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## THE DEVELOPMENT OF THE CANADIAN LEGAL SYSTEM.

### I.

#### PRIOR TO THE BRITISH NORTH AMERICAN ACT OF 1867

This subject refers to the machinery of the Canadian law, not its product. It may be taken to cover, in a general way, law-making bodies, and law-interpreting bodies, but not the laws made or the interpretations put upon them by judicial opinion.

In treating it, we must remember that while the Canadian colonies and our own original thirteen worked on parallel legal theories up to the time of the Revolution, from that time on the methods of dealing with any law-making questions were necessarily quite unlike,—Ontario, Quebec and the Maritime Provinces still looked to their mother country to straighten out their differences, without trying to do so among themselves, and, indeed, without having that power; the American colonies having achieved emancipation, had no thought of appeal and were compelled to shake down together as best they might.

On both sides of the border, the federal idea was the end reached. Both have sought to ensure national unity while preserving local self-government. In Canada, however, the national or

central government stood historically first, the communities second; with us, the States came first and the national government was created by them.<sup>1</sup>

A proper appreciation of the present Canadian system can only be reached by knowing something of its evolution. We shall, therefore, begin with the early days of Canada, and follow the general course of the development of the legal side.

In French Canada, under the Old Régime, rural society was divided into *seigneurs* and their tenants, called *censitaires*. In Canada, as in France, gentility and the possession of an estate went together, but in Canada feudalism was modified: the *censitaires* could not be crippled by over-taxing nor by requiring too great service,—habitants were not serfs. Prior to the year 1663, these *seigneurs* had generally full power to decide all disputes among their tenantry. Apart from the exercise of this power, and occasional disciplining by the Governor or Intendant, the only judicial functions were of the rough and ready kind, exercised under trading companies which had been given royal charter, the principal one being that of the "Hundred Associates," (organized by Richelieu in 1627) although justice was in rare instances administered directly by the Governor General under royal authority.<sup>2</sup> The Intendant, also had limited judicial powers—as in cases between *seigneurs* and in certain crown cases, and could make ordinances covering certain trades, etc.

In the year 1663, the population had increased considerably and Louis XIV, to correct some abuses which had been called to his attention and "to promote the prosperity of the province," provided for the establishment of justice through a law-making

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<sup>1</sup> See interesting discussion of this in Clement's "Canadian Constitution," pp. 17 and 18.

<sup>2</sup> The *seigneur's* judicial powers varied according to the importance of his fief. Barons were empowered to erect gallows and pillories, but the ordinary judicial powers of a Canadian *seigneur* were confined to Middle and Low justice, which comprehended only minor offences. See "Old Quebec," by Parker and Bryan, page 96.

The Hudson Bay company, chartered by Charles II in 1670, theoretically had sole control of the country adjoining streams flowing into Hudson Bay, and by its charter possessed sole legislative, judicial and executive powers within its domains.

and law-administering body originally called the "*Conseil Souverain*," later the "*Conseil Supérieur*." It was located at Quebec, and was made up of the Governor, Bishop (or his substitute), Intendant, and five councillors chosen by the Governor and Bishop. This council exercised legislative and judicial powers, in the former capacity making such ordinances as were needed and in the latter giving judgment according to such ordinances, being controlled in both by the royal ordinances and the *coutume de Paris*. It may be noted in passing that the Governor was always a noble, the commander of the forces; while the Intendant was usually of the middle class and trained to law or business. Both Governor and Intendant reported in detail to the crown and criticized each other, so we may assume that dissenting opinions began early.

An Attorney-General also sat in this council, which was empowered to establish subordinate courts throughout the colony; the local judges were in fact appointed at Montreal, Quebec and Three Rivers.<sup>4</sup> Of course, neither *seigneur* nor habitant had any voice in the selection of councillors or subordinates, but an appeal lay to the "*Conseil d'Etat du Roi*." This was burdensome, and only exercised in five or six cases, it is said. With changes of small importance, this system continued until 1760. French law and French usages controlled, with slight local modifications. "The whole system of administration centered in the king," Parkman says, "who to borrow the formula of his edicts 'in the fullness of our power and our certain knowledge' was supposed to direct the whole machinery."<sup>5</sup> Favoritism was often charged, torture was used when needed to get confessions or incriminating evidence and justice was frequently perverted.

With the capitulation of Canada in 1760, as witnessed by the Treaty of Paris in 1763, Great Britain became charged with the responsibility of administering justice through all the Province.

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<sup>3</sup> In 1675 the change was made from "*Conseil Souverain*" to "*Conseil Supérieur*," the number of councillors was increased and the power of appointment reserved to the crown.

<sup>4</sup> Cf. "Judicial System of Quebec," by James Kirkby, in *Encyc. of Canada*, —Gilbert Parker, in "Old Quebec," (p. 106) says that "Law-breakers were tried every Monday morning by the Superior Council in the Ante-chamber of the Governor's apartment in Fort St. Louis."

<sup>5</sup> See "Old Régime," pp. 285-286.

