges, acting as a committee of the King's Privy Council or most secret advisers, chosen for their judicial attainments and wide experience, and invested with power to deal with special subjects as the last Court of Appeal in relation to all matters affecting the empire overseas. Similar functions are discharged with respect to the mother country by a tribunal commonly known as the House of Lords, but which may be described as the Judicial Committee of that body. In fact, the same individuals may be, and frequently are, sitting to-day as the Privy Council and to-morrow as the House of Lords.

The Privy Council sits in a handsome building fronting on Whitehall, the entrance being in Downing Street, a stone's throw from the historic structures, Nos, 10 and 11, which are the official residences of the Prime Minister and the Chancellor of the Exchequer for the time being. My information is that the building now

occupied by the Privy Council was, nearly two hundred years ago, occupied by the Lords Commissioners of Trade and Plantations, a board or department of the Imperial Government in that time which dealt particularly with the affairs of the Colonies. Indeed, it was suggested to us that, in the very room where the five venerable judges were gathered to deal with the questions arising from the grant of the "Coast of Labrador", sat the very men who, in 1763, following upon the Treaty of Paris, attached this "Coast of Labrador" to the Governorship of Newfoundland. If that is so, and they could revisit the scene, it must have been of tremendous interest to them to realize what expenditure of time and effort and money was being made to-day to determine just what they intended when they made this assignment of territory at the close of the Seven Years War. Recently Dr. A. H. Bayse, of Yale University, produced a valuable book on "The Lords Commissioners of Trade and Plantations", dealing with the history and labours of this board under its various developments, from its foundation by William III after the Revolution of 1688, to its abolition in 1782 after Burke made his celebrated attack upon the public offices. Dr. Bayse divides the main portion of his book into, first, the period of the presidency of Lord Halifax (termed the "Father of the Colonies" on his monument in Westminster Abbey) from 1684 to 1761; secondly, the period of transition under various presidents from 1761 to 1768; thirdly, the period of the "Board of Trade" and the "American Department" from 1768 to 1779. He ends with the last years of the old "Board of Trade", from 1774 to 1782. "No final history of British colonial institutions can be written until the part played by the board has been fully studied." This is one important conclusion at which Dr. Bayse arrives. For, as he says, "its letters and instructions to the colonial governors, its reports and representations to the Privy Council, its opinions on colonial law, the personnel of its membership, and the relations of the Commissioners of Trade to political factions and their views on political theories—all these things must be ultimately considered."

A handsome, lofty, well-lighted chamber, divided in half by a fence or bar, was the scene of the Labrador Boundary drama. Approached by a spacious stairway and hall, with entrance doors on either side, and several anterooms, it has its farther half devoted to the judges and their attachés, and that nearest the entrance to the litigants and their barristers and solicitors. Round a large, semi-circular table the judges sit, elderly men, in every-day suits, without wigs or gowns, or any "explosions of the upholsteries", to use Carlyle's phrase. Nor are the proceedings at all like those

in ordinary courts; the tone is almost altogether conversational; eloquence counts for nothing, indeed it is discouraged. What these judges want is facts, stated plainly and briefly, without any embroidery whatever. The lawyers are subjected to an almost continuous fusilade of questions from one or other of the bench. Rarely does counsel get more than ten minutes of uninterrupted argument. If he makes a statement, he has to be prepared to back it in an instant, for a well-directed query from somebody across the bar will bring him up standing. One question will give rise to another or to many. A single interlocutory may, in the course of a few minutes, elicit other enquiries from everyone of the tribunal, and unless the lawyer is thoroughly posted he may find himself in an awkward corner.

