# APPEALS

## TO THE PRIVY COUNCIL

## FROM THE

# AMERICAN PLANTATIONS

BY *Joseph Henry Smith*

WITH AN INTRODUCTORY ESSAY BY

*Julius Goebel, Jr.*

1965 [1950]

OCTAGON BOOKS, INC.

*New York*

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matters and Channel Islands affairs were delegated to one conciliar committee.[426] In July, 1670, the earlier advisory Council for Plantations was revived[427] and in September, 1672, it was strengthened by the addition of jurisdiction over matters of trade.[428] In December, 1674, the commission of this body was revoked, and plantation affairs reverted to the care of the Privy Council Committee for Trade and Plantations.[429] Then in February, 1674/5, Charles by commission confirmed jurisdiction of these matters in that committee.[430] As we have already seen, in 1679 this committee also became a Committee for Jersey and Guernsey.[431]

None of these transient schemes of colonial administration made provision for exercise of an appellate jurisdiction over colonial courts, yet this jurisdiction was not for this reason declined. Although there was much agitation in New England concerning the right of appeal to the King in Council or to Parliament, the first "appeals" came from the West Indian possessions. These "appeals" were not true appeals, as they came to be known later, but were rather "petitions in the nature of an appeal."[432] For convenience of terminology we shall refer to this petitionary species as appeals. There is no evidence that the Council Board conceived of itself as acting in a judicial, rather than an administrative capacity in handling them. That in several cases relief was sought against an executive acting in a judicial capacity may have obscured the nature of the function performed. It should be noticed, however, that the various Restoration committees and select councils established to deal with plantation matters did not exercise jurisdiction in appellate matters until 1672.[433] Judicial determinations were thus largely confined to the Privy Council itself and to colonial executives by delegation therefrom.

There was no fixed procedure employed by the Council Board to settle these early causes. In a 1666 appeal from Barbados, *Middleton* v. *Chamberlain,* the Board after reading the petition of the appellant ordered Lord Willoughby, the Barbados governor, to examine the matter and certify to the Council the true state thereof, together with the laws and customs of that plantation in such cases.[434] Upon return of the report of Lord Willoughby the Council referred

[426] *Supra,* n. 407.
[427] Andrews, *British Committees,* 97.
[428] *Ibid.,* 106–7.
[429] 3 *Doc. Rel. Col. Hist. N.Y.,* 228.
[430] *Ibid.,* 229.
[431] *Supra,* p. 65.
[432] For contemporary use of this terminology see Smith v. Smith (*CSP, Col., 1669–74,* #1146).
[433] A Committee for Hearing Plantation Appeals may have existed (see Andrews, *British Committees,* 80), but we have seen no evidence of or reference to its operation.
[434] Middleton v. Chamberlain (*PC* 2/59/198). It does not appear from what court the appeal was taken. The appellant alleged that Chamberlain sat on the bench at the trial, that respondent's brother was the jury foreman, and that the rest of the jury were "friends and creatures of their own procuring." But it is difficult to reconcile the latter part of this allegation with the statement that many of the jurors objected before judgment, but could not be heard. No question could arise con-

it to the Solicitor General for his opinion, since there was "much matter of law therein." [435] His report was read, approved, and ordered to be communicated by Willoughby to the Barbados judges, signifying the royal pleasure that in any new ejectment brought by appellant the proceedings were to be according to the report of the Solicitor General.[436] In *Vines* v. *Collins,* in 1668, Lord Willoughby was directed by the Council to consider the allegations of a petition from Barbados complaining of a wrongful condemnation in the Admiralty Court, and if sustained, to appoint a time for a rehearing of the whole matter.[437] In *Bradbourne* v. *Beake,* in the same year, a petition complaining of a judgment based upon an *ex parte* report of auditors was ordered sent to Willoughby to do justice therein. If the complaint appeared well grounded and no relief had been afforded, the Council was to be informed of the reasons thereof, that further order might be made upon application.[438] In *Middleton* v. *Chamberlain* we find recognition of the practical rule that colonial judicial proceedings should not be judged by English standards.[439]

In some cases, however, the Council Board itself heard causes. In a Maryland case, following the procedural preliminaries of a petition, answer, and reply thereto, the litigants were heard by the King in Council. After listening to counsel for the petitioner and for Lord Baltimore, the proprietor of Maryland, another hearing was appointed at which Charles Calvert, the deputy governor who had condemned the ship in question, was heard in answer to the petitioner's allegation.[440] At the first hearing the Council was of the opinion that the sentence was erroneous, but upon the second hearing the condemna-

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cerning the patent making no provision for appeals (1 *MS Coll. Letters, Patents, Charters and Commissions Relating to Trade and Foreign Plantations,* 355 [L.C.]), since the patent of the Earl of Carlisle had been previously assumed by the crown (Harlow, *History of Barbados, 1625–85* [1926], 131–32; Williamson, *The Caribbee Islands under the Proprietary Patents* [1926], 211–12).

[435] *PC* 2/61/422.

[436] *PC* 2/62/49.

[437] *PC* 2/60/147. Appellants complained that their ship *Hopewell* had been condemned by Henry Willoughby, Deputy Governor of Barbados, by private order contrary to admiralty law, that appellants being at a distance failed to take their appeal within fifteen days and were thus barred from an appeal; a rehearing before Lord Willoughby was therefore prayed.

[438] *PC* 2/61/68; *CSP, Col., 1661–68,* #1852.

[439] In his report in Middleton v. Chamberlain (*supra,* n. 435) Solicitor General Finch stated that certain errors were assigned by the trustee of the appellant, but were not heard, "and I conceiue that they were only Errors in forme, and ought not to weigh, if they had been heard, it being impossible that the Pleadings and Entryes at Barbados should be so exact in forme as the Pleadings in Westminster Hall" (*PC* 2/62/49). See also *CSP, Col., 1669–74,* #112, where it was asserted that judicial proceedings in Barbados should be summary, without formality, since it was impossible that proceedings there should be the same as in England. In connection with this attitude, note the hostility to the legal profession expressed in the Jamaica rules of court (*ibid.,* #604 I).

[440] Gookin v. Calvert (*PC* 2/60/256, 305, 356, 369). The cause involved the condemnation of appellant's ship for violation of a Navigation Act, 15 Charles II, c. 27. For the proceedings in the Provincial Court in January, 1665/6, against the *Hopewell* see 49 *Md. Archives,* 560–63. For sale of the ship following condemnation see 57 *ibid.,* 10.

tion was upheld, since appellant failed to prove that Calvert had licensed the ship to trade in Maryland.[441] The Maryland charter contained no appeal reservation,[442] and normally appeals from the Provincial Court were made to the Upper House of the General Assembly,[443] but apparently no opposition was made to the jurisdiction of the King in Council in this instance. In a 1672 Barbados cause, respondent was given the alternative of a rehearing before Lord Willoughby and some of the Council of Barbados or attendance on the King in Council for decision in the cause.[444]

In two 1672 cases the Council for Foreign Plantations was regarded as the body to which application should be made to secure a representation to the King advising relief in cases of unlawful seizure.[445] But no authority is found in the instructions of that Council for exercise of such jurisdiction.[446] After the establishment of the initial Council for Trade and Plantations, in September, 1672, some causes were referred by the Privy Council to this body to consider and report.[447] This appears to have been *ad hoc* supplementation of the standing instructions of this body.[448] The available evidence indicates that determinations of this body were not reached in a manner associated with appellate judicial hearings. There is nothing to indicate that both parties were heard on appeal, and certainly the consideration of a cause was not restricted to any record made in the court below.[449] It would appear that an effort was

[441] *PC* 2/62/218, 246. *Cf.* the earlier complaint from the colony that, "appeals to his Royall Majesty into England [were] termed criminall and denyed" (5 *Md. Archives*, 139).

[442] 3 Thorpe, *op. cit.*, 1677.

[443] 1 *Md. Archives*, 481, 509–11, 513–22, 527–30; 2 *ibid.*, 11, 13–14, 33, 59–60.

[444] Maynard v. White (*PC* 2/63/258). If he desired the latter alternative, White was to give security to appear and accept the decision, and to attend the King in Council within three months after notice. *Cf.* in connection with this cause *CSP, Col., 1669–74*, #349, 843; *ibid., 1675–76*, #396.

[445] Petition of Clugstone *et al.* complaining of the seizure of the ship *James* by Sir Charles Wheeler at Nevis (*CSP, Col., 1669–74*, #813). Petition of Knight *et al.* concerning the seizure of the *William and Nicholas* by Wheeler at Anguilla (*ibid.*, #823–24, 853).

[446] See Andrews, *British Committees*, Appen. II.

[447] Rabba Couty v. Beeston (*CSP, Col., 1669–74*, #968, 999) concerning the ship *Trial* condemned by a Nov. 23, 1671, sentence of the Jamaica Vice-Admiralty Court under authority of an act of Parliament, on finding that owner-petitioner was not a denizen; Smith v. Smith (*PC* 2/64/45) in which petitioner John Smith complained that by jury ignorance or corruption a verdict and judgment had been obtained against him in Nevis during his absence, and prayed an order to stay execution or award restitution and that Thomas Smith be ordered to England so that both parties might be heard before the King in Council, petitioner being willing to pay costs if judgment went against him. The latter petition was referred to the Council for Trade and Plantations to examine and report what was fit to be done for petitioner's relief (*CSP, Col., 1669–74*, #1107, 1136).

[448] See Andrews, *British Committees*, Appen. III.

[449] In Rabba Couty v. Beeston, the Council for Trade and Plantations perused an exemplification of the sentence, heard Beeston who had rendered the sentence, and found that the sentence was grounded on the presumption that Couty, a Jew, was accounted a foreigner. But by certificates obtained by appellant from Governor Lovelace of New York after the trial below, it appeared that Couty had lived as a free burgher for several years

made to decide causes on their merits, untrammeled by legal rules of appellate procedure. However, the Council for Trade and Plantations did not always prove an efficient agent for the determination of these causes; [450] the King in Council, in one case, was compelled to assume the determination of an appeal after an attempted reference had failed.[451]

As we have stated, all these causes are not essentially "appeals"—they are rather "petitions in the nature of appeals." They can be regarded as an intermediate step between the petition of complaint and the true appeal. The initial case in which a genuine appeal can be said to be found is *Rodney* v. *Cole*. In this cause Rodney complained via a petition to the King of the proceedings of Governor Russell of Nevis whereby petitioner was disseised of a plantation and Cole placed in possession for certain pretended debts.[452] The petition was referred to the Council for Trade and Plantations to call in the parties, examine the matter, and report the state of the case and what should be done for the petitioner's relief.[453] This referee ordered Russell to answer in writing, to which answer the petitioner replied; [454] depositions were submitted,[455] and the parties were heard by their respective counsel.[456] The report of the Council for Trade and Plantations was referred by the Council Board to the Committee for Grievances to consider; [457] this committee ordered the former referee to send it all the papers in the matter and one of their number to inform

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in New York, that the condemned ship was English built, and that the master and a requisite number of sailors were English. Furthermore, Lieutenant-Governor Lynch in a letter to Slingesby, the Secretary of the Council, termed the sentence severe. The report found the sentence illegal and that the vessel, *etc.*, or the value thereof, ought to be restored. For the proceedings in this cause see *MS Journal Council for Trade and Plantations, 1672–74*, 13, 16–21.

[450] In Smith v. Smith petitioner John Smith alleged that he had long attended the sitting of the Council and could not hear of any fixed time, their meetings being seldom (*CSP, Col., 1669–74*, #1146; *cf. ibid.*, #1155). The ineffectual character of this Council is further indicated in *Egerton MS*, 2395/276 (printed in Andrews, *British Committees*, 112). But *cf.* the evaluation of the working of the council in 1 *APC, Col.*, xv; Andrews, *British Committees*, 111.

[451] Smith v. Smith (*PC* 2/64/123; *PC* 2/64/145; *CSP, Col., 1669–74*, #1155). The King in Council may have assumed the hearing to facilitate the departure of the respondent from England. Appellant had been compelled to give £500 security to pay costs sustained by respondent in delaying his departure to attend the Council in the matter, if no just cause of complaint were found.

[452] *CSP, Col., 1669–74*, #958.