Neither the Articles of Capitulation nor the Treaty, which was supposed to cover the details of the arrangement between France and England, made any mention of the laws which were to prevail. This oversight soon caused confusion. During the interval between the surrender of the Province and the signing of the Treaty the legal end of the government, both the formulation of laws and the enforcing of them, was in the hands of the military chiefs in command in the various localities. No one knew the limits of the jurisdiction of his neighbor, nor whether French or English law should control.

This was ended in 1763, after the treaty was signed, Benjamin Franklin being in the forefront of those who persuaded England that Canada was worth keeping. By proclamation, George III divided the territory of the province among new governors, who had power to establish courts of judicature and public justice for the hearing of civil and criminal cases "according to law and equity and, as near as may be, agreeable to the laws of England with the right to appeal to the Privy Council." General Murray was commissioned Governor of Quebec, to act only according to instructions from the crown and according to laws made with the advice and consent of a council acting with a representative assembly to be summoned as soon as the situation of the province permitted—all such laws within three months of enactment were to be transmitted to the king for his approval. The same commission empowered the Governor to pardon except for treason and wilful murder.

Following his instructions and under sound advice<sup>6</sup> Governor Murray established courts of King's Bench and of Common Pleas, but their duties were somewhat vague. True, the Treaty provided for the naturalization of the French who remained in Canada, and the Governor's instructions prescribed that jurors should be of the same nationality as suitors in each case—where the suitors were of different nationalities the jurors were of 'mixed origin', but the general administration of justice was not on a well-defined plan.

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<sup>6</sup> His chief legal advisers were Chief Justice Hey and Attorney General Masereau, both strong men. The latter was born in London, of French Huguenot parents and was graduated at Cambridge; though Protestant he opposed the political disqualification of Roman Catholics.

It is a fair statement, too, that from 1763 to 1774 the law of the province was in an unsettled state. The French Canadians claimed that their rights were controlled by the ancient customs and usages which held before the capitulation, and which they believed had been secured to them by the Treaty of Paris. On the other hand, the English subjects argued that it was the intention that all the old jurisprudence of the country should be set aside, and the English law established in its stead, even with respect to titles to lands, and the questions of descent, alienation and settlement.<sup>7</sup>

In 1774, Parliament intervened for the first time in Canadian affairs, and granted Canada a system of government.<sup>8</sup> This was done by what is known as the "Quebec Act," which was introduced in the House of Lords by the Earl of Dartmouth, and passed that house without opposition. In the House of Commons, however, it was bitterly assailed and, when it was returned to the House of Lords, Chatham said it was "a most cruel, oppressive and odious measure, tearing up justice and every good principle by the roots."<sup>9</sup> This criticism was probably prompted by the English inhabitants of the province, who were much against the Act at all times, because it substituted the laws and usages of

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<sup>7</sup> Atty. Gen. Thurlow (1766) sided with the French Canadians, saying, "They seem to have been strictly entitled by the *jus gentium* to their property as they possessed it upon the capitulation and treaty of peace, together with all its qualities and incidents by tenure or otherwise, and also to their personal liberty. \* \* \* It seems a necessary consequence that all those laws by which that property was created, defined and secured, must be continued to them. To introduce any other tends to confound and subvert rights, instead of supporting them." Bourinot's Constitutional History of Canada, p. 11.

<sup>8</sup> 14 Geo. III, c. 83.

<sup>9</sup> The American Congress, in an address to the people of Great Britain in September 1774, declared the act to be "unjust, unconstitutional and most dangerous and destructive of American rights."

By the Declaration of Independence it is cited as "abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries so as to render it at once an example and fit instrument for introducing the same arbitrary rule into these colonies."

French Canada for English law<sup>10</sup> and did not require Roman Catholics to take the test oath.<sup>11</sup>

Under this Act all power was placed in the hands of the Governor and a legislative council of not less than seventeen or more than twenty-three. This body, with the consent of the governor, could make ordinances within certain limits for the government of the province, thus giving it control of the local law-making. Every ordinance, however, had to be transmitted to the Crown for approval, and by the terms of the Act it was provided that all civil rights should be treated according to the French civil law and procedure, and the criminal law should be that of England; both civil and criminal law might be changed by ordinance. All ordinances were drawn up both in French and English, and both languages were employed in the council debates.

This Act, which is often termed the Constitution of 1774, was in force until 1791, when two provinces were established in Canada and more liberal government granted each. This liberality was largely due to Pitt, backed by the influence of Charles Fox, as both knew that some forty thousand loyalists had gone from the new states to the provinces after the revolution and fought to secure for them in part in their new abode what had been denied to the old colonies.<sup>12</sup> Of these new comers about ten thous-

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<sup>10</sup> See Cavendish's Debates, p. 29.

It is remarkable that almost every one had something to say against the Quebec Act, except the French Canadians. Pennsylvania and New York objected because the boundaries fixed by it cut into their holdings; London merchants disliked the use of French civil law; British parliamentarians were down on it because it looked to a rule by crown officers alone and did not encourage representative government. See Article by Prof. George Bryce in VIII "Narrative and Critical History of America," p. 134. (Winsor); cf. "Michigan as a Province, Territory and State," by Utley, Vol. I, p. 258.