The first impression one got of these judges, watching them in action, was their age, and the next their alertness. Taking the bench that tried this Labrador case as typical, (and I compared it with other tribunals later) I found the average age of the five judges was 73. Lord Sumner was the youngest, 67; Lords Cave and Haldane were 70 each; Lord Warrington was 75 and Lord Finlay was 84. The *Daily Mail*, of 18th April, 1927, states—on the authority of that week's law journal—that the average age of the King's Bench judges is 59; in the Court of Appeal, 66½; among Lords of Appeal in Ordinary, 73. Two of the Labrador judges, Viscounts Haldane and Finlay, were chosen because both had been Lord Chancellors themselves, Lord Haldane having been in addition associated with three cases between the Dominion of Canada and the Province of Quebec, in respect to marine issues, while Lord Finlay represented Britain (including Canada and Newfoundland) before the Arbitration Tribunal at the Hague in 1880, on the Atlantic Fisheries Dispute, as British attorney-general at the time. It was understood in judicial and legal circles in England that the intention of the law lords was to set up a specially strong bench for the trial of this case because of its importance, not alone to Canada and Newfoundland, but to the empire as a whole. Therefore the Lord Chancellor associated with him these two of his predecessors, while Lord Sumner enjoys the distinction of possessing one of the acutest brains of the English Judiciary, and Lord Warrington demonstrated during the progress of the trial a mastery of its intricacies not exceeded by any of his colleagues. Lord Haldane, again, has been twice Lord Chancellor. Two of his ancestors on his mother's side were Lord Stowell, practically founder of the Admiralty Court, and Lord Eldon, himself a Lord Chancellor of his day.

general for England appeared on behalf of the commodore. But here the result was the same. The Privy Council decided against the imperial Government, and against the naval officer, and upheld the right of the Newfoundland merchant to be compensated for the loss sustained by him through the imperial officer carrying out the orders of the British Admiralty, violating the rule that "an Englishman's home in his castle". Prowse, in his *History of Newfoundland* p. 551, thus summarizes the Privy Council's judgment in this case:

The judgment of the Privy Council was delivered by Lord Herschell on the 4th of August 1892. It sustained the decision of the Supreme Court of Newfoundland; that naval officers had no authority to invade the rights of private individuals whenever it was necessary to enforce the provisions of a treaty or convention, that in order to confer such authority upon officers to invade the rights of individuals and private property, legislation was necessary. The court completely demolished the argument of defendant's counsel that the act complained of being an affair of State done under the authority of the Crown, the Newfoundland court was not therefore competent to enquire into it; they declared that such a doctrine was wholly untenable.

The result of my observation of the proceedings before the Judicial Committee, during the fourteen sittings of the Labrador Boundary case, and of the attitude of the judges, was to convince me that the Privy Council is a tribunal the empire cannot afford to do without. If such a tribunal did not exist, and, moreover, had not the confidence in itself which such a tribunal must necessarily acquire through generations of service, some other machinery would have to be devised to settle cases similar to this, or those involving the rights of minorities. It is, of course, easy to argue that the Supreme Court of every Dominion should be the final tribunal for all issues arising within that territory. But it is not difficult to envisage problems leaping to light in Canada or South Africa, with goodly proportions of their people not of British extraction, where the rights of minorities might be threatened and where the existence of an outside tribunal, competent and impartial, would enable otherwise perhaps very serious consequences to be avoided. The recent declaration of Premier Taschereau of Quebec, in favour of appeals to the Privy Council, when a somewhat hasty motion was made in the Quebec Legislature to abolish these, following upon the Labrador decision, supports this view. He was not unmindful, it seems to me, of some of the implications said to be involved in the so-called "new charter" of the overseas Dominions as formulated at the recent Imperial Conference. But he desired

it to be clearly understood that his province proposed to depend upon the Privy Council for the protection of its special rights under successive Acts of the British Parliament.

Moreover, the Judicial Committee is invested with power to act as the final authority in Colonial Boundary cases, and the appropriate machinery for carrying such cases to that tribunal was utilized by Canada and Newfoundland in bringing the Labrador case before the tribunal, while the "Colonial Boundaries Act, 1895", an imperial statute, embodies the necessary provision for giving effect to the decision of the Judicial Committee by the appropriate Order in Council, in these words:

Where the boundaries of a Colony have, either before or after the passing of this Act, been altered by her Majesty the Queen by Order in Council or Letters Patent, the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the Colony; provided that the consent of a self-governing Colony shall be required for the alteration of the boundaries thereof.