[453] *Ibid.*

[454] *MS Journal Council for Trade and Plantations, 1672–74*, 6–7. For the answer see *CSP, Col., 1669–74*, #958. For the reply, *ibid.*, #1050. Further Russell answers are in *ibid.*, #1074, 1079.

[455] For Rodney see *ibid.*, #1052–54. For his petition that a witness be heard before leaving the country see *ibid.*, #1049. For Russell see *ibid.*, #1081–82.

[456] *Ibid.*, #1110.

[457] *PC* 2/64/158. The report of the Council for Trade and Plantations advised that a special commission be directed to Lieutenant-Colonel Stapleton and four others in Nevis with power to examine the records and proceedings of the island court and also witnesses on oath. Action was then to be taken conditional upon the identity of the debts for which the plantation in question was sold (*CSP, Col., 1669–74*, #1110; *cf. MS Journal Council for Trade and Plantations, 1672–74*, 25, 39–40, 42).

The Channel Islands regulations are significant chiefly in that they embodied the framework of a workable policy which was extensible to America. There were, however, certain additional adjustments necessary in royal plantations, for while the local judicial machinery in the Channel Islands and its course of proceeding was as ancient and well settled as that of the realm itself, the judicature in the new world was undeveloped, and the process of review within a particular jurisdiction had to be fixed as a preliminary for subsequent review by the crown. As a result, the commissions and instructions to the governors, which were a most important factor in creating and defining conciliar jurisdiction, dealt with two distinct phases of the appeal problem—the appellate system within the colony itself and the arrangements for appeal from the province to the crown. The former phase being the foundation of the conciliar judicial hierarchy, we shall examine its regulation first.

In this category we find that royal commissions and instructions were utilized both to establish and to delimit the appellate powers of the governors and councils and to prohibit the exercise of the same powers by colonial assemblies. The earliest instructions as to appeals, issued to Jamaica in 1678 and to Virginia in 1679, ordered that appeals be allowed in cases of error from the colony courts to the Governor and Council.[37] By the 1681 instructions to Jamaica, appeals were to be permitted in cases of error from the island courts to the Governor and Council, provided the sum appealed for exceeded £100 sterling and that security be first given by appellant to answer such charges as should be awarded in case of affirmance.[38] The same provisions were contained in the 1686 Leeward Islands and the 1689 Barbados instructions, with the exception that the minimum amount was raised to £300.[39] In the similar 1690 Bermuda instructions £50 was fixed as a minimum.[40] In the 1692 Jamaica instructions, substantially the same as earlier except for a £300 minimum, provision was made that such of the council as were judges of the court from which the appeal was made should not be allowed to vote on such appeal, but might be present at the hearing to give their reasons for the judgment below.[41]

In most continental colonies the governor's commission was the instrument

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*et coutumes de l'Isle de Jersey*, 233; 2 Hoskins, *Charles the Second in the Channel Islands*, 397–98.

[37] 1 Labaree, *Royal Instructions to British Colonial Governors, 1670–1776* (1935), #442.

[38] *Ibid.*, #445. At the hearing of these appeals any three or more of the judges of the Supreme Court were to be present to inform and assist the court. This provision was peculiar to the Jamaica instructions. The instruction maintained until 1692, although in 1685 the minimum amount was altered to £300 sterling. The instruction issued upon the petition of Jamaican merchants and planters (*CO* 391/3/241).

[39] 1 Labaree, *Royal Instructions*, #445. Both instructions continued until 1702.

[40] *Ibid.*, #445. Note that the clause "in cases of error" was omitted. For the later significance of this omission see the discussion of Cunningham v. Forsey, *infra*, p. 390 *et seq.*

[41] *Ibid.*, #448. This addition was the result of a proposal by Governor Beeston; see *CSP, Col., 1689–92*, #2400, 2407.

first utilized for provisions as to appeals. In the June, 1686, commission to Sir Edmund Andros as governor of the Dominion of New England, the basic instruction pattern of the insular colonies was followed. The commission thus permitted appeals in cases of error from the dominion courts to the Governor and Council in civil cases, with a £100 sterling minimum and the usual security provisions.[42] This provision was reproduced in the 1688 commission to Andros as dominion governor,[43] and in the successive commissions to Dongan (1686), Sloughter (1689/90), and Fletcher (1691/2), as governors of the province of New York.[44]

The brief but clear instruction issued to Governor Culpeper of Virginia in 1679 was followed in 1682 by a discursive provision which did not directly order appeals to the Governor and Council, but certainly assumed this to be the course in that colony. The same instruction went out to Maryland in 1691 and New Hampshire in 1692. This instruction provided that as it might not be fit that appeals be brought to the Governor and Council too frequently or in causes of too small value, the governor, with the advice of the council, should propose local legislation whereby the method and limitation of such appeals might be settled in the manner most convenient to the inhabitants.[45] But contemporarily the commissions to Copley and Nicholson of Maryland provided for appeals to the Governor and Council in civil cases of error with a £100 sterling minimum.[46] These commissions were treated as legislative standards for the directed limiting acts.[47]

It was inherent in imperial administration of justice that lower legislative bodies should not exercise judicial functions. This policy received earliest

[42] 1 *Laws of New Hampshire*, 150. The earlier commission (October, 1685) to Joseph Dudley as president of the Council for the Dominion of New England contained no such provision (*ibid.*, 93). A Dominion act gave this provision statutory form; see An Act for establishing Courts of Judicature and Publique Justice, March 3, 1686/7 (3 *Pub. Rec. Col. Conn.*, 413). For territorial extension of the commission to Rhode Island and Connecticut see 1 *Laws of New Hampshire*, 168–69, 171.

[43] 3 *Doc. Rel. Col. Hist. N.Y.*, 539.

[44] *Ibid.*, 379, 625, 829. The commission and the instructions of James, Duke of York, to Colonel Dongan as governor, in 1682/3, did not mention appeals (*ibid.*, 328, 331).

[45] For Virginia see the instructions of 1682 to Thomas Culpeper (28 *Virginia Magazine of History and Biography*, 43); see also the minutes of the Lords Committee of Trade and Plantations in considering the draft of the instructions (26 *ibid.*, 138–39; *CO* 391/3/328, 340). This provision was preserved in subsequent Virginia instructions until 1702 (1 Labaree, *Royal Instructions*, #446). For Maryland see the 1691 instructions to Copley (8 *Md. Archives*, 279) and the 1694 instructions to Nicholson (23 *ibid.*, 548). For New Hampshire see the 1692 instructions to Samuel Allen (1 *Laws of New Hampshire*, 514). The attitude of Virginia in this matter is revealed in a March, 1661/2, act governing appeals (2 Hening, *Statutes at Large Va.*, 65–66) wherein it is stated that "because there may be as greate error in judgment or will in matters of small value as in the greatest, it is further enacted that appeales shall lye open as aforesaid for any thing of what value soever."

[46] 8 *Md. Archives*, 266 (Copley); 20 *ibid.*, 86 (Nicholson). Security was first to be given by appellant to answer charges awarded in case of affirmance.

[47] See *infra*, pp. 87, 215.

recognition in the 1679 Virginian instructions.[48] Later instructions to Virginia, Maryland, and New Hampshire all ordered that no appeals whatsoever be allowed from the Governor and Council to the Assembly.[49] But in Virginia this right of appeal from the General Court to the General Assembly, established by a 1642/3 statute,[50] was not yielded without protest.[51]

For our purposes it is not the provincial appellate process which is important, but the appeal to the King in Council from judgments of the Governor and Council. In the insular possessions, by the 1680 instructions to Barbados the governor was directed to signify royal disallowance of all laws restraining liberty of appeal to the King in Council, except those involving criminal causes and civil causes under £100 and in cases in which security had not first been given by appellant to answer possible award of costs in case of affirmance.[52] In the 1681 Jamaica instructions it was provided that parties dissatisfied with appellate judgments of the Governor and Council might appeal therefrom to the King in Council, provided the sum involved exceeded £500. As conditions governing the appeal, it was provided that the appellant give security to answer

[48] Appeals were to be allowed from the colony courts to the Governor and Council "and to no other court or judicature whatsoever" (1 Labaree, *Royal Instructions*, #442). This instruction for Virginia is alleged to have been a result of Bacon's Rebellion (G. L. Chumbley, *Colonial Justice in Virginia* [1938], 69), but the Lords Committee's journal makes no mention of such motivation (*CO* 391/3/340). This practice of appeals from the Governor and Council to the Assembly had received statutory recognition in a March, 1661/2 act (2 Hening, *Stat. at Large Va.*, 65–66), but this act was disallowed in 1682 (*CSP, Col., 1681–85*, #371; *cf.* Labaree, *Royal Government in America* [1930], 401–2). The instruction was apparently obeyed, for we find Governor Culpeper writing in December, 1681, that appeals from the General Court (Governor and Council) were formerly heard by the Assembly, but were now heard by the King in Council in great causes (*CSP, Col., 1681–85*, #319).

[49] 1 Labaree, *Royal Instructions*, #446.

[50] 1 Hening, *Stat. at Large Va.*, 272. A 1658/9 act imposed a minimum limitation upon appeals to the Assembly (*ibid.*, 519), but this was removed in the next year (*ibid.*, 541). *Cf.* 1 Bruce, *Institutional History of Virginia* (1910), 690–93.

[51] Reading the Virginia Assembly journal of Nov. 10, 1682, the Lords Committee was of the opinion that an address in so far as it concerned appeals to the Assembly was altogether unfit for presentation to the King and that Lord Howard should be encouraged in his refusal to transmit such address to the King as desired (*CO* 391/4/55–56). *Cf.* on the objections to the Assembly acting as an appellate body, *Journals of the House of Burgesses of Virginia, 1659/60–1693* (ed. H. R. McIlwaine, 1914), 167. Governor Howard, in April, 1684, refused to join the House of Burgesses in an address to the King that appeals lie as formerly from the General Court to the General Assembly, basing his objection on the terms of his instructions (*ibid.*, 202–3; *cf. ibid.*, 196–97, 228). In May, 1691, a petition of the House to their Majesties prayed that this ancient appeal practice might be renewed, there being no other way to correct errors of the General Court in causes under £300. As for causes above this sum, the appeal allowed to the King in Council was impossible to put into practice, considering the great distance from England, the extraordinary troubles, hazard, and charge unavoidably attending the same, and the impossibility of bringing over evidences, records, and papers, *etc.* (*ibid.*, 370; *cf.* 1 Bruce, *op. cit.*, 693–96).

[52] 1 Labaree, *Royal Instructions*, #443; see also *CSP, Col., 1677–80*, #1522; *ibid., 1702*, #1164. For formulation of the instructions see *CO* 391/3/203.

any charges awarded in case of confirmation and that execution be not suspended by reason of any appeal.[53]

In 1684 supplementary Barbados instructions were issued, directing that no appeal be allowed unless made within a fortnight after sentence and that appellant give good security to prosecute with effect and to answer the condemnation, and also to pay all costs and damages awarded.[54] It is probable that these regulations stem from a Lords Committee investigation instigated by Governor Dutton into the manner of allowing appeals.[55] These two Barbados provisions were used in 1685 to replace the security provision of the earlier Jamaica instructions.[56] Although the Bermuda instructions of 1686 followed substantially the Barbados instructions of 1680 and 1684, substituting a £100 minimum,[57] the 1685 Jamaica instructions became the prototype for instructions in 1686 to the Leeward Islands, in 1689 to Barbados, and in 1690 to Bermuda. The Leeward Islands minimum was placed at £300; that for Bermuda, at £100.[58]

In the continental colonies the first instrument to mention appeals to the King in Council is found in the 1679 commission to John Cutt as President of the Council of New Hampshire. By this commission, appeals were to be permitted to the King in Council in all causes, both real and personal, in which more than £50 was involved, the appellant first entering into security to pay full costs in case of affirmance upon appeal.[59] But this recourse was scarcely

[53] 1 Labaree, *Royal Instructions*, #445. This instruction also issued at the instance of Jamaican merchants and planters (*CO* 391/3/241–42). *Cf.* the enigmatic July 25, 1685, order of the Lords Committee that no appeals to the King be admitted in Jamaica in any action under £500 (*CO* 391/5/170).

[54] 1 Labaree, *Royal Instructions*, #444.