<sup>11</sup> It is noteworthy that this relieved the Roman Catholic population of Canada from disabilities long before such relief was granted in Great Britain and Ireland. See Bourinot, p. 16.

<sup>12</sup> In one of his speeches, Fox said, "I am convinced that the only method of retaining distant colonies with advantage is to enable them to govern themselves." See Greene, "History of the English People," Vol. IV, p. 1753. He may have been influenced in some degree by the French Revolution, to which all English statesmen were looking for both light and warning. McCarthy's "Four Georges and William IV," Vol. III, p. 299. See also Trevelyan's "Life of Charles Fox."

and had gone to Upper Canada, the majority of the balance settling in Nova Scotia and founding the Province of New Brunswick.

To meet the needs of the new population, the governor in 1778 had created five judicial districts in Upper and Lower Canada; that in Quebec was called Gaspé, those in the upper section were named Luneberg, Mecklenburg, Nassau and Hesse, after the German houses of those names allied to the English royal family. By the constitution of 1791, as the act of that year was called, the Provinces of Upper and Lower Canada were entirely separated. A Governor General was appointed over both, but each was given its own legislative council and assembly, with power to make laws. In Upper Canada the Council was to have not less than seven members, in Lower Canada not less than fifteen; in the former province the assembly consisted of not less than sixteen, in the latter fifty. Members of the councils were appointed by the Crown for life, members of the assembly elected by owners of lands according to certain property qualifications. The legislature met not less than once each year, and each assembly continued for four years<sup>13</sup> unless sooner dissolved by the Governor. The British Parliament reserved to itself the right to regulate duties, navigation and inter-province of foreign commerce, but left the use of moneys to the will of the legislature. The Governor and executive council were made a court of appeals until the legislatures made other provisions. The right of bequeathing property was to be absolute and unrestricted. All lands in Upper Canada, as well as in Lower Canada, might be granted in free and common socage. English criminal law was in force in both provinces.<sup>14</sup>

In accord with the general spirit of the act, and doubtless largely because of the feeling in England which had prompted its passage, general measures were adopted which were, so far as might be, along the same lines as those in force in England. Notwithstanding a promising beginning, racial jealousy and other causes made it impossible to work satisfactorily under the provisions of this constitution. In 1837 the friction was so great that

<sup>13</sup> No councillor or clergyman could be elected to the assembly. Bourinot, p. 22.

<sup>14</sup> Cf. "The Law of the Canadian Constitution," by W. H. P. Clement.

rebellions occurred in different parts of the provinces, and in the next year the Queen sanctioned a bill, passed by both houses, suspending the constitution and making temporary provision for the government.<sup>15</sup> The result was legal chaos; the Quebec special council suspended the writ of habeas corpus and Lord Durham, then Governor-General, sentenced certain British subjects to transportation without trial, condemning them to death if they returned to the colonies. Parliament criticized Lord Durham and passed a bill indemnifying those putting his ordinance in force.

Notwithstanding his arbitrary measures, Lord Durham proved a broadminded friend of the colonies. On his return to England after less than a year as Governor General, he made a full report to the crown in 1839, recommending, among other things, that the provinces be reunited and that the independence of the judges be secured. Parliament acted promptly in 1840, and in 1841 the provinces were again formally joined;<sup>16</sup> the same act provided that English should be the only language in legislative records. Three years later seigniorial tenure was abolished, affecting the title to nearly thirteen million acres, held by one hundred and sixty *seigneurs* and occupied by about seventy-two thousand tenants. In 1848 the clause preventing the use of French in the legislature was repealed. Thus, by a certain amount of give and take Canada managed to struggle along under this act of 1840 and its amendments until 1864, when legislation reached a deadlock and the need of some radical change was apparent.

To accomplish this, delegates from all of the provinces met at Quebec in 1864, and adopted seventy-two resolutions which form the basis of the British North American Act of 1867, which, with its supplementary acts of 1871 and 1886, is the present Constitu-

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<sup>15</sup> Cf. Bourinot's Constitutional History of Canada, p. 32.

<sup>16</sup> 3 and 4 Vict., c. 35, known as the "Union Act." In the discussion of this measure, Lord Brougham spoke of Canada as "a burden we have not yet shaken off." See Dicey, Law and Opinion in England, p. 450. Lord Durham's report said, "I would not impair a single prerogative of the Crown; on the contrary, I believe that the interests of the people of these provinces require the protection of prerogatives which have not hitherto been exercised. But the Crown must, on the other hand, submit to the necessary consequences of representative institutions; and if it has to carry on the government in unison with a representative body, it must consent to carry it on by means of those in whom that body has confidence." In addition he urged some union of all the provinces



tion of the Provinces. The preamble recites that it is desired to have "a constitution similar in principle to that of the United Kingdom." While this preamble has been criticized by a distinguished legal writer as a piece of "official mendacity" or "diplomatic inaccuracy,"<sup>17</sup> and it has been said that it in fact presents features more like those of the United States than those of England, it must strike an American lawyer as a curious mixture of the two, insofar as the administering of law is concerned. Up to the present day, however, it seems to have solved the problem of making the French and English theories of law interlock.