Of course, it is not essential for a boundary dispute between two colonies, or two provinces thereof, to be submitted to the Privy Council. Thus Ontario and Manitoba in 1878 arbitrated before Chief Justice Harrison, Sir Edward Thornton, and Sir Francis Hincks the dispute as to the western boundary of Ontario. These arbitrators made an award, but its validity was questioned because of failure by the Ottawa parliament to give effect to it by legislation. So the whole question, as to a boundary award and as to the steps needed to validate it, was carried to the Privy Council whose Judicial Committee in 1884 rendered a finding that (a) the award was not binding, because of lack of legislation: (b) nevertheless, the boundary line laid down by the award was substantially as the Judicial Committee found it; (c) the boundary line should be drawn thus (giving it in detail); and (d) "without expressing an opinion as to the sufficiency or otherwise of concurrent legislation of the provinces of Ontario and Manitoba, and of the Dominion of Canada (if such legislation should take place), their Lordships think it desirable and most expedient that an imperial Act of Parliament should be passed to make this decision binding and effectual."

Boundaries of some of the Australian colonies have been fixed in the same way, and now the Labrador decision brings the record up to date. Possibly it may prove the last, though it is not unlikely



that some of the African possessions of the empire may, in days to come, call for pacific solution of similar disputes by the same tribunal. If this tribunal did not exist, something else would have to be found to take its place. Most probably it would be in the form of an arbitration tribunal, and these arbitrations almost invariably result in a compromise, because the arbitrators are never sure of themselves, and "split the difference", in the hope of mollifying, if not fully satisfying, the contending parties. Moreover, arbitrations as a rule simply mean that the decision is left to one man, the chairman, because the usual practice is for each of the contenders to appoint one or two men with the umpire, or chairman, chosen by them, or from neutrals. The result is that the men chosen by the contenders are really mere advocates for their side, and the only man who acts judicially is the chairman. But in this instance, as in all others before the Privy Council, five unbiassed judicial minds apply themselves to the solution of the problem as presented to them, and it is not unreasonable to conclude that the decision they reach is that which has the most merit in it. For instance, one of the points emphasized by the judges in the Labrador case, but which is ignored entirely by Canadian critics, is that "no evidence was given of any exercise of a Canadian jurisdiction in any part of the territory in dispute."

How important a place the Privy Council fills in the judicial system of the empire is illustrated by a passage from the *London Times* of 13th October last:

The Judicial Committee will resume its sitting next Tuesday for the hearing of 48 appeals and one matter specially referred by his Majesty to the Committee for decision. The present list shows a considerable increase in the appeals to be heard, as last year only 27 appeals were set down.

To the present list India contributes 37 appeals, Canada four, Australia and New Zealand three each, and the Irish Free State 1. The last relates to the basis upon which Civil Service superannuation should be calculated under the Irish Treaty. One of the Indian appeals is against a conviction of murder; in another, relating to a partition action, the point at issue is whether "certain admissions and denials upon which the partition was based were made in the presence of the deity of the deponent."

The most important matter is the special reference which relates to a long-standing dispute between the Dominion of Canada and Newfoundland, as to the boundary of Labrador, the northern coast of which has for long formed part of the Colony of Newfoundland. The hearing has been fixed for October 21, and is likely to last a considerable time. Six judgments only await delivery.

The London *Times* of 28th April, 1927, deals with the spring term of the tribunal in the present year thus:

The Judicial Committee of the Privy Council resumes its sittings, in two divisions, on Tuesday next with a list of 28 appeals, as against 30 for the corresponding term last year. Of these 17 are from India, four from Canada, two each from Australia and the Gold Coast Colony, and one each from Nigeria, Ceylon and China. Six judgments await delivery, including one dealing with civil servants' superannuation under the Irish Treaty.

It will be seen from those quotations that most of the appeals come from India. When the Labrador case was under trial in one chamber last fall, another section of the Committee, under the presidency of Lord Phillimore, was dealing in another with an Indian appeal respecting mortgages on properties. Indeed, it has since been found necessary to create a special branch of the Judicial Committee to hear appeals from the ruling of Indian courts exclusively. This is no reflection upon the capabilities of the jurists in India, but it may be taken as a compliment to the Privy Council and as justifying the system of appeal to that body. Indeed, tribute to the importance of the Council's Judiciary Committee to the British empire was paid by an eminent member of the Labour party during the debate on the new scheme. Every overseas Dominion has had occasion to be grateful for the facilities of appeal more than once. A completely independent judgment is at times of inestimable value, both from the moral and from the judicial standpoint. The greatest legal brains in the empire placed at the disposal of any part of that empire constitute a guarantee the advantages of which must be obvious to any mind not blinded by prejudice.