[55] On August 17, 1683, Sir Richard Dutton proposed that he receive directions as to allowing appeals. The Lords Committee resolved to appoint a day to consider the manner of admitting appeals from the plantations to the King in Council (*CO* 391/4/182–83). On August 24 it was ordered that the instructions to Lord Culpeper and other governors concerning appeals be considered by the crown law officers in order to a more practicable settlement of such appeals (*ibid.*, 190). On September 25 the 64th paragraph concerning appeals was referred to the consideration of the Lord Keeper, who was to be attended by the Attorney General and the Solicitor General thereon (*ibid.*, 198). On October 2 a letter was dispatched to the Attorney General with extracts of commissions in the plantations touching the manner of allowing appeals to the King in Council (*ibid.*, 209). On December 1 a further Dutton prayer for direction in the method of allowing appeals was referred with the matter of appeals from all the plantations to the consideration of the Attorney General (*ibid.*, 242, 248–49). But we have seen no report from the Attorney General.

[56] 1 Labaree, *Royal Instructions*, #445.

[57] *Ibid.*, #443, 444. The clause preventing legislative restraints upon appeals to England was addressed to prospective legislation.

[58] *Ibid.*, #445. The £300 Leeward Islands minimum was raised to £500 in 1689.

[59] 1 *Laws of New Hampshire*, 4. A province act of March 16, 1679/80, gave the General Assembly with the President and Council power to hear and determine all actions of appeal from inferior courts, whether of a civil or a criminal nature (1 *ibid.*, 24). But it was alleged that this act was beyond the power of the Assembly, since the royal commission appointed appeals to the King in Council (*Trans. Orig. Doc. Rel. N.H.*, 94).

regarded in the province as a valuable privilege.[60] The 1682 commission to Edward Cranfield as Lieutenant-Governor contained the same provisions, with the additional proviso that execution should not be suspended by reason of any appeal.[61] Three years later New Hampshire was incorporated into the Dominion of New England and governed by Joseph Dudley as President of the Council of the Dominion. By the terms of the Dudley commission, appeals were to be allowed in all real and personal actions above the value of £300, subject only to the condition that appellant first enter into good security to pay full costs in case no relief were obtained upon appeal.[62] This commission was superseded by the first commission to Sir Edmund Andros as Governor of the Dominion of New England of June, 1686. The terms therein governing appeals were substantially those of the 1681 Jamaica instructions, with the addition that appeals be made within a fortnight after sentence and the substitution of a £300 minimum.[63] A March, 1686/7, Dominion *Act for Establishing Courts of Judicature and Publick Justice* embodied these provisions, with the exception of the clause that execution be not suspended by reason of any appeal. The act also allowed appeals from the local Chancery Court to the King in Council, where the matter in difference exceeded £300 sterling

[60] It was questioned whether such appeals might not prove a great occasion for the obstruction of justice in the province (Address of the General Court to the King, June 11, 1680, 1 *Doc. and Rec. Rel. Prov. N.H.*, 412). It has been indicated that this suggestion was made with reference to the Mason proprietary claims (Fry, *New Hampshire As a Royal Province*, 211). But these claims were ordered to be settled by other means, see *infra*, pp. 115 *et seq.*

[61] 1 *Doc. and Rec. Rel. Prov. N.H.*, 438.

[62] 1 *Laws of New Hampshire*, 97. For an earlier proposal of a council to which appeals might be taken from the judicatures of the several New England colonies see *CSP, Col., 1677–80*, #1305; *ibid., 1681–85*, #1155, 2033 (the latter proposal would leave only the most difficult and important causes to be brought to England). In considering a commission to Colonel Kirk as governor of Massachusetts, in November, 1684, the Committee considered what rule ought to be set for appeals, or whether the sum should not exceed £200 or more (3 *Edward Randolph*, 326). But finally no appeals were to be allowed to England until the government was settled (*CSP, Col., 1681–85*, #1941; *cf. ibid.*, #2033).

On November 2, 1686, an appeal to the King in Council was taken in Cooke v. Paige from the Court of Appeal and Grand Assize held at Boston. The appeal was allowed upon condition that appellants forthwith give bond with sufficient securities to the value of £1,000 sterling to respondent that they would draw forth from the Secretary and the clerk of the court copies of the records, judgment, plans, and evidences on both sides and lay them before the King in Council and prosecute to effect within nine months or such further time as the King in Council should allow; that they would show final judgment before the President and Council and pay such costs as were awarded within — days after return of judgment (*MS Rec. Mass. Special Courts, 1685–86*, 8). In Cooke and Burrall v. Paige an appeal was allowed on the same conditions with only £500 security (*ibid.*, 11). But Cooke *et al.* refused to give the desired security (*Dudley Records*, 13 Mass. Hist. Soc. Proc. (2nd ser.), 284). For issuance of execution see *MS Rec. Mass. Special Courts, 1685–86*, 14–15. The June 10, 1686, Order of the President and Council for the Holding of Courts and Execution of Justice reserved the right of appeal as provided in the commission (1 *Laws of New Hampshire*, 104).

[63] *Ibid.*, 150.

"as in case of appeale from the Governour and Councill is provided."[64] In the second Andros commission, of 1688, which embraced a greater territory, the appeal provisions remained the same as those of the earlier commission;[65] as we have seen, these same provisions were inserted in the New York commissions to Dongan, Sloughter, and Fletcher.[66] The commission to Fletcher as Governor of Pennsylvania, which issued later in 1692, also provided for appeals from the superior courts of the province to the King in Council in the same causes and under the same regulations as in the prototype Andros commission.[67]

In those colonies in which appeals from the Governor and Council to the Assembly had been prohibited,[68] an appeal to the King in Council was substituted, since it was judged absolutely necessary that all subjects have liberty to appeal to the King in Council in cases deserving the same. The 1682 Virginia instructions permitted such appeals by persons dissatisfied with the judgment of the Governor and Council where the matter in difference exceeded £100 sterling; appellant was to give security to answer charges awarded upon affirmance, and execution was not to be suspended by reason of any such appeal.[69] In 1685 the minimum was raised to £300, and it was also ordered

[64] *Ibid.*, 193. This last clause has been construed that "appeals could be taken to King in Council under the conditions governing appeals from the court of governor and council" (Barnes, *The Dominion of New England* [1923], 108).

[65] 3 *Doc. Rel. Col. Hist. N.Y.*, 539–40.

[66] *Ibid.*, 379, 625, 829–30.

[67] *Ibid.*, 857.

[68] See *supra*, pp. 79–80.

[69] 28 *Virginia Magazine of History and Biography*, 43. When Governor Culpeper communicated this instruction to the Virginia Council in May, 1683, the latter proposed that no appeal be allowed from an order of the Governor and Council under the value of £200 sterling. The proposal was prefaced by a statement that it had "duly considered what great inconveniences Appeals have and may produce by constraining several honest and Indigent persons to be deprived of their just Rights and dues until the appeals be determined which in all probability cannot be expected in less time than a Year" (1 *Executive Journals of the Council of Colonial Virginia* [ed. H. R. McIlwaine, 1925], 495). It was also proposed that execution, if desired, issue immediately upon the determination of the Governor and Council before the appeal was determined and that appellant give bond with good security for the payment of the judgment, with double damages if the judgment were confirmed on appeal. In drawing up the 1683 instructions for Lord Howard, the provisions respecting appeals were referred to the crown officers, but seemingly without any visible effect (*CSP, Col., 1681–85*, #1208, 1264, 1286); see also the statement of Lord Howard (refusing to join the House of Burgesses in an address to the King that appeals be allowed as formerly from the General Court to the General Assembly) that if it was apprehended that the minimum of £100 sterling set for appeals to the King in Council was too low and might give vexatious spirits the occasion of too frequent appeals, he and the council would join the House in an application to the King that no appeals be permitted under the real value of £200 (*Journals of the House of Burgesses Va., 1659/60–1693*, 203; April 29, 1684). On May 21, 1684, the governor answered an address of the House that no appeals might lie to the King in Council, but that if the King was of the opinion that appeals should lie, that none might be permitted under the real value of £500 and that sufficient security be given to pay all costs and damages if judgment was affirmed. The gov-

that appeals be made within a fortnight after sentence.[70] The Maryland 1691 and 1694 instructions followed the 1685 Virginia instructions closely, except for the fortnight limitation.[71] The New Hampshire instructions of 1692 also followed the Virginia model closely, but contained a £100 minimum.[72]

As to appeals in criminal causes, it was provided in a few instructions after 1689–90 that appeals be permitted to the Privy Council in all cases of fines imposed for misdemeanors, providing the fine amounted to or exceeded £200 sterling (in Bermuda £100) and that the appellant first give security effectually to prosecute the appeal and answer the condemnation in case of affirmance.[73]

These royal commissions and instructions regulating the appellate process were supplemented in a few instances by the acts of colonial legislatures. In New York, while it was still a proprietary colony, an act of November, 1683, permitted appeals to the King in Council from both Chancery and the new Court of Oyer and Terminer and General Gaol Delivery where the subject matter amounted to £100. Conditions which had to be met by appellants included the giving of security to prosecute the appeal with effect.[74] A later 1691

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ernor refused to join in this address to the King, but expressed a willingness to join in an address setting forth the grievances occasioned by allowing appeals over a minimum of £100 and supplicating that no appeal lie under £300 of which few judgments were there passed (*ibid.*, 243); see also, *ibid.*, 248–49; *CSP, Col., 1681–85*, #1698.

[70] 1 Labaree, *Royal Instructions*, #446; *cf.* 1 *Executive Journals of the Council of Colonial Virginia*, 516–17.

[71] 1 Labaree, *Royal Instructions*, #446; *cf.* the appeal provision in the 1691 commission to Governor Copley (8 *Md. Archives*, 266; 23 *ibid.*, 548), and the 1694 Nicholson commission terms (20 *ibid.*, 86–87).

[72] 1 *Laws of New Hampshire*, 513; *cf.* the enigmatic statement of Lieutenant-Governor Usher as to appeals to the King up to £50 (*CSP, Col., 1693–96*, #2105).

[73] The instruction issued for Jamaica in 1689; for Bermuda in 1690 (1 Labaree, *Royal Instructions*, #458). The 1690 instructions to Governor Sloughter of New York contained such a clause (3 *Doc. Rel. Col. Hist. N.Y.*, 688), but later instructions and commissions of this period failed to include it. The instruction originated in a desire of some of the considerable inhabitants of Jamaica expressed to the Lords Committee (*CO* 391/6/233).

[74] 1 *Col. Laws N.Y.*, 128. This act provided that any inhabitant, planter, or freeholder within the province could appeal from any judgment or decree obtained against them in the High Court of Chancery or any courts of oyer and terminer and general gaol delivery to the King. The party appealing was first to pay costs in the suit appealed from and all debts, costs, and damages adjudged against him in any other suit in the province, to give in two securities by recognizance double the value of the judgment in question to prosecute the appeal with effect, and to make return thereof within twelve months. The £100 limitation was an implicit infringement of the royal prerogative, as expressed in the patents, reserving the right of receiving appeals from "any judgment or sentence" given in the province; see 3 Thorpe, *op. cit.*, 1638–39, 1642. But it was neither disallowed nor affirmed. However, despite the broad terms of the patent an appeal to the King in Council was earlier denied in Billop v. West from a June 6, 1683, New York City Mayor's Court judgment (3 *Doc. Rel. Col. Hist. N.Y.*, 366). The petition for leave to appeal mentioned the patent reservation of appeals to the King in Council. The grounds of the denial do not appear; see *Select Cases of the Mayor's Court of New York City, 1674–1784* (ed. R. B. Morris, 1935), 648 *et seq.* The act made no provision for appeals from the General Court of Assizes, the former superior court, from which three appeals had

act following the terms of the governor's commission provided for appeals in cases of error to the Governor and Council from any Supreme Court judgment above the value of £100 and from thence to the King in Council from any decree or judgment above £300. The conditions governing appeals were similar to those in the earlier statute.[75] These provisions were re-enacted in a 1692 act[76] which was continued by later statutes until 1698.[77]

In the proprietary province of East New Jersey, where no royal instructions obtained, an act of assembly was passed in March, 1682/3, providing for appeals to the King in Council from judgments of the Court of Common Right.[78] The provisions of the act were substantially similar to those of the New York act of November, 1683.[79] But it appears that appeals were taken by crafty litigants or were threatened for the purpose of delay and vexation,[80] since in December, 1683, there was passed *An Act to Prevent Vexatious Delays in Law*. The evil aimed at was the suspension of execution by vexatious appeals to the King in Council from judgments of the Court of Common

been taken to the King in Council; see *PC* 2/68/371; *PC* 2/69/268, 634. But this court was abolished in 1684 as useless (1 *Col. Laws N.Y.*, 171; 2 Van Rensselaer, *History of the City of New York* (1909), 282; Goebel and Naughton, *Law Enforcement in Colonial New York*, 19–20).

