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DECISIONS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL  
THEIR RELATION TO EDUCATION IN CANADA.

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INTRODUCTION.

Before entering into the discussion of the subject of this study it would be profitable to trace first the history and development of the judicial powers of the Privy Council. The origin of the privy council, from which has been formed the judicial committee, is, like that of most of our institutions of government, more or less shrouded in mystery. It is impossible to choose a definite date and say "That is the date of the beginning of the privy council". The power at present exercised by the judicial committee is a development brought about through centuries of growth. In order to trace this development it is necessary to go back to the earliest times when all institutions of modern government were in the germinal stage and known under different names than those now applied to them in their altered form.

During the Norman and Angevin period alterations of lasting importance were effected in the system of government then in vogue. During the reign of Henry I arose a body known as the Curia Regis, which was organized for judicial and financial purposes. "The Curia is the germ from which have developed the departments of government"(1). "The Curia Regis in it's widest signification and early use under William the Conqueror and William Rufus, seems to have denoted the National, Common or Great Council of the Realm - the Witanagemot in it's feudalized form - ..... The Curia in it's judicial aspect was invested with the old appellate jurisdiction of the Witanagemot and with the direct jurisdiction, as the feudal court of the King's vassals in all disputes between the tenants in capite"(2)

The Curia Regis as a judicial body and in it's financial powers was developed by Henry I and a regular routine of business established.

Under Henry II this body was re-organized and it's administration extended. From it itinerant justices were sent on circuit throughout the country. In the transaction of business the King himself was at the head and in early times attended and actively participated in the dispensation of justice. Henry II was accustomed to take this active part.

"From the reign of Henry I at the latest, the judicial functions of the Common Council of the realm appear to have been exercised by a supreme court of justice, to which the name "Curia Regis" is specially though as yet not exclusively appropriated, and which is attendant upon the King in his movements from place to place". (3) In the absence of the King the Justiciar presided, assisted by the officers of the Royal Household, the Chancellor and others appointed by the King. Described by Coke as "A noble, honorable and reverent assembly of the King and such as he wills to be of his Privy Council in the King's court or palace".

Until the reign of Henry II the Curia Regis continued as the supreme court. By that time it's business had so increased that eighteen judges were attached to it. In 1178 the King reduced this number to five and deprived the court of it's character of a final court of appeal by reserving for his own decision cases in which the Curia failed to give justice. This tribunal is the source of our present Courts of Common Law, for shortly after the Magna Carta the curia Regis was divided permanently into the Exchequer, Common Pleas and King's Bench.

- (1) Anson Constit. Hist. P. 12.
- (2) Taswell-Langmead Eng. Constit. Hist. P 124.
- (3) Ibid.

After this division of the Curia Regis the King still continued to exercise his personal jurisdiction through his "Continual" or ordinary council, both as a court of final appeal and as a court of first instance, in cases not specially delegated to the Common Law courts. During the reign of Henry III this "Continual" council acquired strength and prominence due to the minority of the King. "This body ill-defined as to constitution and powers but always in immediate attendance upon the King first appears in the minority of Henry III. It is distinct from the larger deliberative assembly, the Commune Concilium, from the more frequently summoned assembly of the Magnates, and from the judicial and financial staff which transacted the business of the courts, the Chancery and the Exchequer"(1) "It's powers were most extensive and indeed indefinite. It was the King's standing council of advice in all matters of administration; it received, discussed and remitted to the proper courts a vast number of petitions.....for relief in various matters of judicial cognizance". (2)

In the exercise of judicial functions the Chancellor presided, after the abolition of the office of Justiciar. Each Chancellor endeavored to widen the jurisdiction. This assumption of powers was carried to such an extent that statutes in restraint of their powers were passed. These however, had little effect and "the council in the reign of Richard II had become a power co-ordinate with the King rather than subordinate to him, joining with him in all business of state, not merely assisting but restricting his actions". (3)

The King's Ordinary council continued to exercise it's jurisdiction, even after the establishment of Parliament and the recognition of the judicial powers of the House of Lords as a court of appeal and court of first instance. After the giving forth of branches such as the Star Chamber, it transmitted at a later date it's powers to the Privy Council, the judicial Committee of which latter body still exercises them.

