The Imprisonment of Reverend William Smith

ECHO IN CANADA OF THE IMPRISONMENT BY THE ASSEMBLY OF PENNSYLVANIA OF PROVOST, THE REVEREND WILLIAM SMITH, IN 1758

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The somewhat singular incident in Colonial history of the Assembly of Pennsylvania imprisoning the Reverend William Smith, Provost of the College and Academy of Philadelphia (afterwards the University of Pennsylvania), in 1758, had an echo in Canada a few years later, which seems not to have been noticed by the historians of either Pennsylvania or Canada, but which may be thought worth mentioning.

The Provost had caused to be published in a newspaper in German, conducted by himself for the benefit of the poor Protestant German immigrants, and had previously advised to be published in the Pennsylvania Gazette (of which Benjamin Franklin was understood to be a part-owner), a Petition of one Moore, which contained strong charges against the Assembly. Both Moore and Smith were ordered to be imprisoned for what the Assembly considered contempt; but on the matter being taken to the Privy Council at Westminster, the imprisonment was set aside as illegal.¹

This proceeding attracted a good deal of notice in England, especially as the agitation had already begun, destined to result in the independence of the United States and the destruction of the old British Empire.

Francis Maseres, of Huguenot descent, who had been

¹ For the particulars of this very curious case, see my article: “Libel on the Assembly” in The Pennsylvania Magazine of History and Biography, LII. 176–192; 249–279; Essays and Addresses, XVII.
admitted a Student-at-Law at the Middle Temple, was Called to the Bar from that Inn of Court in 1758. A man of great erudition and one who took a deep interest in all Constitutional questions, this case of the Provost was carefully studied by him, and he never forgot it.

In 1766, he was appointed Attorney-General of Quebec, and filled that office with credit and acceptance until 1769, when he returned to England. His disagreement with Sir Guy Carleton (afterwards Lord Dorchester) rendered it unpleasant—to say the least—for him to remain under that Governor. Refusing a position as one of the Judges for India for personal reasons, he, in 1773, became Cursitor Baron of the Exchequer,² which office he filled to general satisfaction until his resignation in 1779. He then became Senior Judge of the Sheriffs' Court of the City of London, which office he held till 1820, dying in 1822.

During his stay in Canada, he differed in opinion from Carleton as to the wisest legislation for the new Colony, which differed from the English Colonies to the south in almost every particular, language, race, law, customs, religion, land-tenure—the whole genius of the peoples was different.

When Canada was finally ceded to the King of Great Britain by the Treaty of Paris, in 1763, little time was lost before the issue of a Royal Proclamation; this Proclamation of October 7, 1763, informed the King's "loving subjects" in Canada that as "soon as the state and circumstances" of the Colony would permit, the Governor would call a General Assembly "in such Manner and Form as is used and directed" in the Royal Colonies in America; also that until such an Assembly could be called, "all Persons Inhabiting in

²The Cursitor Baron was the Junior or Puisné Baron, who was specially charged with dealing with "Motions of Course" on the Revenue side of the Court of Exchequer—the office was abolished in 1856.
or resorting to our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England.'

It does not appear that the French Canadians as a body were discontented with the law thus introduced; but the Noblesse, the Seigneurs, the land-owners, never were reconciled to the change effected in their position—the Feudalism which had, in great measure, become outworn in England was in greater force in Nouvelle France; and the Seigneur was the most important personage in his district—saving only the Bishop. So, too, the Clergy who under the French regime had been entitled to receive "Dixmes," tithes—although only the twenty-sixth bushel of corn was taken and not the tenth sheaf—and who since the Conquest, or at least, since the Proclamation, were paid by their parishioners only what the parishioners saw fit to pay, there being no legal obligation to pay anything, thought that they had a legitimate matter of grievance. The Bishop, of course, was troubled by the hard case of his subordinates—and the Bishop was still a man of great importance.

The desire of the Home Authorities to satisfy the "New Subjects" (the name generally applied by the English to the French Canadians), none can doubt; and the sincere endeavor of Sir Guy Carleton, the Royal Governor, to discover their real wishes must be apparent to all. Carleton, however, had little means of finding the wants of the Habitant, and, almost of necessity, he took the voice of those he knew as the