[75] 1 *Col. Laws N.Y.*, 226. The provision that appellant first pay all debts, costs, and damages adjudged against him in any other suit in the province was omitted. If default were made in prosecution to effect, then execution was to issue out upon the judgment against the party or their sureties in course, without any scire facias. The act made no provision for an appeal to the King in Council from decrees of the Governor and Council as a court of chancery.

[76] *Ibid.*, 303.

[77] *Ibid.*, 359, 380.

[78] Leaming and Spicer, *Grants and Concessions . . . of New Jersey*, 238. Under this enactment the Court of Common Right was supreme within the province; an attempt to appeal therefrom to the Governor and Council was rejected (13 *Doc. Rel. Col. Hist. N.J.*, 103; *Journal of Courts of Common Right and Chancery of East New Jersey, 1683–1702* [ed. P. W. Edsall, 1937], 16–17). *Cf.* 3 *Doc. Rel. Col. Hist. N.J.*, 4; Tanner, *The Province of New Jersey, 1664–1738* (1908), 459.

[79] *Supra*, p. 84. The statutes differed in that in New Jersey the appeal was to be prosecuted to effect and return made thereof within eighteen months after the appeal was made; in New York the period was twelve months. Also in New Jersey there was no minimum necessary for an appeal; in New York a £100 minimum was necessary. In practice it may have been necessary to show cause for allow- have been necesary for appellant-defendant to A time limit of ten days for taking the appeal also appears to have been imposed (*ibid.*, 293). In case of money judgments it seems to have been necessary for appellant-defendant to deposit the amount of the judgment with the court upon appeal (*ibid.*, 294–95).

[80] It is stated that "by the fall of 1683, experience indicated that delay rather than reversal might prompt defendants cast to appeal to the King" (Edsall, *op. cit.*, 62). But from the establishment of the Court of Common Right in May, 1683, to December, 1683, the date of the corrective statute, only two appeals were taken. In Vicars v. Slater an appeal was granted under the usual conditions to defendant Vicars in an action of trespass and false imprisonment in which £45 damages had been awarded (Edsall, *op. cit.*, 166; May 9). In Carteret v. Williamson defendant petitioned for an appeal in a trespass and ejectment action and was ordered to give in £200 security within four days to prosecute with effect and not commit waste (*ibid.*, 171; August 30). In neither case had the statutory eighteen months for prosecuting the appeal lapsed. There appears little evidence of any "experience"; the act may have been based upon legislative fear.

Right.[81] But appeal by immediate application to the King in Council was also regarded as a procedural possibility.[82] In the province of West New Jersey there was a judicial lag, and the first regulation of appeals to England was made in 1699.[83]

In Bermuda the Governor and Council acted as a court of chancery in causes over £100 sterling by virtue of a 1691 act. From this court, parties might take an appeal to the King in Council if application were immediately made in court; not otherwise. Appellant was to give in sufficient security within ten days to prosecute the appeal with effect within the twelve months following the ten-day period or to pay treble damages to the party aggrieved, the casualties of the seas and other inevitable dangers only excepted. This chancery court also exercised appellate jurisdiction in any matters criminal and civil determinable in the General Assizes, but the statute is obscure as to the right of further appeal to England in these cases.[84] By a 1694 act appellants to the Governor and Council were to prosecute appeals within thirty days after application therefor by filing bills in the Secretary's Office.[85]

A 1694 Maryland act for appeals and regulating errors provided for an "appeal" or for writ of error to the Governor and Council from any Provincial Court judgment wherein the original debt or damages exceeded £50 sterling or 20,000 pounds of tobacco. Security provisions were the same as governed on appeal from the County Courts to the Provincial Court. Any persons aggrieved by any Chancery Court sentence, subject to the same minimum as at law, also

[81] Leaming and Spicer, *op. cit.*, 272–73. The act declared that in any suit in the Court of Common Right where an appeal was taken to the King or Council Board by the defendant and not prosecuted according to security given, such appeal should be adjudged as taken for vexation and delay only. Appellant therein should be incapable of bringing or exhibiting any bill or suit in the Chancery of the Court of Common Right against plaintiff in such action, but execution should issue on the judgment appealed from without delay. Proviso was made that if security should be given for prosecuting the appeal or for not committing waste, the appellant or his security were to be at liberty to apply to Chancery for relief in equity against the penalty of the bond.

[82] In November, 1687, the Board of Proprietors considered the advisability of an appeal to the King in Council from a judgment in ejectment involving proprietary rights. "Upon consideration its the cense of this Board that an appeale bee not desired to the King and Council . . . for that the Proprietors may at any time obtain a mandamus to have the Record before the King and Council there to be reheard" (Edsall, *op. cit.*, 95).

[83] The 1693 Act for a Court of Appeals (Leaming and Spicer, *op. cit.*, 517) made no provision for appeals to England. The 1699 Act for Provincial Judges (*ibid.*, 563) provided that the General Assembly be the supreme judicial body unless an appeal be demanded to England; in the latter case the appellant was to find sufficient security to prosecute the appeal within eighteen months and to pay the costs of court from which the appeal was taken and to abide the judgment of said court until reversal. In 1684 Samuel Cole was denied an appeal to England by the court at Burlington (*The Burlington Court Book of West New Jersey, 1680–1709* [1944; ed. by H. C. Reed and G. J. Miller]). Later, appeals were granted to the General Assembly, although "the Court say though they find noe law for it in the book of Assemblies Acts" (*ibid.*, 141).

[84] *Acts of Assembly of Bermuda, 1690–1713/4* (1719), 18–20.

[85] *Ibid.*, 35.

might obtain review by the Governor and Council. From any judgment, sentence, or decree of the Governor and Council, in either law or equity, where the real value in dispute exceeded £300 sterling an appeal lay to the King in Council following the commission and instructions to Governor Nicholson.[86]

This law was short-lived, being repealed by an October, 1695, enactment. The latter statute altered the minimum for appeals from both the Provincial and the Chancery Courts to the Governor and Council to £50 sterling or 10,000 pounds of tobacco. In case of affirmance of a Provincial Court judgment, no further appeal to the King in Council was allowed, unless the determination exceeded £300 or 60,000 pounds of tobacco according to the commission and instructions to Governor Nicholson. Appeal to the King in Council in chancery causes was also provided for where the original debt or damages exceeded the above minimum.[87]

In addition to the various commissions and instructions for individual colonies the Privy Council might make a general order applicable to appeals from any colonial source. Such an order was issued in January, 1683/4, directing that in the future no appeals should be admitted at the Council Board from any of the plantations unless sufficient security were first given by appellants, as well at the Board as in the respective plantations, to prosecute the appeal effectually and to stand the award of the King in Council.[88]

From this survey of the regulations imposed upon colonial appeals by commissions and instructions, it is apparent that several features of the existing Channel Islands regulations were adopted. Certain categories of subject matter, viz., criminal causes, were totally excluded by implication or limited to fines imposed for misdemeanors above specified minimums. Appealable minimums were likewise set up for civil causes. The same period of fourteen days in which to take an appeal was adopted. Provision was also made for security by appellant effectually to prosecute and to answer the condemnation and award of costs. Of course, certain of these provisions may have been adopted directly from the civil law, i. e., the limit on the period in which to take an appeal. However, from the opinion of Attorney General Sawyer mentioned above,[89] it seems more likely that these colonial regulations were based upon Jersey and Guernsey precedents.

The royal commissions and instructions issued during this period were primarily concerned with the establishment of judicial hierarchies in the

[86] 38 *Md. Archives*, 6. At first it was proposed that common law appeals to the Governor and Council have a £100 sterling or 40,000 pounds tobacco minimum pursuant to the royal instruction, but the lower house was of the opinion that the lower minimum would be of service to the country (19 *ibid.*, 83).

[87] 38 *Md. Archives*, 59. This temporary act was continued by several later acts; see *ibid.*, 78, 84.

[88] *PC* 2/70/108; *CSP, Col., 1681–85*, #1518.

[89] See *supra*, pp. 60–61.

captained by Thomas Daniell and in the service of the Assiento, was driven into Jamaica by want of provisions on a voyage from Cadiz to Puerto Velo. After victualing and leaving Jamaica, the ship was seized by men of war at the order of Sir Francis Watson, the acting governor, for violation of the Acts of Trade. A special Court of Oyer and Terminer was erected for trial of the ship by commission from Sir Francis, and the ship was condemned.[115] Several irregularities were alleged in the proceedings—that such court was unknown except in case of piracy, that the court's establishers acted as judges and purchased the informer's share in the condemnation before judgment, that the evidence was corrupt, and that counsel were not obtainable by claimant.[116]

Claimant petitioned the King in Council for relief, and the Dutch ambassador also intervened in the matter.[117] The governor was instructed that Daniell be admitted to appeal to the Governor and Council against the sentence of the Court of Oyer and Terminer, with further liberty to appeal therefrom to the King in Council. In the latter case authentic copies of the records and proceedings in the cause were to be transmitted with such information as should be taken therein on oath.[118] On June 4, 1690, upon petition, the Governor and Council accordingly ordered the vessel appraised and delivered to Daniell upon his giving security for two-thirds the appraised value in case of affirmance upon rehearing.[119] The appeal was ordered heard upon June 25, but on that date Sir Francis Watson pleaded lack of notice, and the hearing was adjourned to June 30. The Provost Marshall was also ordered to have ten jurymen at the former trial before the Governor and Council on that date.[120] At the start of the hearing on June 30 respondents pleaded to the jurisdiction of the court; after argument and debate thereon, the plea was overruled. Appellants then advanced that Watson had not been governor, that even if he had been governor, there was a positive instruction not to erect any new court. Lastly, that the things bought were not for merchandise, but only necessaries and comprehended within the articles of peace at Madrid. After argument to the contrary the Governor and Council resolved that Watson was not governor; that if he had been governor, the instructions did not give power to erect any such court; that therefore the whole process was *coram non judice* and the judgment in itself void from the beginning. Even if the court were lawful, the factual contention of the appellants as to the nature of the articles

[115] *CSP, Col., 1689–92,* #50 I; 4 *MS Mins. Jamaica Council, sub* June 25, 1690.

[116] *CSP, Col., 1689–92,* #50, 50 I; see also *ibid.,* #297, for allegations as to the conduct of Chief Justice Elletson in the cause.

[117] 2 *APC, Col.,* #295; *CSP, Col., 1689–92,* #179, 233, 235.

[118] 1 Labaree, *Royal Instructions,* #492; *cf. CSP, Col., 1689–92,* #258.

[119] 4 *MS Mins. Jamaica Council, sub* June 4, 1690.

[120] *Ibid., sub* June 25, 1690.

purchased was upheld. Therefore, the sentence of the Court of Oyer and Terminer was reversed.[121]

A similar review process is found in Maryland. At a special Court of Oyer and Terminer, in January, 1692/3, the *Margaret* was condemned for violation of the Acts of Trade.[122] Although the reclaimant insisted upon a direct appeal to the King in Council,[123] he had to be satisfied with an appeal to the Governor and Council, "or further if occasion be."[124] The review granted in the Jamaica cause is *sui generis,* because of special conciliar intervention. In the case of Maryland the authority for the suggested hierarchy is not evident. The commission provision as to appeals to the Governor and Council was confined to civil causes.[125] The only instruction relating to appeals in criminal causes, however inapplicable, had not even been issued for Maryland.[126]

### ORIGINAL JURISDICTION OF THE PRIVY COUNCIL

Having thus canvassed the appellate jurisdiction of the King in Council in matters colonial, it remains to inquire into its exercise of original jurisdiction. Such jurisdiction was declined when one Alvaro Peres de Tavora complained in November, 1676, that he had been disseised of Bombay lands and goods by the East India Company.[127] The company protested, at a June, 1677, Committee hearing, that if the matter were not left to the local courts, encouragement would be given the inhabitants to decline the settled course of law. Further, the company could not produce witnesses and evidence at such a distance.[128] The Lords Committee thereupon agreed to report that, since it did not appear that petitioner had been denied justice upon a trial at law, it was not proper to give sentence in a cause which originally belonged to local courts established by charter. Therefore, petitioner was to be left to apply to such courts for redress.[129] This report was approved, and an order accordingly issued by the King in Council. There is some indication, however, that appellate jurisdiction would be assumed, although the controlling East India Company charter contained no appeal reservation.[130]

[121] *Ibid., sub* June 30, 1690. For the restraining instructions see 1 Labaree, *Royal Instructions,* #421.