"In every department of the executive it was the duty of the council to advise the Crown and there soon follows the assumption by the council of judicial powers, which to some extent supplemented and to some extent superseded, the action of the courts". (4)

The assumption of power by the council continued, during the infancy of Henry VI it added to it's consultative functions those of a council of regency. "The jurisdiction of the Council dangerously indefinite, but on the whole salutary in it's exercise, under Henry VII, had become a formidable engine of oppression before the death of Elizabeth". (5)

The Court of Star Chamber was the court which was the instrument whereby the court fell into disfavor. At it's inception, when created by the statute 3 Henry VII Cap. I justice was done. Indeed often it was only here that justice could be obtained speedily and at a small cost by the poor and often only here justice could be obtained by the weak.

By the statute of 16 Charles I Cap 10 the power of the Privy Council was "to inquire into all offences against the Government and to commit the offenders into custody in order to take their trial in some of the courts of law". But their jurisdiction was only to inquire, not to punish.

The council used the Star Chamber to enforce it's decrees and proclamations thus giving such decrees and proclamations the force of law.

- (1) Anson P. 61
- (2) Taswell-Langmead P. 144
- (3) Stubbs Constit. Hist. III P. 247
- (4) Anson P. 22
- (5) Anson P. 27

"So long as the Star Chamber was available for the enforcement of proclamations there existed a judicial power residing in the executive, limited by no settled rules, exercisable at the Royal discretion and alleging the interests of government as the grounds of it's exercise". (1)

The mis-use of power resulted in the abolition, by the Long Parliament in 1641, of the Star Chamber and the forbidding of the privy council or council board from intermeddling in civil cases or suits of private interest between party and party. "With this enactment the judicial powers of the King's council acting as a court of first instance within the jurisdiction of the courts of law was brought to a close". (2) This enactment did not abolish the council for "The so-called Star Chamber is ..... only a committee of the privy council on which account also every privy councillor could occasionally take part in the proceedings and even the whole body sit as Star Chamber as was done at first in important cases, and later, at all events from Edward VI, was the general rule whence this penal jurisdiction became quite an ordinary portion of the political business of the ministerial council". (3) "The Privy Council as a whole is therefore at the present time reduced for ordinary purposes, to executive business which is formal and not discretionary, while it's consultative functions have disappeared". (4)

"The abolition of the Star Chamber did not abolish the council nor deprive it of all judicial power. It retained jurisdiction as a court of last resort in Admiralty matters and in all matters, civil and criminal arising in the King's lands beyond the seas". (5) That is, the King in council was not deprived of the right to hear petitions from adjacent Islands or the plantations.

In 1661 a committee was appointed to hear appeals and "deleances" from the Channel Islands. In 1667 a re-arrangement of the privy council was made, committees for Foreign affairs, for the Admiralty, for Trade and Plantations and for petitions of complaint and grievances were constituted with definite rules and duties. To the committee for Trade and Plantations were assigned the appeals and "deleances from the Channel Islands. In 1687 this committee was made an open appeal of the whole council. Nine years later another change was made providing that appeals were to be heard by a committee of all the Lords or any three of them. "Thus we may say that down to the year 1833 all the petitions "des autres terres et de pay de par la mer et les Isles" were dealt with by an open committee of the privy council which advised the Crown as to the order to be made in each case". (6)

In the year 1833 the council ceased to be a council of the Crown being organized with the judicial committee and three standing committees. By the act of that year the following were assigned to the judicial committee:

- (1) All appeals and complaints in the nature of appeals made to the Crown in council.
- (2) All matters, which arising in Admiralty or Vice-Admiralty courts in the dominion of the Crown, might heretofore have been taken, by way of appeal, to the court of Admiralty.
- (3) Any other matter as the Crown may choose to refer to the judicial committee for hearing or consideration.

The committee as created by statute, consisted of members who should hold or have held certain high judicial offices. The present composition of the committee consists of the Lord President, members of the privy council who have held high judicial office, the Lord Justices of appeal and two other persons whom the King may appoint by sign manual warrant. Four members are required to be present to hear an appeal.

In 1871 four paid members were appointed and they together with the Chancellor do almost all the work.

- (1) Anson P. 29
- (2) Ibid. P. 74
- (3) Gneist Hist. of Engl. Constit. 505.
- (4) Anson P. 77
- (5) Maitland P. 320.
- (6) Anson P. 287.