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*The Royal Proclamation may be read in Shortt and Doughty’s Documents relating to the Constitutional History of Canada, second edition, The King’s Printer, Ottawa, 1918, pp. 163 seq. The violation of the Royal promises contained in this Proclamation, which could be justified, if at all, only on the ground of necessary public policy, has been often stigmatised as "The Tragedy of Quebec"; but it is reasonably certain that the Quebec Act saved Canada for the Empire, and made possible the New British Empire.*
voice of the French-Canadian people; and those he knew were the Noblesse and the Bishop. Whether he was as much influenced by these as Maseres thought—and did not hesitate to say—may not be quite certain; but what is certain is that he was thoroughly convinced that the New Subjects were anxious for the reinstatement of their former law. The very few English-speaking inhabitants of the Province or "Government" of Quebec were, as a rule, opposed to a change being made whereby they would be placed under an unfamiliar law, differing from the Common Law, to which they had been accustomed, and which they had been promised the protection of, by the King in his Proclamation of October, 1763. Some of them alleged—and, it may be with truth—that they had come to Canada relying upon the Royal word. Representations were made on their behalf in London by influential persons; and there was no little discussion in business and political circles as to the proper course to be taken. In these discussions, Maseres took his full share, his view being that the promises of an Assembly, &c., contained in the Proclamation should be implemented without delay, and the Province given a Legislature of its own.

In the result, the noted Quebec Act (1774), was passed by the Imperial Parliament; in this the promises of the Proclamation were ignored, instead of an Assembly elected by the People—or some of them, for it would have startled everyone to suggest that the electoral franchise should be exercised by any but a superior group—as the Proclamation promised, the legislation for the Province was vested in a "Council for the Affairs of Province of Quebeck, to consist of such Persons resident there, not exceeding Twenty-

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4 Some of the activities of Maseres in respect of the proposed government of Canada may be seen in Shortt and Doughty, ut supra,—see the Index.
5 14 George III., c. 83. (Imp.)
three, nor less than Seventeen, as His Majesty, His Heirs and Successors shall be pleased to appoint . . . as it is at present inexpedient to call an Assembly.’’ And, so that there could be no doubt about the position for the future, the Act specifically ‘‘revoked, annulled, and made void . . . the said Proclamation . . . from and after’’ May 1st, 1775.

Maseres used all his influence against this measure, but in vain; he had already published certain works, not quite without value even at the present time, upon abstruse questions in mathematics.6 On the subject of Quebec, he published in 1770 a folio with the title, Memoires à la Defense d’un Plan d’Acte de Parlement pour l’Établissement des Lois de la Province de Québec, contre les Objections de Mons. François Joseph Cugnet. In 1773, he published another volume in octavo: An Account of the Proceedings of the British and other Protestant Inhabitants of Quebec, in order to obtain a House of Assembly. After the Quebec Act was passed, he, in 1777, published another octavo (a second volume appearing in 1779), entitled The Canadian Freeholder. He was at that time Cursitor Baron of the Exchequer, and consequently the work was anonymous. The authorship, however, was an open secret, and he, himself, did not hesitate to present copies to his friends. My own copy of the first volume (that of 1777) has the inscription ‘‘C. Polhill The Gift of the author, The Hon’ble Mr. Baron Mazeres.’’

The book purports to be ‘‘Two Dialogues between an Englishman and a Frenchman settled in Canada

6 The part of Maseres’ mathematical works which is the most interesting to modern mathematicians—at least, to me, an old Professor of Mathematics—is that dealing with negative quantities and the minus sign.

7 This volume is not very rare; it is quoted in the second-hand book catalogues very often, whereas the second volume is seldom seen. Maseres’ name was spelled in at least four different ways by his contemporaries. ‘‘Maseres’’ is his own orthography (without accent).
Shewing the Sentiments of the Bulk of the Freeholders of Canada concerning the late Quebeck Act, with some Remarks on the Boston-Charter Act." Of course, the Quebec Act is wholly disapproved of by both parties; and, what is more remarkable, the Boston-Charter Act is quite as strongly condemned.

What immediately concerns us in this Paper is the suggested manner of government for Canada—then, it is to be remembered, extending as far south as the Ohio and as far west as the Mississippi.

The Englishman, an alias for Maseres himself, thinks that a system similar to that provided for by the second Charter of the Province of Massachusetts Bay would best suit Canada, the Crown appointing the Governor, the Lieutenant-Governor and Secretary of the Province, and the power of making laws being vested in the Governor, a Council consisting of twenty-eight Members and an Assembly elected by the people. In the Colony to the south, the freeholders of each Township in the Province, that is, in every space of ground of six miles square that is cleared and settled, have the right to choose two Members of the Assembly; and thus a large and respectable body of men come together to legislate for the common weal. He thinks that as the Seigniory in the Province of Quebec is about two leagues or six miles square, each seigniory might send two Members, larger seigniories more in proportion. Then comes a wholly novel proposition—there are two classes of freeholders in the Province, those holding direct from the Crown and those holding under others. The former class is that of the Seigniors who hold by the tenure of fealty and homage without any quit-rent whatever; the latter, that of those who hold of the Seigniors, either by fealty and homage in Arriers-Fiefs or by rent-service "or, as you Frenchmen express it par cens et rentes." He suggests that one of the Members of the Assembly should be selected
by the Seignior (or co-seigniors, if the seigniory is in joint-ownership), and the other Member by the "peasants of the seigniory and the owners of arriere-fiefs in it who hold their lands of the seignior or co-seigniors of it." He thinks, too, that it would be advantageous for the two classes of Members to sit in different Houses, each House having a veto upon the proposals of the other.