## II

### SUBSEQUENT TO THE ACT OF 1867

#### 1. THE LEGISLATIVE MACHINERY. (a) *The Dominion.*

It is provided by this act<sup>18</sup> that the Dominion as such shall have one Parliament, consisting of the Queen, the Senate and the House of Commons. Another part of the act lists matters coming exclusively within the authority of this parliament; these include many powers similar to those of our Federal Government, and also marriage and divorce, savings banks and the criminal law, including procedure in criminal cases, but not the constitution of courts of criminal jurisdiction. But the power of the Dominion Parliament does not stop with this list, as it extends to "all matters not coming within the classes of subjects—assigned exclusively to the legislatures of the provinces." This reminds us forcibly of the difference between the underlying principles of the Canadian federation and those of our own national government. Across the border it was assumed that the nation came first and the provinces later; with us the independent states existed first and were woven into a nation later. Any power of which it has not divested itself, naturally, is lodged with the grantor.

While the Act gives the Dominion Parliament any powers not expressly delegated to the Provincial Legislatures, its legislation is limited in another way. It cannot assume a power which the Imperial Parliament could not exercise. As an illustration, the

<sup>17</sup> A. V. Dicey, "The Law of the Constitution," p. 155.

<sup>18</sup> 30 and 31 Vict. c. 3. See Sections 17 and 91.

Dominion Parliament, that it might better probe a scandal, passed an Act providing for the examination of witnesses upon oath. This was disallowed by the Imperial Privy Council, as no such power then rested in the Imperial Parliament.<sup>19</sup>

Senators are appointed for life, the Governor General acting in Council filling vacancies. The original quota gave twenty-four from Ontario, twenty-four from Quebec and twenty-four from the Maritime Provinces. This number has been increased under the reserved powers in the act by the appointment of a few senators from provinces later joining the federation—and, in providing for future emergencies,<sup>20</sup> the Imperial Parliament has thrown the doors wide open by empowering the Parliament of Canada "to make provisions for the representation in the Senate and House of Commons \* \* \* of any territories which for the time being form part of the Dominion." As pointed out by some writers, this leaves it in the power of the Dominion government, while the old provinces are still tied down to equality of representation.<sup>21</sup>

Beyond a property qualification, the loss of which deprives the Senator of his seat, there is little else to cause comment as to the personnel of the Senate. It was intended to secure equal representation to the divisions of the Dominion, as the United States Senate does to the States, but it was too cramped by the original limitations and must be often amended. Its scope is narrower than that of the House of Lords in that it has no real judicial functions, and it has less power than our Senate as it has no voice in treaties or appointments to office. It is purely legislative, its only power outside of law-making being to say whether

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<sup>19</sup> See Sec. 18, B. N. A. Act of 1867. This was in 1873; since then this power had been granted.

<sup>20</sup> By the B. N. A. Act of 1886, 49 and 50 Vict., c. 35. This is a brief measure adopted principally to give more elasticity in the matter of representation for new provinces carved out of the Northwest Territories. This enactment practically does away with the limit of 78 members fixed by the original act and is outside of the thought of the Quebec Conference resolutions. At present there are 87 Senators.

A Senator must be 30 years old and legally seized of lands "held in free and common socage, or seized or possessed for his own use and benefit of lands held in franc-alen or roture" of the value of \$4,000 above all incumbrances.

<sup>21</sup> See Clement, p. 113.

or not a Senator has been disqualified for one of the causes recited in the Act.

In reaching a standard for representation in the House of Commons, the Quebec Conference hit on the peculiar expedient of using the Province of Quebec as a gauge, as it had neither the largest nor smallest population, and one less apt to change sharply. Accordingly, it was decided that Quebec always should have 65 members, and each other province should have such number as would bear the same proportion to its population that the number 65 does to the population of Quebec, a census being taken every ten years. A small property qualification is required to enable one to vote for the members of the House.<sup>22</sup> Members were elected for a five year term, unless Parliament be sooner dissolved.

We look in vain in the original B. N. A. Act for any specific statement of the general duties of the House of Commons: it could not, and cannot, make any appropriation for any purpose not first recommended by a message from the Governor General at the same session.<sup>23</sup> Otherwise its powers and duties are only limited by the general clauses relating to the Canadian Parliament.

A law passed by both Houses goes to the Governor General for the assent of the Crown; if he assent he must forthwith send a copy of the Act to one of the Secretaries of State for the Crown, and if the King in Council within two years of its receipt thinks fit to disallow the Act, such disallowance, being signified by the Governor General, annuls the Act from the date of signification. Another course is open to the Governor General than assent or dissent, as he may reserve an Act for the signification of the pleasure of the Crown; if this course be adopted the Act has no force unless, within two years of its receipt by the Governor General, he signifies that it has received the assent of the crown. Such assent, however, cannot validate an *ultra vires* enactment.<sup>24</sup>

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<sup>22</sup> This varies in many ways. See table in Bourinot, p. 87. Now there are 221 members to represent considerably less than 6,000,000 people, including Quebec's population of about 1,650,000. This is a larger number than allowed by the original ratio under the U. S. Constitution of 1 for every 30,000. Our House of Representatives has 435 members. At the Canadian ratio we would now have over 3,000. See Section 51, B. N. A. Act 1867.