Another aspect of the general question of the utility of this tribunal is that of the cost of Privy Council appeals. Regarding this, Mr. C. H. Cahan, M. P. for Montreal, is reported as having spoken thus in the Ottawa parliament during March, 1927:

The right of appeal to the Privy Council often becomes a menace to the rights of individuals who have not sufficiently large financial resources to enable them to maintain their defence to appeals granted to large and wealthy corporations throughout Canada. In fact, I believe that corporations of this character have made use of their financial strength to intimidate and to restrain litigants from maintaining judgments which they have obtained in the highest court of this country, by threatening them with an appeal to the Privy Council, and, if the threat was not successful, putting an appeal into effect. The expenses of an appeal to the Judicial Committee of the Privy Council are ruinous

to litigants of moderate means, and I think the time has come when the Government might well consider the amendment of the Judicial Committee Acts of 1833 and 1844 in such manner as would restrict the right of the Judicial Committee of the Privy Council to grant leave to appeals in many classes of commercial cases.

This, it seems to me, is a criticism largely against the legal fraternity in England rather than against the Judicial Committee itself, though doubtless some of its regulations as to procedure, etc., might be modified in the interest of less well-to-do litigants. Canadian and Australian lawyers in London while the Labrador case was proceeding (awaiting its close to secure the hearing of their cases) told me it cost three or four times as much to go to law in England as it did in either of these Dominions. This, if so, is partly due, I imagine, to the English legal system whereby solicitors as well as barristers must be employed; and partly to the fact that the most closely-bound of all "trade unions" in England is that of the lawyers. In English courts, in any case of importance, one must employ a "leader", a "K. C.", and if the case is an outstanding one, a second "K. C." as an assistant, besides junior counsel, ordinary barristers who have not "taken silk." The fees of these gentlemen are automatically fixed thus: the second "K. C." gets two-thirds of the leader's fee; the junior gets two-thirds of the second "K. C.'s" fee, and if there is an additional junior he gets two-thirds of the first junior's fee: all these amounts being, of course, apart from the solicitors' fees. The London *Daily Mail* of 15th June, 1926 prints an article "from a legal correspondent", under the caption, "Law Costs too Heavy." From it the following is taken:

The legal profession is showing concern at the progressive decrease in litigation. In the King's Bench Division, for example, cases to be dealt with at the beginning of the current term registered a great decline, while there is a drop of 11 in the number of the cases to be heard in the Court of Appeal from the already attenuated figures for 1925. What is the reason for this decline? There is an uneasy feeling among those lawyers whose livelihoods depend on litigation that business will not and cannot increase until law becomes cheaper. High Court fees are too high: and though it means perhaps only £1 here and 10s there, yet the net result is sometimes fees totalling an amount absolutely out of all proportion to the sum recovered. Yet the majority of barristers and solicitors have to work hard for their money; and much of the mischief of costly law is due to what an eminent judge has called the "terrible and scandalous prolixity in English procedure." Whatever the cause, the figures show



beyond any doubt that the mounting up of costs is frightening the poor litigant—and that is not a state of things to be desired in a justice-loving community.

Apparently, according to Mr. Cahan, this condition also applies to Privy Council cases and, if so, there is no doubt a remedy. In so far, however, as the Labrador case is concerned, the feeling of all of us connected with the Newfoundland side of it was that no fees charged by Sir John Simon and his associates could be too large, and that it was impossible for money to repay him, especially, for the service he gave us. Yes, as a matter of fact the fees he charged us were much smaller than many English legal authorities thought were warranted. This moderation was due, I believe, to his knowledge that ours was a small and by no means wealthy colony, and that empire interests were involved. Certainly, I cannot subscribe to the doctrine that the costs in this instance were too large. Of other cases I do not know enough to form a conclusion.