[122] *CO* 5/713/P 34.

[123] *CO* 5/713/P 35.

[124] *CO* 5/713/P 34.

[125] See *supra,* p. 79.

[126] 1 Labaree, *Royal Instructions,* #458.

[127] For the conciliar petition see *Cal. Ct. Mins. East India Co., 1674–76* (1935), 379–81. For the company answer thereto see *ibid.,* 387–89; for the reply of the petitioner see *ibid., 1677–79* (1938), 9–11.

[128] *CO* 391/2/57. For notes of Sir Joseph Williamson on the hearing see *Cal. Ct. Mins. East India Co., 1677–79,* 49.

[129] *CO* 391/2/57; *Cal. Ct. Mins. East India Co., 1677–79,* 51–52. For the submission of the petitioner to the company and the restoration of his estate see *ibid.,* 97–98, 141.

[130] For the charter relating to Bombay, where the matter arose, see *Charters Granted to the East India Company* (1773), 80.

letters patent to the Duke of York as Lord High Admiral could not be abridged by any subsequent grant—here the December 14, 1661, royal proclamation for the encouragement of the settlers in Jamaica. He further asserted that no legislative act derivative from that proclamation could prejudice a prior right granted to the Admiral.[353] It was thereupon agreed that Governor Vaughan be advised of the royal dissatisfaction at the admission of the jurisdictional plea and of the inability of the local legislature to lessen the Lord High Admiral's jurisdiction; that an appeal being made to the King, the governor should cause good security to be given by the interloper to answer in case of forfeiture under the Royal African Company charter.[354] This episode is also reflected in the legislative review process by alertness against Jamaican acts extending parish bounds beyond the high water mark.[355]

In addition to hearing appeals the Council Board also exercised the power of ordering reviews or rehearings held in colonial courts. In two instances in 1693–94, one from Virginia [356] and one from Maryland,[357] the Lords Committee advised review or rehearing upon complaints of injustice. But in the following century it was denied that the power to order rehearings below was possessed by the Privy Council.[358]

### THE COMMITTEE APPRAISED

Returning now to a consideration of the composition of the appellate body, we find that appeals were heard before Committees composed of anywhere from three to twelve members, with seven a fair average. There was little continuity of personnel, more than fifty different persons being found in attendance at various times.[359] What is more significant is the lack of a consistent nucleus of councilors learned in the law. We have noticed sporadic attendance by Lord Chancellor Jeffreys, Sir Leoline Jenkins, Francis North (as Chief Justice and Lord Keeper), and Master of the Rolls Powle. Apparently there was no endeavor to have a legal luminary present at every appeal hearing.

Since the Committee and the Council were not composed of members

[353] *Ibid.*, #987. For the royal proclamation see 6 Howell, *State Trials*, 1353–54; N. B. Livingston, *Sketch Pedigrees of Some of the Early Settlers in Jamaica* (1909), Part II; *cf.* Whitson, *The Constitutional Development of Jamaica* (1929), 15–16. On the patent of the Duke of York as Lord High Admiral see Crump, *op. cit.*, 102–3. The point was also raised whether the Royal African Company charter was void under the Statute against Monopolies, but we are not concerned with this aspect of the matter here.

[354] *CSP, Col., 1675–76*, #988–89. Harper (*The English Navigation Laws* [1939], 187) wrongly terms the administrative treatment of the matter an "appeal."

[355] *CO* 391/2/126, 217–18.

[356] 2 *APC, Col.*, #502; *CSP, Col., 1693–96*, #328; *CO* 391/7/181.

[357] *CO* 391/7/267–68.

[358] See *infra*, pp. 316–17.

[359] For a list of the most active members see Bieber, *The Lords of Trade and Plantations, 1675–96*, Appen. D.

selected for their legal experience and ability, it should not be expected that procedural niceties were preserved in their operations or that distinctions of a formal nature were closely observed. For instance, no distinction might be made between a "petition and appeal" and a "petition for leave to appeal." [360] Likewise, the lines between a complaint and an appeal might be blurred.[361] This procedural laxity also appears when the Lords in a proceeding by petition, not denominated an appeal, voided a judgment of the Tangier Mayor's Court as *coram non judice*.[362]

Of the nearly sixty appeals which came before the Committee and the Council, in only twenty-six were conciliar orders of affirmance or reversal issued.[363] Of this group, equally divided between affirmances [364] and reversals,

[360] See Witham v. *Rex*, where the appeal of Witham was denied below, but his petition relating the circumstances of the proceedings below was treated as a "petition and appeal." There was no specific mention made of granting an appeal (*CSP, Col., 1685–88*, #94, 95, 97, 113). Contrariwise, in the appeals of Brenton against Lawson and Wilkinson, appeals were granted below (see *supra*, n. 187), and security given, but the Council Board rather redundantly allowed of appeals in the two seizures (2 *APC, Col.*, #480).

[361] In Richier v. Goddard, the respondent, arriving in Bermuda as governor in August, 1693, demanded of the appellant as acting governor £1,000 as half the profits of the government since appellant had received his commission. Upon the refusal of this demand, Richier was arrested and confined for a period before release on parole, and his goods were seized. Richier petitioned that his property be restored on giving security to answer any action in England and that evidence be allowed to be collected in his defense. The petition was granted by the Council, and execution thereof was referred to the Committee (*CSP, Col., 1693–96*, #911). The Committee treated this petition as an appeal; Governor Goddard was ordered to permit Richier to come to England to prosecute his appeal on giving security, and no obstructions were to be made to the examination of witnesses and the taking of depositions in the island (*Ibid.*, #924; *PC* 2/75/377). For a fuller account of the prosecution complained of by Richier see *CSP, Col., 1696–97*, #733. In addition to the seizure of property by Goddard without process of law, Nicholas Trott at the instigation of Goddard had obtained two judgments against Richier at the December, 1693, Assizes. These judgments were declared null and void in December, 1699, upon a hearing by the Committee for Hearing Appeals (*PC* 2/77/444). The appeal appears to have been dropped as far as the complaints against Goddard are concerned. However, this "appeal" was instrumental in effecting the recall of Goddard as governor of Bermuda (*CSP, Col., 1696–97*, #1028).

[362] The £50 judgment voided was recovered against Sir John Mordaunt for defamation, but it appeared that the defamatory words were spoken out of the jurisdiction of the Tangier court. The Lords Committee was motivated by a petition of Edward Hughs that the Tangier court be ordered to pay petitioner the £50 deposited there. The Committee also consulted an answer of Mordaunt and a report of the crown law officers in the matter (*CO* 391/4/336–37). Attorney General Sawyer had advised earlier that an appeal would lie from proceedings of the court of Tangier to the King in Council (*CSP, Dom., 1684–85*, 76–77). For the Tangier court system see Routh, *Tangier, 1661–1684* (1912), 118–20.

[363] Four appeals entered before 1696 were heard by the Committee for Hearing Appeals after the Committee of Trade and Plantations had been dissolved. These appeals were Holder v. Coates (*PC* 2/76/241, 573); Richier v. Trott (*PC* 2/75/365, 377; *PC* 2/76/241; *PC* 2/77/12, 368, 393, 396, 444); Brenton v. Lawson (2 *APC, Col.*, #480); Brenton v. Wilkinson (*ibid.*).

[364] In Scott v. Dyer, although the judgment below was affirmed and the appeal dismissed, respondent was ordered to repay to appellant a certain sum which respondent confessed he had received in excess of his just demands by the judgment of the Barbados Court of Common Pleas (*PC* 2/71/556).

was below £300.[197] Such blanket provision, however, failed of issuance. In 1735/6 an act of Parliament was proposed by which appeals to the King in Council were to be allowed for any sum in actions concerning the woods brought in the Massachusetts Vice-Admiralty Court.[198] But this provision was never enacted. The charter minimum provision was seemingly made more effective by at times construing the phrase "matter in controversy" to mean "judgment recovered." In other words, in case a plaintiff sued for £1,000 and judgment was given for defendant or for a sum under the minimum, no appeal would be allowed.[199] The charter allowed fourteen days in which to take an appeal, but provincial practice in the later period, at least, was to demand an appeal immediately after judgment was entered.[200] We have, however, seen no appeal rejected because not taken *ore tenus* at the time of judgment.

An attitude reminiscent of that of Massachusetts in real actions is also found in New Jersey, but with no charter explanation. In this latter colony we find it alleged in 1754 that in cases of casual ejectment in the Supreme Court writ of error would not lie to the Governor and Council as a Court of Errors. As a corollary, an appeal to the King in Council was also barred.[201] Yet we do find a 1753 instance of a writ of error being allowed in such a case, although contested.[202] The extent to which this doctrine was in force must remain unknown, because of the loss of the records of the Court of Errors.

Finally, we find that in addition to the New England colonies the charter of Maryland afforded grounds for refractory conduct. An attempt was made after the 1715 restoration of proprietary government to evade the appellate jurisdiction of the King in Council [203] on a plea based upon the charter clause

[197] *PC* 2/93/164. *Cf.* the fears of contractor Ralph Gulston that trespass suits would be kept below £200 to prevent an appeal (*CSP, Col., 1734,* #327 i).

[198] *JCTP, 1734/5–1741,* 85–86.

[199] Partridge v. Hutchinson, action on the case for £400, judgment for £250/5/9 (*MS Mass. Sup. Ct. Jud. Judgment Book, 1700–1714,* 178); *Rex* v. Blin, debt for £1,000 lawful money on obligatory writing, judgment for defendant affirmed (*ibid., 1715–21,* 59); Oulton v. Waldo, action on the case for £500, judgment for £184/12/3¼ affirmed (*ibid.,* 152); Moody v. Powell, trover for £1,500, judgment for £747/15/4 reversed (*ibid.,* 157); Oulton v. Waldo and Savage, action on the case for £1,052/9 sterling, judgment for £360 and costs reversed (*ibid.,* 158); Glen v. Shamon, action on the case for £800, judgment for defendant affirmed (*ibid.,* 223). But in Apthorpe v. Pateshall, trespass on the case for £800, an appeal was allowed from a judgment of £226/5/2 (*ibid., 1766–67,* 9). However, in the later case of Cutler v. Pierpont, trespass for £5,000, judgment for plaintiff for £15 plus costs was given; an appeal was prayed, but there is no notation that it was ever granted (*ibid., 1772,* 125). This matter was canvassed by counsel and bench in 1763 in Scollay v. Dunn (Quincy, *Reports of Cases, Superior Court of Judicature, 1761–72* [1865], 80–83).

[200] Apthorpe v. Pateshall (*MS Mass. Sup. Ct. Jud. Judgment Book, 1766–67,* 9); Hancock v. Bowes (*ibid.,* 91–92); Apthorpe v. Deblois (*ibid.,* 197); Cutler v. Pierpont (*ibid., 1772,* 125).

[201] James Alexander to F. J. Paris; Aug. 13, 1754 (*Paris MSS,* I 19).

[202] *MS* Commonplace Book (P.R.O., Trenton, N.J.), *sub* writ of error.