<sup>23</sup> Section 54, B. N. A. Act 1867.

<sup>24</sup> See Clement, (2d Ed.) p. 135.

(b) *The Provinces.*

In each Province the Legislature is absolutely supreme as to all matters within the limits of subjects and area as defined in the B. N. A. Act of 1867. In nowise are these legislatures subject to the Dominion Parliament or to the Imperial Parliament—they can even abridge the Crown's prerogatives insofar as matters in their respective provinces are concerned.<sup>25</sup> They derive no authority from the government of Canada and are not subordinate to it. They are on equal footing with the Dominion Parliament, and their laws have as much weight before the courts.

As to their make-up, each province followed its own taste, and the Act of 1867 ratified the wishes of the respective delegates to the Quebec Conference.<sup>26</sup> Ontario was content with one house, called the "Legislative Assembly of Ontario,"—Quebec decided upon two, styled "Legislative Council" and "Legislative Assembly." The other provinces varied. In Ontario members of the Assembly were made elective; in Quebec the twenty-four Councillors were appointed by the Lieutenant Governor in the name of the Crown and their qualifications are fixed as those of Senators of the Dominion; the members of the Assembly are elected. In both Ontario and Quebec the Assembly continues for four years unless sooner dissolved.

(c) *The Governor General and Lieutenant Governors.*

As under the English theory the Crown is supposed to be part of the law-making body of England, we naturally find the Crown mentioned by the British North American Act as part of the Dominion Parliament.<sup>27</sup> The Governor General stands as the official representative of the Crown in this connection. Similarly in describing the legislatures of the provinces, we find that the Act speaks of the Lieutenant Governors as integral parts.<sup>28</sup>

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<sup>25</sup> If the writer correctly interprets the decisions of the Courts, this is true. In the Liquidator's case (61 L. J. P. C. 75) the Privy Council said "the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain. In *Exchange Bank v. Reg.*, Their Lordships negatived the preference claimed by the Dominion Government upon the ground that by the law of Quebec the prerogative was limited." Cf. *Exchange Bank v. Reg.*, 11 App. Cas. 157.

<sup>26</sup> Sections 69 *et seq.* B. N. A. Act of 1867.

<sup>27</sup> Section 17, B. N. A. Act of 1867.

<sup>28</sup> Sections 69 and 17 B. N. A. Act of 1867.

It does not appear, however, that any of these representatives of the Crown really take an active, and, so to speak, official part in framing laws. They have the veto power, as we have seen, which we consider as part of the power of the executive under our system, and there is no provision like ours for overriding the veto. And, while the veto by the Crown in England has become practically obsolete, it is not so in the Provinces, as it is exercised with reasonable freedom.<sup>29</sup> As to the acts passed by provincial legislatures, the procedure is like that for the Dominion Parliament, with the substitution of the Lieutenant Governor of the Province for the Governor General, the Governor General for the Queen and the time limit of one year instead of two.

## 2. THE COURTS.

It is agreed that Great Britain keeps in touch with and control of the Canadian Provinces through four mediums—the Royal Governor, the veto power, control of foreign relations and the 'act that it has the final court of appeals.'<sup>30</sup> Just as we, on our side of the line, now recognize that our true Federal Constitution is the original written constitution plus the opinions of the Supreme Court, so must Canadians agree that their course must be shaped not by the British North American Acts alone, but by those Acts plus the constructions of law given by the Imperial Privy Council or by the Supreme Court of Canada. It means much the same whether we define law as "that ordering of the relations of life which is upheld by the general will,"<sup>31</sup> or as "not a fixed and determinate tradition, but a mobile and growing science of social relations."<sup>32</sup> What we want is to have written law, past and present, moulded for the spirit of the times, and the finishing touches of the operation necessarily are in the hands of the courts. A short examination convinces one that Canada is well equipped with this delicate part of the legal machinery, with a few more questions as to its operation than we have with reference to ours.

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<sup>29</sup> Cf. "The Government of England" by Lowell, p. 405.

<sup>30</sup> Cf. "The Government of England" by Lowell, p. 402.

<sup>31</sup> Dernberg's definition, approved by Mr. Carter in "Law; its Origin, Growth and Function," p. 8.

<sup>32</sup> "Flexibility of Law" in the "Outlook," Vol. 96, p. 848.

In a general way, the courts of the Canadian System may be divided thus:

- (a) Judicial Committee of the Imperial Privy Council;
- (b) Supreme Court of the Dominion;
- (c) Other Courts of the Dominion;
- (d) Provisional Courts.

This division begins at the focus and works out, which is a convenient way of thinking, perhaps.