Of course, the French-Canadian agrees with the Englishman; but expresses the hope that "care will be taken by his Majesty and the British Parliament, whenever an Assembly shall be established in this Province . . . that our Representatives shall be restrained from assuming to themselves any privileges or exemptions from the laws to which the other inhabitants of the Province shall be subject." He goes further—and here we see the Pennsylvania precedent indicated—he hopes "that they will be restrained from exercising, under any pretence how specious soever, a coercive power over the rest of their fellow-subjects, or a power of punishing them by imprisonment, or otherwise, in a summary way, for any crimes or offences whatsoever, instead of leaving them to be tried in the ordinary courts of criminal jurisdiction in the Province." "I mention this precaution," he continues, "because I have been told that some of the American Assemblies have exercised such powers of arbitrary imprisonment every now and then over their fellow-subjects."

The Englishman states that it is true "that such a power has sometimes been exercised by some of the American Assemblies, but . . . it has not been done very often; and when it has been done, it has always been disapproved by all the lovers of liberty in the Province . . . and has tended to lessen the authority and importance of the Assembly that has acted in this manner rather than to increase them . . . therefore, there is reason to hope that when an Act of Parliament shall
be passed for establishing an Assembly in this Province, His Majesty's Ministers... will take care that a clause shall be inserted... restraining the Members in the particulars you have mentioned.'"

But when in 1791, the Canada or Constitutional Act,\footnote{31 George III., c. 31. (Imp.)} was passed, whereby a House of Assembly was provided for each of the two Provinces, into which the old Province of Quebec was divided, there was no such provision, and the Houses of Assembly imprisoned those they pleased for contempt, arrogating to themselves the powers as well as the name of the House of Commons. One somewhat curious fact bearing upon the question of impeachment by Colonial Legislatures, I have not seen noticed either by historians or by legal writers.

When by the Canada or Constitutional Act (1791),\footnote{31 George III., cap. 31. (Imp.).} the government of the new Provinces of Upper Canada and Lower Canada, formed out of the old Province of Quebec, was provided for, it was intended that the Constitution should, as far as possible, be "the very image and transcript of that of Great Britain" (as Lieutenant-Governor Simcoe put it). Accordingly there were to be the Governor, representing the King, an Executive Council, representing the Ministry at Westminster, a Legislative Council representing the House of Lords—these two Councils being appointed by the Crown—and a Legislative Assembly representing the House of Commons, elected by the people.

This Constitution worked satisfactorily for a time, especially as much of the expense of government, including protection from external aggression, was borne by the Mother Country. But after the War of 1812-14, when Canada began to relieve the Imperial Treasury of part of that burden and had, moreover, increased in wealth and population, distinct dissatisfaction arose over the want of responsibility of the Executive to the
people. Moreover, the Governor or Lieutenant-Governor not uncommonly "regarded [them] with aversion and not seldom with contempt. Body of Executive Councillors, who having no function but that of controlling his will by unwelcome advice, were (at least, in Lower Canada) continually left for many months together in a state of utter inaction and insignificance. They met to perform a few formal duties. Occasionally they were called together to relieve the Governor from some fatiguing investigation, some dangerous responsibility, but otherwise he acted alone and without reference to them for advice."

Matters proceeding from bad to worse, and open rebellion being threatened, the Officers of the Colonial Office at Westminster took occasion to give the situation careful consideration; and, April 30, 1836, Lord Glenelg, the Secretary of State, in whose department was the care of the Colonies, submitted to his colleagues in the Cabinet, a précis of the situation with suggestions for the proper action to be taken to meet the alarming situation.

It contained the following: "With respect to the Executive Council, without much fuller information it is impossible to say to what extent concession ought to be made; . . . it would probably be sufficient to render the Members of this body liable to impeachment for misconduct before the Legislative Council." The Rebellion of 1837–8 followed. This being subdued, Lord Durham came to Canada, and made his famous Report on the situation of affairs. The result was the Union Act of 1840, which united the two Canadas, and laid the foundation for full Responsible Government. Nothing was said in the Act, however, as to Impeachment, nor was there need. Responsible Government covered the whole situation.

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11 3 and 4 Vict., cap. 35 (Imp.).