[203] Charges of denial of appeals to England

granting powers equal to those of the Bishop of Durham within his County Palatine.[204] In that County Palatine a writ of error lay from judgments of the local chancery and of the justices of the bishop to the bishop himself; from his judgment a writ of error could be sued, returnable in King's Bench.[205] By analogy it was argued that appeals lay from the provincial courts to the proprietor, subject to further review by King's Bench.[206] Nevertheless, in practice appeals were still taken to the King in Council.[207] In an isolated instance in 1707 we also find an appeal taken from the Chancery Court to the Archbishop of Canterbury in the Arches.[208]

### THE NEW CHARTERS

Turning now from those colonies in which charter government was long established, let us inquire whether the above-related experiences were reflected in newly issued charters. In the 1722 grant of St. Vincent and St. Lucia to the Duke of Montagu there was included a reservation of appeals to the King in Council modeled after the instructional norm.[209] But the only St. Vincent

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had been made against the former proprietary government. In 1701, in reply to a Board of Trade letter requiring information relating to ill conduct of proprietary governments, especially Maryland, when under that form of government, it was answered by the Maryland Council that "there were not any appeals allowed to England, but the judgment and sentence of the Governor and Council which was then stiled the Upper House of Assembly was final in all causes, and the Governor and Council, who were the only Judges of the said Appeals, were the same persons who gave judgment in the Provincial Court, the Lord Proprietary and his Council being the judges of that Court" (*CSP, Col., 1701,* #1039). To the same letter the House of Delegates on March 18, 1701/2, stated: "As to appeals, it is acknowledged by this House that in the time of the Proprietary Government here, appeals for England have been denyed" (*ibid., 1702,* #203). *Cf.* J. McMahon, *An Historical View of the Government of Maryland* (1831), 271. In some quarters King's Bench was apparently regarded as the proper appellate body, for we find fear that causes would be brought to Westminster Hall (*CSP, Col., 1696–97,* #79, 80).

[204] 3 Thorpe, *Federal and State Constitutions,* 1679.

[205] Coke, *Fourth Institute,* 218; Lapsley, *The County Palatine of Durham* (1900), 184, 212.

[206] *Proceedings Maryland Court of Appeals, 1695–1729,* (ed. C. T. Bond, 1933), 355. See also *ibid.,* 425–26, 445, where appeals from the Court of Appeals to the proprietor were admitted. After the Maryland patent had passed the seals, the failure specifically to reserve the judicial supervisory power of the King was commented upon. See Barnes, *Land Tenure in English Colonial Charters of the Seventeenth Century,* in *Essays in Colonial History Presented to Charles McLean Andrews by His Students* (1931), 29. *Cf.* Le Case del Countie Palatine de Wexford, *Davis* 59, 62.

[207] Bond, introduction to *Proceedings Maryland Court of Appeals, 1695–1729,* vi, xli.

[208] Helms v. Franciscus, 2 *Bland's Chan. Rep.,* 566–67, *note.*

[209] The clause was as follows: "And it being necessary that all the subjects of us our heirs or successors may have liberty to appeal to the royal person or persons of us our heirs or successors in civil causes that may deserve the same, Our will and pleasure therefore is and we do hereby for us our heirs and successors declare and grant that if either party shall not rest satisfied with the judgment decree or sentence of the superiour courts of the said islands that then and in such cases it shall and may be lawfull to and for either party to appeal to us our heirs or successors in our or their Privy Council provided the matters in difference exceed the value or sum of £300 sterling and that such appeal be made within

act concerning insolvent estates specifically providing for an appeal to the Governor and Council was disallowed *inter alia* for not providing a further appeal to the King in Council.[242] Another act of the same year for regulating trials in civil causes was disallowed upon the same grounds.[243] But it is doubtful whether these disallowances were ever officially made known in the colony.[244]

A few scattered disallowances are found at later dates. In reporting in 1708 upon a Nevis act for the establishment of courts, the Attorney General represented that the law was improper in not reserving a power of appeal.[245] For this reason, among others, the act met with disallowance on December 30, 1708.[246] In February, 1713/4, a Pennsylvania act for regulating party walls and buildings in Philadelphia encountered disallowance, the objection being, among other things, that no appeal was allowed therein to the King in Council.[247] In 1772 an act of the Bahamas was disallowed, on the ground that it prohibited appeals to the King in Council from the special court created thereby.[248] Common colonial enactments were those regulating the fees for various legal proceedings and documents. We have seen no attempt to hinder appeals to England by fixing exorbitant charges for copies of the proceedings necessary on appeal. We do find complaint in 1736 against Wavel Smith, Leeward Islands Secretary, that in chancery appeals the parties were forced to take out new copies of the proceedings, Smith refusing to authenticate those used below.[249]

Colonial efforts to circumvent the crown's appellate authority were not confined to attempted legislative denials, but sometimes took the form of executive recusancy. Opportunity for this was enhanced in those colonies in which the governor, a veritable Poobah, acted as Chancellor, Ordinary, and Chief Justice of the Court of Errors. Charges of such arbitrary denials of appeals were leveled against Governor Lowther, of Barbados, in 1719.[250] A few years earlier from Jamaica had come complaint that actions of the governor as Chancellor were practically without review. In the first place, the instructional minimum limited appeals to causes of £500 subject matter. Secondly, the governor controlled departure from the island; sometimes leave

[242] *Ibid.*, 862. For the act see *ibid.*, 683.
[243] *Ibid.*, 862. For the act see *ibid.*, 702.
[244] *Ibid.*, 860.
[245] *CSP, Col., 1708–9,* #250; *cf. ibid.,* #264
[246] *PC* 2/82/226.
[247] 2 *Stat. at Large Pa.* 543. For the objections to the act on the part of Solicitor General Raymond see *ibid.*, 550. For the act itself, see *ibid.*, 368.
[248] The disallowed act was An Act for erecting a special Court and better establishing and regulating the other courts of Judicature within these Islands. Richard Jackson, counsel for the Board of Trade, in reporting thereon said that "this prohibition, tho' it seems as fit in the case of such a Special Court, as it can be in any, is altogether inconsistent with the constitution of the colony" (5 *APC, Col.,* #212).
[249] *JCTP, 1734/5–1741,* 122–23.
[250] *A Representation of the Miserable State of Barbados* (1719), 25, 35.

could not be obtained at all or only upon extravagant bail far beyond the value of the subject matter. Thirdly, an appeal to England could be tried only before the Queen in Council. If the governor were a member of a great family, his relations and friends on the Council Board would be biased and favor whatever redounded to his credit.[251]

### VICE-ADMIRALTY APPEALS

The next aspect of the Council's jurisdiction to be examined is that exercised over the vice-admiralty courts in Navigation Acts cases. Following the passage of the 1696 *Act for Preventing Frauds and Regulating Abuses in the Plantation Trade* an effort was made to assure the commissioning of courts of vice-admiralty in the several plantations.[252] As has been indicated previously, in connection with the *Cole and Bean* cause, this "dark, contradictory Act" was silent as to appellate proceedings from the courts to be established in the plantations.[253] There is nothing to indicate whether the King in Council or the High Court of Admiralty or both should exercise appellate, corrective power. Despite the fact that up to the year 1783 more than eighty appeals from vice-admiralty court sentences were entered in the Privy Council register, the jurisdiction of this body was contested sporadically during the entire period under discussion. The problem was raised as a general query by the governor of Maryland in 1699. There was no pending issue of jurisdiction, but apparently the matter was mooted in anticipation of such an issue. In May, 1699, Governor Blakiston wrote that following the condemnation of certain ships under the Acts of Navigation, it had been questioned whether an immediate appeal lay to the High Court of Admiralty. The governor felt that his commission as vice-admiral would allow such an appeal, but he was given pause by a clause in his commission as governor that appeals were to be made to the King in Council only.[254] Although no actual jurisdictional test case was

[251] *The Groans of Jamaica, Expressed in a Letter from a Gentleman Residing There, to His Friend in London* (1714), Preface vii–viii.

[252] See *supra*, c. ii, n. 93. It was advanced in some quarters that the reference therein was to admiralty courts already established; see Attorney General Northey in *CSP, Col., 1702*, #708.

[253] For comment on the legislative draftsmanship see 4 *H. of L. MSS (n.s.), 1699–1702*, 326. William Penn wrote, "This law is weakly penned, and could not be otherwise, when only Comr. Chaddock and Ed. Randol were the framers of it" 4 *Duke of Portland MSS* (H.M.C., 15 Rep., App., Part IV [1897]), 31.

[254] *CSP, Col., 1699*, #433. For the commission as vice-admiral see 25 *Md. Archives*, 61; for the gubernatorial commission clause, presumably the same as that in Nicholson's commission, see 20 *Md. Archives*, 86–87. At a meeting of the Maryland Council on March 18, 1698/9, the Attorney General stated that the pink *Johanna* had been condemned in the Vice-Admiralty Court and that the master demanded an appeal therefrom to the High Court of Admiralty in England, and prayed advice in what manner and to what tribunal such appeal should be granted. Upon consideration of the clauses relating to appeals in the governor's commission, the council board were of the opinion that appeals to

made,[255] the Board of Trade ordered that the opinions of the crown law officers and of Sir Charles Hedges be taken in the matter.[256] Attorney General Trevor pointed out that there were express clauses both in the commission as vice-admiral and in the commission to the vice-admiralty judge allowing a right of appeal from any vice-admiralty court sentence to the High Court of Admiralty. Therefore Trevor was of the opinion that either party aggrieved by any vice-admiralty court sentence had a right of appeal to the High Court of Admiralty and that such appeal had to be allowed there.[257] Hedges was of the opinion that any subject aggrieved by Maryland Vice-Admiralty Court proceedings had by law a right to appeal to the High Court of Admiralty and that his appeal ought to be allowed.[258] The Board of Trade then informed Blakiston that they found no contradiction between the commissions as governor and as vice-admiral; but if any inconvenience should arise under these commissions, they would use their best endeavors to find fit remedies.[259] However, when the Maryland judicial organization was outlined to the Board of Trade in 1701, the same doubts as to the proper appellate body were declared to exist.[260]

The actual test of the problem arose at about the same time in Pennsylvania, where strong opposition to vice-admiralty courts existed.[261] Shortly after the establishment of a vice-admiralty court in that colony, several condemnations were made by Judge Robert Quary for violations of the Navigation Acts,[262]

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England should be from the Governor and Council to the King in Council. It was thereupon advised that, if the master would first appeal to the Governor and Council, from thence an appeal might lie to the King in Council and not otherwise (25 *Md. Archives* 57–58). For the record in the *Johanna* cause, in which an appeal to the High Court of Admiralty was allowed, see *CO* 5/714/C 32.

[255] The Board of Trade made inquiry as to what proceedings had been made or directions given upon any appeal in the three seizures related by Governor Blakiston (*CSP, Col., 1699,* #758–59), but it appeared that no appeals had been designed or that they had been waived (*ibid.,* #763).

[256] *Ibid.,* #796.

[257] *Ibid.,* #797 II.

[258] *CO* 5/714/C 38.

[259] *CSP, Col., 1699,* #798.

[260] *CO* 5/715/D 66. But it was also stated that only one appeal had been taken and that not prosecuted—probably the *Johanna* cause; see *supra,* n. 254. Ambiguity is still existent in later Maryland history. Commissions to vice-admiralty court judges issued by Governor Sharpe in 1754 and 1760 and by Governor Eden in 1773 and 1775 contained an obscure appeal reservation, i.e., "saving nevertheless the right of appealing" (*MS Md. Vice-Adm. Ct. Rec., 1754–75,* ff. 2, 17, 75, 83). The only appeal recorded after 1754, from a 1764 condemnation under 7 and 8 Wm. III, c. 22, failed to designate the appellate body (*ibid.,* f. 52).

[261] For an account of the struggle in Pennsylvania see W. T. Root, *The Relations of Pennsylvania with the British Government, 1696–1765* (1912), c. iv.