(a) *Privy Council.*

Chitty says, in his *Prerogatives of the Crown*, "original and exclusive jurisdiction in cases relating to boundaries between provinces in the Plantations \* \* \* is vested in King-in-Council. They possess the judicial power through the King in all cases in which appeal lies to the King."<sup>33</sup> This recourse to the Crown for help has always been recognized and in 1833<sup>34</sup> provision was made for appeals to the Council and for constituting the Judicial Committee, with the probable idea of preserving the uniformity of English law throughout the colonies.

The right of appeal to this Judicial Committee, insofar as it concerns Canadian Courts, is peculiar. The Supreme Court of the Dominion, as we shall see later, stands as an Appellate Court for the Dominion; notwithstanding this, any litigant deeming himself aggrieved can take his appeal direct from the Provincial Courts to the Judicial Committee of the Privy Council, provided he elects to do so instead of going to the Supreme Court of the Dominion. In some instances "where the case is of public importance or of a very substantial character" (*Prince v. Gagnon*, 8 App. C. 103)<sup>35</sup> a party who has taken appeal to the Dominion

<sup>33</sup> It rests on the traditional appeal to the Crown as the fountain of justice. Originally proofs were taken, the Star Chamber arising when it existed. By 16 Car. 1. c. 10, the Star Chamber was abolished, but the appeal to the King was not taken away.

<sup>34</sup> 3 and 4 Wm. IV, c. 41.

<sup>35</sup> A controversy involving £1,000, where the appeal seems to have been asked as a matter of right. It was denied, the Committee saying that as the Dominion legislature had said that the judgment of the Supreme Court should be conclusive, "saving any right which Her Majesty may be pleased to exercise by virtue of royal prerogative," Their Lordships would not advise allowance of appeals except where the case is of gravity and of public interest.

Supreme Court is granted a further appeal to the Privy Council. In some respects this is analogous to the reaching down by the United States Supreme Court to take up questions passed upon by the Federal Courts of Appeals, but the result in Canada has not been so satisfactory, apparently.

No recent data as to the disposition of such appeal cases are available to the writer, but we find that out of ninety-six cases in which appeal was sought to the Privy Council, before 1898, leave to take the appeal was refused in forty-three; where granted, nineteen were affirmed on appeal, fifteen reversed, five modified and the others quashed or not prosecuted for some reason. We can sympathize with one Canadian critic who says "it is regrettable that the Judicial Committee has so often found that the Supreme Court was wrong. There is no power to determine that the Privy Council is always right. Neither jurisdiction is outside the range of fair criticism. Jupiter may sometimes nod in London as well as in Ottawa."

The procedure on such an appeal requires a full petition setting out the questions involved and the contentions of the parties, as well as the disposition made by the Supreme Court of the Dominion. If the judgment in the Supreme Court appears substantially right to the Committee, upon examination of the petition, the appeal will not be granted. Such examinations sometimes lead to curious conclusions, as in the case of *MacMillan v. Grand Trunk Railway Co. of Canada*.<sup>16</sup> In this case there had been a sharp difference of opinion in the Canadian Court on one point, two judges holding one way and two the opposite, while the Chief Justice was of opinion that the point upon which the others differed did not properly arise in the case. This might seem to be a case which would demand attention from an outside arbiter, if one could be found, but the Judicial Committee refused aid on the ground that a judgment so reached could not bind the Supreme Court of the Dominion or any Province Courts as a precedent and therefore the case of the petitioner failed.

Doubtless there was good ground for such a failing, but it would seem to lend weight to such criticism as is quoted above and to the contention of some of the brilliant members of the Canadian

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<sup>16</sup> Wheeler's Privy Council Law, p. 982.

Bar, during the debates on the establishment of the Supreme Court for the Dominion that the Judicial Committee came to the consideration of the Canadian Constitution and Laws "at the greatest disadvantage from the wrong point of view."

(b) *Supreme Court of Canada.*

By section 101 of the British North American Act of 1867, the Parliament of Canada was authorized to provide for the General Court of Appeal and for additional courts to administer the laws of the Dominion. This power was not exercised until 1875, although Sir John McDonald in 1869 introduced a bill for its creation and other measures looking to the same end were introduced later before it became a fact. The Act under which it was finally created was framed by the then Minister of Justice, Fournier, and provided for the establishment of a Supreme Court and a Court of Exchequer for the Dominion. Much discussion followed its introduction. The question was raised whether such a court could deal with any questions except those arising under the Acts of the Dominion Parliament. Some thought it would be unwise to give this Court appellate jurisdiction in local matters; others that it would be fatal not to compel appeal from the Provincial Courts to the Supreme Court direct instead of to England. One of the latter said that if provincial appeals were not compelled he foresaw "the dismal spectacle of six melancholy men endeavoring to catch an appeal case which but for this act would have gone to England" and further, that the judges "would become rusty and relapse perhaps into a state of barbarism."

While it is not clear whether it was originally intended to do so or not, the broader construction has prevailed and the court is now admitted to have power to deal with questions under the jurisdiction of the Provinces<sup>37</sup> as well as under Parliamentary Acts.

As now constituted, the Court consists of a Chief Justice and five puisne judges,<sup>38</sup> two being selected from the bench or bar of

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<sup>37</sup> See *Prince v. Gagnon*, *supra*. Also *La Cité de Montréal v. Les Ecclesiastiques de St. Sulpice*, L. R. 14 App. C. 660. See also article on "Canada, Colony to Kingdom," VII American Journal of International Law, p. 271, by John S. Ewart.

<sup>38</sup> The Chief Justice receives \$8,000, the other Judges \$7,000 per annum.



Quebec. The judges must reside at or within five miles of Ottawa, where the Court sits. They are appointed by the executive and hold office during good behavior. Fifteen years' service or disqualification for infirmity gives the right to retire on a pension of two-thirds of the salary.

The Court holds three sittings each year. Five judges constitute a quorum, but a majority of those sitting on the case are required to decide it. Generally speaking, appeals require a final judgment in a Superior Court of the Dominion System or of a Court of last resort in the Provinces, but lie also from territorial courts.

Quebec appeals are specially treated. Where the matter in controversy does not amount to \$2,000, no appeal lies unless the validity of an Act of the Parliament of Canada or of the Legislature of the Province, or of an ordinance, is concerned, or where the case relates to money due the Crown. From Ontario, appeals must concern matters involving more than \$1,000 and from the Maritime Provinces more than \$250.

The Court has two functions which strike an American as peculiar. Questions of the election of members to the Parliament are decided by it instead of by the House itself; and the Court has the duty of "advising the conscience of the Government." For this latter purpose, questions are referred by the Governor and Council to the Court for its opinion.

While Dicey has said that the "true Supreme Court of Canada is the Judicial Committee of the Privy Council" about 3,000 cases have been decided by the Supreme Court since its establishment.

(c) *Subordinate Courts of the Dominion.*

Under the same power which authorized the Dominion Parliament to establish the Supreme Court, it has also established the Exchequer Court of Canada, and Revising Officers' Courts and has given to the railway committee of the Privy Council of the Dominion some judicial functions, and has authorized the Court of the Minister of Agriculture to decide upon the status of a patent. Of these, the Exchequer Court has jurisdiction in actions against the Crown and in admiralty cases. The Revising Officers' Courts have control of the settlement of voters' lists from Dominion elec-

tions, and the powers of the other courts mentioned and their judicial functions are such as would be expected from their titles.

(d) *Provincial Courts.*

Each Province has provided for its own needs in the matter of courts. The system in the Province of Ontario, which seems to be the most workable, may be of interest.<sup>29</sup>

In Ontario we find the Division Court as the lowest Court with a general jurisdictional limit of \$200 and in certain cases of not exceeding \$60. In this Court either party may require a jury of five and appeal lies to the High Court, where the matter in dispute exceeds \$100.

The next higher court is the County Court, corresponding in a general way to the County or Circuit Courts of our States. Its outside jurisdictional limit is \$800 and in certain actions \$500.

Next above this comes the Supreme Court of Judicature for Ontario, consisting of two divisions—the High Court of Justice and the Court of Appeal for Ontario. Of these the High Court is the Supreme Court of Record having original jurisdiction with powers incident to the old Courts of King's Bench, Common Pleas and of Chancery. Appeals lie from it to a Divisional Court of the High Court, comprising three Judges of the High Court, the trial judge being disqualified from sitting. There is a further appeal to the Court of Appeals from the judgment of a Divisional Court where that Court is not unanimous and also where the amount involved exceeds \$1,000, or where patents are involved or some other matters of general interest are concerned.

The highest court in the Province is the Court of Appeals, which is the Appellate Division of the Supreme Court. This consists of a Chief Justice and four Associate Judges. From it, as we have seen, appeal may lie either to the Dominion Supreme Court or to the Judicial Committee of the Privy Council.

### 3. MISCELLANEOUS NOTES.

A discussion of the legal system would be incomplete without some reference to the bar and possibly to some peculiarities of the laws.

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<sup>29</sup> The article entitled "The Legal System of Quebec," by Dean Walton, of the McGill Law School, published in the *Columbia Law Review* for March, 1913, covers its subject so thoroughly that any outline in this paper would be quite superfluous.

Legal education in Canada is under the control of the Legislature for each respective Province, but all Provinces have adopted the same general method of incorporating the members of the profession into a society empowered to make rules and regulations governing admission and qualification and only a person admitted to membership in the society is entitled to practice. In all the Provinces, students are obliged to spend some years as articled clerks in solicitors' offices to learn practical work. The advantages of university education are recognized by a shortening of this required term in some Provinces by one year and others by two.

The distinction between barristers and solicitors which prevails in England has been practically done away with in all of the Provinces. Theoretically, the distinction is preserved, as every person must be called to the bar by the benchers of the law society, but in reality barristers and solicitors are interchangeable terms.

King's Counsel are created by patents of precedence granted by the Crown. Such a grant is, of course, a mark of distinction, although that distinction is not now, any more than it was originally, necessarily in branches of learning; it may be purely political. In this history repeats itself.<sup>40</sup> Such counsel are entitled to wear a silk gown and to have precedence in courts in order of appointment next after the Attorney General.