[262] The sloop *Jacob* was condemned in the November 10–12, 1698, session of the court held at Newcastle, on the ground that the master and three-quarters of the crew were not English subjects (*CSP, Col., 1699,* #138 V; Root, *op. cit.,* 101). The owner, Moorhead, declared that he appealed home to the High Court of Admiralty. Quary told him that before the appeal could be entered good security must be given, not only for what the sloop was appraised at, but also for all damages and costs of court. Moorhead refused at first, later became willing, but security was never given,

but inhibitions were secured by the owners from the High Court of Admiralty in England.[263] However, in one instance the party securing such inhibition was advised not to make use of it, but to submit to the judgment of the local court.[264] His suspicions aroused,[265] Quary questioned whether after a decree in a colonial vice-admiralty court based on the Navigation Acts the High Court of Admiralty in England ought to grant an inhibition. For, he posited, if the cause should be carried to England, it could not be tried in the High Court of Admiralty there, though by the 1696 act all causes arising from the aforesaid acts were made triable in the vice-admiralty courts in the plantations. Quary further desired to know whether the clause in his commission allowing appeals to the High Court of Admiralty was designed to extend to all causes whatsoever, whether cognizable in that court or not.[266]

Although not very specific in his answer, Sir Charles Hedges, High Court of Admiralty judge, affirmed the right of appeal to the High Court of Admiralty in cases concerning the Acts of Trade.[267] But by learned men in both the civil and the common law Quary was advised that Parliament had invested the vice-admiralty courts in the plantations with more ample powers than given to the High Court of Admiralty in England, since by the 1696 statute all causes arising under the Acts of Trade were to be tried in the courts

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nor was the appeal ever entered (*CSP, Col., 1699,* #138). In May, 1699, the *Providence* was condemned as not duly registered according to law (*ibid.,* #426 II, III; Root, *op. cit.,* 102; 4 *H. of L. MSS (n.s.) 1699–1702,* 353). An appeal being moved for, Quary informed petitioners that an appeal lay to the High Court of Admiralty. It was moved that the ship and cargo be delivered to appellants on giving bond to prosecute the appeal. Quary replied that bonds signified nothing in the colony, since they could not be sued on, under pretense that there was no Attorney General for the King (*CSP, Col., 1699,* #426). For the owner's version see *ibid., 1702,* #150; *cf. ibid.,* #178. See also that of William Penn (1 *Penn-Logan Corres.* 36).

[263] 4 *H. of L. MSS (n.s.) 1699–1702,* 331–32, 334. Reliance was placed upon Penn's influence at court to have the ships cleared (*ibid.,* 318). See also *ibid.,* 336, for a statement of reliance upon reversals in England.

[264] *Ibid.,* 325.

[265] Knowing the prejudice of the persons who had secured the inhibition, Quary concluded that the appeal was declined from conviction of application to the wrong appellate jurisdiction (*ibid.,* 332).

[266] *Ibid.,* 325. This argument is based upon the language of the 1696 statute which restricted suits for penalties in England to "His Majesty's Courts of Record at Westminster," whereas in the plantations, suits could be brought in any court under one section and in the Admiralty Court specifically under another. See 7 and 8 William III, c. 22, ss. 2, 7. But it has been claimed in some quarters that the High Court of Admiralty possessed an original inherent jurisdiction over violations of the Navigation Acts, regardless of statute; see *The Sarah* (8 Wheaton 391, *note,* pp. 396–97). As to Admiralty Courts not constituting courts of record, see Coke, *Fourth Institute,* 135; Crump, *op. cit.,* 130–32; Harper, *op. cit.,* 186–87. For specimen commissions to vice-admiralty court judges see *supra,* Chap. II, n. 97. The clause reads: "saving, nevertheless, the right of appealing to our aforesaid High Court of Admiralty of England, and to the Judge or President of the said courts, for the time being." See also the similar clauses in commissions to governors as Vice-Admirals, *supra,* Chapter II, n. 97. Compare the myopic view in Lewis, *The Courts of Pennsylvania in the Seventeenth Century,* 5 Pa. Mag. Hist. and Biog. (1881), 178.

[267] 4 *H. of L. MSS (n.s.), 1699–1702,* 331–35.

sailed the existent instructions with the same threefold argument, but it was conceded that local judicial practice admitted appeals from the inferior courts to the Governor and Council under the instructional £300 minimum.[16] A further memorial from petitioners set forth at length numerous objections to the existing instructions as to appeals.[17] To these objections it was answered in the main that petitioners were not parties in interest, that no complaints had come directly from the island.[18] The inconvenience of some of the proposed alterations was also pointed out.[19] The Board of Trade, apparently moved by the opposition argument, represented that no determination be made in the matter until the opinion of the Barbados government and of the island inhabitants was ascertained.[20] Conciliar approval obtained,[21] the Board of Trade ordered the governor to signify the consequences of the proposed alterations and the general attitude of the people thereto.[22] This reform effort came to nought, but, in the course of these hearings new instructions were

[16] *Ibid.*, #1069. Since petitioners made their argument by counsel, which had not been ordered, the agents for the island were given liberty to be represented by counsel at the next hearing.

[17] Memorial of Everard Cater, November 16, 1702 (*ibid.*, #1164). (1) Most island suits were of less than £500 value. (2) Writs of error which were appeals at common law, were allowed for small sums, it being governmental wisdom to keep inferior courts in awe and to rectify their mistakes. (3) The number of reversals on appeal from Barbados showed the probability of mistakes in law there. The Committee report was made by men who had sat upon many appeals and were qualified to judge the necessity thereof. (4) The instruction had an adverse effect on enforcement of the Navigation Acts. (5) Uncertainty of subject value resulted in impossibility of determining whether a case fell within the instruction. Complaint to England was necessary in such cases where appeals were denied below, these complaints being more vexatious and tedious than appeals. (6) A settled, sufficient damage (besides costs) on all appeals would prevent such inconveniences and discourage vexatious appeals. (7) The fortnight limitation was an unnecessary deviation from the common law by which writs of error were not limited in time. In many cases it was impossible to appeal within such time, as in the case of the death of parties or agents or in their absence. (8) It was frequently impossible to know within a fortnight the terms of a judgment or decree. (9) Security to answer a condemnation when execution was not stayed was a great hardship. The charge in all appeals being nearly the same, a sum certain might be appointed as security on all appeals, as in the House of Lords.

[18] *Ibid.*, #1175. Before any alteration was made in the instructions, it was proposed that the Governor and Council and other principal planters and merchants in the island should be required to give their opinion whether any serious inconvenience attended the current instructions.

[19] *Ibid.* Sir Thomas Powys, counsel for the petitionary opposition, stated that all plantations had minimum and security requirements; that it was reasonable that sufficient security be given, since charges on appeals could not but be high. As to the fortnight limitation, he supposed there was no necessity of drawing up a formal appeal within such time, but only a declaration by the party that he would appeal. The inconvenience of six months suspense, as proposed by the Committee, was pointed out. Dodd, co-counsel, alleged that allowance of appeals without limitation would be fatal to poor litigants who could not be at the charge of coming to England to defend appeals. Counsel Hodges and Hawkins for petitioners reiterated the arguments of the memorial, but also took occasion to point out that the order of reference to the Board was not whether any alteration should be made or not, but for what lesser sums it should be made, and for what longer time than presently directed.

[20] *Ibid.*, #1194.

[21] 2 *APC, Col.*, #856.

[22] *CSP, Col., 1702–3*, #20.

dispatched to a number of colonies. These instructions for the most part only codified the existing appellate regulations,[23] yet an additional restriction was promulgated that in appeals to the Governor and Council such of the council as were judges of the court from which the appeal was made should not be permitted to vote upon such appeal, but might, nevertheless, be present at the hearing to give reasons for their judgment below.[24] A danger, apparently not foreseen, but inherent in strict adherence to this instruction, was inability to secure a quorum upon appeal.[25] The Board of Trade by analogy extended this instruction to the case in which a governor was an interested party.[26]

A few years later it was proposed from Barbados that appeals to the King in Council should be granted for sums over £50, if applied for within sixty days.[27] But administrative silence greeted the proposal. In a 1714/5 memorial, probably originating with Barbados interests, the £500 minimum was assumed as of general force in the plantations and was severely criticized as preventing appellate review in England in most litigation. It was further alleged that governors frequently refused appeals in cases satisfying the minimum requirements upon false pretense that the subject matter failed to meet such requirements. Necessity for preliminary recourse to England to secure leave to appeal in the latter cases made conciliar appeal a litigious luxury.[28] Castigated was the "interest" made by the Board of Trade to quash the earlier Committee recommendations for alteration of the Barbados instructions.[29]

A 1730 observer of the South Carolina judicial system criticized as too high

[23] The instructions were sent to Barbados, Bermuda, the Leeward Islands, Maryland, New Jersey, New York, and Virginia. 1 Labaree, *Royal Instructions*, #448–49. The form followed was that of the Jamaica instructions of 1692. The greatest variation was in the minimal amounts necessary to an appeal. In appeals to the Governor and Council no minimum was set for Maryland and Virginia, £50 for Bermuda, £100 for New Jersey, and £300 for the other colonies (*ibid.*, #448). In appeals to the King in Council £100 was fixed as a minimum for Bermuda, £200 for New Jersey, £300 for Maryland, New York, and Virginia, and £500 for Barbados and the Leeward Islands (*ibid.*, #449). The basis for imposing a £200 minimum for New Jersey, rather than £300, may be a proposal contained in an August, 1701, memorial of the proprietors of the two New Jersey provinces whereby it was proposed "that no appeal to the King may lie in personal actions, where the cause of action is of less value than two hundred pounds" (Smith, *History of the Colony of Nova-Caesaria, or New Jersey* [1865], 572). *Cf.* the earlier reservation of appeals in an answer to proposals of the East New Jersey proprietors (*CSP, Col., 1699*, #1006).

[24] 1 Labaree, *Royal Instructions*, #448. This provision had been inserted in the Jamaica instructions since 1692. Although the force of this instruction in Maryland terminated in 1715, the practice embodied therein continued. See 2 *Correspondence Governor Horatio Sharpe*, 9 Md. Archives, 433.

[25] See *CSP, Col., 1711–12*, #249; *ibid., 1728–29*, #457; 3 *Journals Assembly Jamaica*, 518–21.

[26] *CSP, Col., 1712–14*, #412.

[27] *Ibid., 1706–8*, #682.

[28] 2 *Col. Rec. No. Car.*, 161. The £500 appealable minimum complained of was alleged to have been established by 1689 instructions. This is probably an erroneous generalization drawn from the Barbados and Leeward Islands instructions of that year. See 1 Labaree, *Royal Instructions*, #445. Schlesinger in 28 *Political Science Quarterly*, 281, accepts as true this allegation as to general 1689 instructions.

[29] 2 *Col. Rec. No. Car.*, 165.

served that for the colonists the most important effect of the Council's policy not to be bound by the instructional limitation was the introduction of an additional step for litigants and one, of course, contributing to the expense of appeal by making necessary a petition for the admission of a cause below par value.

Although the Privy Council usually adhered strictly to its rule that a cause had to be pursued through the various instances in the provincial judicial hierarchy before an appeal would be entertained in England, in a few instances appeals *per saltum* were admitted, viz., an appellant was allowed to skip the final colonial instance.[60] Furthermore, owing to a statutory confusion

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was limited to appeals to the King in Council (*ibid.*, #458). But the £200 minimum there still blocked an appeal, even in the absence of a policy of only permitting conciliar appeals from the superior courts of the plantations. This same erroneous reading of the governor's instructions occurred in Smith v. *Rex* (*PC* 2/94/601, 608, 616). This cause involved a £100 fine imposed in the Antigua Court of King's Bench and Common Pleas on July 22, 1735. The relief petitioned for was the same as granted in the earlier cause. In Tittle v. White no writ of error had been allowed below from the imposition of a £60 fine in the Court of King's Bench and Common Pleas in St. Christopher in June, 1743. Again the writ of error had been denied as contrary to the governor's instructions as to appeal minimums. The relief granted was identical with that in the first case above for the same reasons of conciliar policy (*PC* 2/98/605; *PC* 2/99/3, 56). In 1749 Benjamin King of Antigua applied for similar relief from a £100 fine in the Court of King's Bench and Grand Sessions, but no action is recorded as taken on the petition (*PC* 2/101/244). In Brown v. Bordley on consideration of a petition for leave to appeal from a Provincial Court of Maryland judgment, it appeared that the case was not yet regularly before the King for an appeal. It was therefore advised that appellant be admitted to bring a writ of error from the Provincial Court to the Court of Appeals or otherwise as he should be advised (*PC* 2/88/483). In Turnbull v. Topham the usual relief was afforded in a civil action in which the sum involved was under the £300 minimum (*PC* 2/102/437, 480, 496). See also Smith v. Buckley, where a right of office was involved, although the immediate sum concerned was under the instructional minimum (*PC* 2/103/324); Young v. Dunbobbin (*PC* 2/103/326). In Wall v. Jessup petitioner prayed that the judges of the Nevis Court of King's Bench and Common Pleas be ordered to sign a bill of exceptions and allow a writ of error to the Court of Errors with further liberty of appeal to the King in Council, but the prayer was refused (3 *APC, Col.*, #488). In an August 21, 1770, opinion whether an appeal to the King in Council would lie in an action of debt in the Inferior Court of Common Pleas of Rhode Island brought by George Champlin (Comptroller of the Customs) for nine shillings, Attorney General De Grey stated: "I conceive the Lords of the Council will not *per saltum* hear the appeal if there are any immediate courts to which the error lies till the matter has passed through such jurisdictions" (*T* 1/471/131–32).