Without going into general details of practice which would too much expand this paper, we may note some peculiarities.

For instance, in criminal law, under the Dominion Acts, no married person is a competent witness against the other as to acts committed since marriage, but is competent otherwise; also, no person is excused from answering because the answer would tend to incriminate the witness, but such evidence is not usable in a later prosecution, except for perjury. Under Ontario law, the accused and wife are both compellable witnesses and no mere wit

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<sup>40</sup> Sir Francis Bacon was appointed K. C. extraordinary in 1601, without being a Sergeant-at-Law or one of the ordinary staff of law officers, or retained in any cases for the Crown. It was a pure case of "pull." Francis North was similarly designated in 1668, to the great disgust of the Bar in general. See Pulling's "Order of the Coif," p. 190.

ness can be compelled to incriminate himself. In speaking of this, we should remember that the General Criminal Law is all under control of the Dominion and that the Provincial Legislature simply punishes for infraction of Provincial laws.

With reference to insolvency, we find peculiar questions arising. In 1843, uniform bankruptcy laws for all Canada were passed. These applied only to traders, but gave full discharge. In 1869 and 1875 new laws were passed also applying only to traders. Since 1880, no Dominion law has been in effect except the so-called "Winding-Up Act" of 1882, which applies to banks, insurance companies and certain other corporations. It was left to the Provinces to give relief, the result being that Quebec went back to its old law, which provided for distribution of assets on insolvency, but not for discharge, and Ontario has left its creditors to voluntary assignments with a rider which gives all creditors with overdue claims the right to take advantage of an execution levied by any one.<sup>41</sup> In New Brunswick and Nova Scotia, the creditors are left to their common law remedies.

Patent law in Canada also differs from ours. Under the present statute a patent can be obtained for eighteen years at a cost of \$60. The fee is payable for six years at a time and if another fee is not paid on the expiration of the first period, the patent is forfeited, and it is also canceled if no manufacturing is done under it within two years of its issue. The construction of the phrase "original inventor" agrees with ours that it means "discoverer" instead of with the English interpretation that it means "one first bringing into the realm."

All provinces have codes of law in force and most of them have codes of procedure. They are not unusual in their general plan with the exception of those of Quebec.

As we have already noted, the most important question in early Canadian legal history was how to make the French and English theories interlock. Code law solved this difficulty. At present, in the Province of Quebec, one attending a trial of a civil suit hears the advocates quote articles of the civil code and French

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<sup>41</sup>Quebec has an ingenious thumbscrew for causing "voluntary bankruptcy:" a debtor can decline, but is thereupon subject to *capias* which can only be dissolved by bankruptcy.

authorities in support of them; in a criminal case, on the other hand, we find the penal law of England, as codified under Sir John Thompson in 1892.

When Canada was ceded to England the civil law in force in Quebec was composed of (1) the common law of France in force in 1663 within the jurisdiction of Paris and which was known as the *Coutume de Paris*, (2) edicts, ordinances and declarations of the French Kings, rendered since 1663 and which were registered in the office of the Sovereign Council of Quebec, (3) *Arrêts*, or ordinances of the Kings, especially applicable to Canada, (4) *Arrêts*, or ordinances of *Conseils Souverain*, and in some case of Intendants.

This was modified from time to time by legislation and became much confused. In 1857, Sir George Etienne Cartier proposed to the Legislature to have all civil law collected and to make a compendium like the Code Napoleon. Three Commissioners were appointed to do it and in 1866 completed their work. This code is now the pride of practitioners in Quebec, and is said to be the best compendium of civil law in existence.<sup>4</sup> It is in four books. The first deals with persons and, except as to corporations concerning which the code derives its provisions from England, gives the law as found only in Quebec. No absolute divorce is allowed. The second book covers property and is founded on the Roman law. The third relates to the acquisition and exercise of rights of property. In it we note the statement that the line of descent of property is as prescribed by Justinian and the use of the term "hypothec," covering mortgages and some other liens on real estate, catches the eye. There are no chattel mortgages, but of course pledges of chattels are permissible, possession passing. Book Four relates to commercial law and is absolutely founded on the French law.

The code of civil procedure was much simplified in 1897. Prior to that, the general rules were those covered by the French law as it stood in 1667 and were somewhat behind the times.

This completes this discussion. It is intended not as any exhaustive analysis, but simply as calling attention to general

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<sup>4</sup> See "Practice of Law in Quebec Province," by Howard S. Ross, IX. Michigan Law Review, p. 317.

features which American lawyers might find interesting. A glance over it shows the most prominent individual influences which have shaped the system to be, chronologically stated, Sir Guy Carleton (Lord Dorchester), Attorney General Thurlow, Lord Durham, Sir John MacDonald and Sir George Cartier, but many other strong men of deep thought have helped at all times. It is rightly a matter of pride to all members of the American Bar to see how the courage and independence of our brethren of the Canadian Bar have met and overcome every obstacle interposed to the development of law up to the present time.

*Sidney T. Miller.*

*Detroit, July, 1913.*