Appellants must also have exhausted their remedies in the superior court of the colony. In Oulton v. Savage (*PC* 2/86/19, 93, 116) a petition for leave to appeal from a November 6, 1716, judgment of the Massachusetts Superior Court of Judicature was ordered dismissed, for on hearing counsel it appeared that petitioners had not applied for a review as they ought to have done and still might do according to the practice and method of proceedings in that colony. See An Act for Review in Civil Causes, 1 *Acts and Res. Prov. Mass. Bay*, 466. *Cf.* the action of the Committee in Cunningham v. Forsey, *infra*, p. 408.

[60] See John Macarell's appeal admitted from the Pennsylvania Court of Common Pleas (*PC* 2/83/447; *PC* 2/84/251, 268). The date of the judgment appealed from does not appear in the Privy Council records, but it is likely that the February, 1710/1, act establishing courts was in force. Under this act the Supreme Court was the superior tribunal

in New Hampshire appeals from the Superior Court of Judicature were made directly to the King in Council,[61] as well as via the intermediate tribunal of the Governor and Council.[62] The former method probably originated in a 1699 provincial act, the disallowance of which was disregarded in the province.[63] The direct appeal from the Superior Court was more frequently utilized, but a trend toward the more orthodox appellate method is discernible in the later period.[64] In one cause the parties appealed to different bodies,[65] but an appeal was also taken from the subsequent Governor and Council judgment.[66] However, if the intermediate tribunal wrongfully refused to receive an appeal, it was possible to appeal directly to the King in Council.[67]

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of the province (*Charter and Laws Prov. Pa.*, 323). In the noncolonial field the same general rule of the Council Board was applicable, but in Mackie v. Maugier from Guernsey appellant was allowed an appeal to the King in Council from the Court of Judgments without taking the usual intermediate appeal to the plenary Royal Court (*PC* 2/85/221).

[61] Allen v. Waldron (*PC* 2/78/174, 191); Merrill v. Proprietors of Bow (*PC* 2/104/86, 101–2); Trecothick v. Wentworth (*PC* 2/106/243); Dering v. Packer (*PC* 2/107/189); Rolfe v. Proprietors of Bow (*PC* 2/109/74).

[62] French v. Follansby (*PC* 2/102/28); Hilton v. Fowler (*PC* 2/111/261); James v. Meserve (*PC* 2/117/236).

[63] See *supra*, pp. 175–76.

[64] See *supra*, n. 62. In the judgment books of the Superior Court of Judicature only one appeal is found admitted to the King in Council from 1750 to 1774. This instance was Wentworth v. Atkinson, March, 1772 (*MS N.H. Sup. Ct. Jud. Judg. Book, 1771–74*, 248–51). Respondent was also granted an appeal to the Governor and Council. Appeals were denied in Merrill v. Proprietors of Bow (*ibid., 1760–63*, 59); Hall v. Sanborn (*ibid., 1767–70*, 18–19). The Governor and Council granted appeals in Proprietors of Durham v. Gillman (*MS N.H. Court of Appeals and Supreme Probate Rec., 1742–74*, 42); Wheelright v. Sanders (*ibid.*, 115); Proprietors of Londonderry v. Flint (*ibid.*, 118); Branfill v. Inhabitants of Portsmouth (*ibid.*, 125); Pearson v. Willson (*ibid.*, 129); Moffatt v. Livius (*ibid.*, 188); Atkinson v. Wentworth (*ibid.*, 215–16).

[65] Wentworth v. Atkinson (March, 1772). No opposition was made by appellant (to the King in Council) to respondent's motion for leave to appeal to the Governor and Council (*MS N.H. Sup. Ct. Jud. Judg. Book, 1771–74*, 251).

[66] Atkinson v. Wentworth (*MS N.H. Court of Appeals and Supreme Probate Rec., 1742–74*, 215–16).

[67] In July, 1722, the Bishop of Sodor and Man and two insular vicars general complained to the King in Council of several fines inflicted upon petitioners by the temporal authorities of the Isle of Man for refusal to retract several ecclesiastical censures (*PC* 2/88/67). But upon hearing before the Council Board a year later, counsel for the temporal authorities objected to going into the merits, since the appeal was not regularly before the Board. See *Add. MS* 36,216/10–12. Whereupon, the petition was dismissed because the appeal ought to have been made in the first instance to the Earl of Derby, the proprietor of Man (*PC* 2/88/282). When petitioners then attempted to follow the Council's directions, the Earl refused to receive petitioners, and the island officials refused the appeal on the grounds of the form of security offered, of submission to the sentence, and of failure to take the appeal within the customary month. To these objections the petitioners answered that no submission to the sentence had been made and that no time limitation for taking appeals existed (*PC* 2/88/392, 511). The entire matter was then referred to the crown law officers, who made their report in May, 1724, after hearing both parties. After summarizing the contentions and evidence of both sides, the referees were of the opinion that the petitioners were not precluded from appealing by any lapse of time, since there was no time limit. Even if there were such limit, "yet it appears in this case that a petition of appeale was presented by the petitioners to your Majesty in Council within that time, which being an appeal to

the appellate jurisdiction of the Governor and Council to appeals from "any of the courts of common law." [126]

The same question as to the inclusiveness of appeal instructions would seem to apply to appeals from the Governor acting as Ordinary. Yet in South Carolina in 1730 we find it assumed without question that appeals from the Ordinary were included within the £300 minimum for appeals to the King in Council.[127]

### CRIMINAL APPEALS

In the field of criminal appeals there was no unforeseen development during the eighteenth century. The provision allowing appeals in cases of fines imposed for misdemeanors amounting to or exceeding £100 or £200 was extended to twenty colonies during the century.[128] The provision for giving security remained the same as in the earlier instructions in this field. It has been noticed previously that in some cases the instructions governing appeals to the Governor and Council in civil causes were purblindly interpreted to include criminal causes.[129] Conversely, in some cases the instruction governing conciliar appeals in misdemeanor cases was erroneously applied to writs of error in criminal matters to the Governor and Council.[130]

An episode in Jamaica reveals greater vigilance. On July 11, 1728, one Lancelot Tyler presented a petition to Governor Hunter in Council, setting forth his conviction in the Supreme Court of Judicature upon an indictment

[126] See 1 Labaree, *Royal Instructions*, #453.

[127] *MS Observations on the Present State of the Courts of Judicature in His Majesty's Province of South Carolina* (1730), 5 (L.C.).

[128] 1 Labaree, *Royal Instructions*, #458. The £200 minimum was established for the older and more important colonies at early dates, i. e., Barbados (1702), Jamaica (1689), Leeward Islands (1702), New Jersey (1702), and New York (1701). Dominica (1770), East Florida (1773), Georgia (1754), Grenada (1771), and St. Vincent (1776) were added later. Eight colonies had £100 minimums, ranging in date of establishment from Bermuda (1690) to Quebec (1768). Maryland enjoyed a £200 minimum instruction for but a short time, 1714–15.

[129] See *supra*, n. 59. For the background of Wavell Smith v. *Rex* (Antigua) see 6 *APC, Col.*, #443, 448, 450–51. In this case the governor was of the opinion that an earlier Order in Council dispensing with the instructional minimum in a similar case did not authorize a general dispensation of instructional limitations and so refused a writ of error (*ibid.*, #448).

[130] In March, 1753, Benjamin King of Antigua in a petition to the Board of Trade related that he had been fined in the sum of £100, so that he could not be granted a writ of error which the governor by his instructions was forbidden to grant for a fine under £200 (*CO* 152/27/AA 67). Earlier, in May, 1749, King had petitioned the Council Board for leave to bring a writ of error to the Governor and Council and if necessary to appeal thence to the King in Council from a July 12, 1748, sentence of the Court of King's Bench and Grand Sessions, imposing a fine for extortion while acting as commissary and judge of the Court of Vice-Admiralty (*PC* 2/101/244). The gravamen of the 1753 petition was that the governor and his circle had drawn up a number of depositions detrimental to petitioner's character and dispatched them to the Board of Trade, although the petition for a writ of error pending before the Council Board was a judicial proceeding in no wise concerning the governor. For these depositions see *CO* 152/26/Z 72; for the record below, *CO* 152/26/Z 35.

for stealing two slaves belonging to the South Sea Company and defacing their marks, under a 1696 act for the better order and government of slaves. On the ground that the indictment lacked certain essential allegations, Tyler moved the court in arrest of judgment, but the motion was denied. Tyler thereupon prayed a writ of error for reversal of the judgment, presenting an opinion of five insular counsel that the absence of the essential allegations constituted ground for reversal.[131] The governor thereupon took the opinion of his Council Board whether such a writ of error would lie. The Board was of the unanimous opinion that such writ would not lie, as the instruction relating to appeals seemed calculated for civil causes only. The Board also expressed great resentment that counsel presumed so notoriously to arraign the justice of the bench and jury and attempted to lead them into a method of proceeding that was unprecedented, illegal, and unjustifiable.[132]

In a few instances the Privy Council intervened in criminal cases not covered by the instructions—treasons and felonies. The earliest cases, the appeals of Nicholas Bayard and John Hutchins, were more in the nature of exercises of the pardoning power and will be discussed later.[133] In June, 1711, one Thomas Macnemara of Maryland petitioned the King in Council, praying that he be restored to the status of attorney, of which petitioner had been deprived because found guilty of homicide by chance medley, and that the record of his trial be certified in order to a reversal of the judgment.[134] Apparently the application was made because the Maryland Court of Appeals refused to allow prosecution of a writ of error by an unauthorized attorney

[131] 11 *MS Mins. Jamaica Council, sub* July 11, 1728. Petitioner stated that it was not alleged in the indictment that the petitioner "did take and carry away" the said negroes.

[132] *Ibid.* Compare the earlier Jamaica case of Brown v. *Rex* (1723), in which petitioner, alleging inability to procure counsel, prayed suspension of a £500 fine until the matter could be laid before the Council in a judicial way or petitioner otherwise relieved. It was ordered that the Governor and Council be instructed to admit a writ of error and assign petitioner counsel and that if the appellate judgment should be unfavorable to petitioner, he might appeal therefrom (*PC* 2/88/469).

[133] See *infra*, p. 297 *et seq.*

[134] *PC* 2/83/256. For the proceedings in the Provincial Court upon the indictment for wilful murder see *MS Md. Prov. Ct. Judg. Book, 1709–10*, 231–34, 398–99. For an account of the trial and comments thereon see *CSP, Col., 1711–12*, #101. It was related from provincial sources that "by reason of ye many Roman Catholic friends the said Macnemara had to assist him in tampering with and sounding the inclinations of the jurors returned, of whose sentiments said Macnemara on his challenges was well advised by them, he was by those that remained unchallenged found guilty of homicide by chance medley and on that verdict the jury persisted against plaine evidence, tho they were twice sent back by the court. But the Chief Justice and his associates taking into consideration the barbarity of the fact with the malice prepense according to evidence, by his acting without any deputation from the sheriff and that in his own case which made it malice implied in law and so murder, they concluded that the jury had found the matter which was the manslaughter, yet they were judges of the manner, and so gave judgment that he was guilty of manslaughter, and for grounds of such judgment relyed on the case of John Vane Salisbury in Plowden's *Commentaries*" (*CO* 5/720/118–19).

during Macnemara's absence from the province.[135] The Committee, upon considering the case of the petitioner, discovered that a jury had found Macnemara guilty, not of murder, but of homicide by chance medley and that petitioner had been denied a pardon, forced to pray his clergy, and afterwards by judgment burnt in the hand and discharged from his status of attorney. Thereupon, the Committee advised that petitioner ought to have been discharged, not burnt in the hand or removed from his status as attorney. Further, that it was proper for the King to grant petitioner leave by writ of error to remove the proceedings on the indictment and to command the Maryland court to restore forthwith to petitioner liberty to practice as an attorney.[136] A September Order in Council followed this recommendation, adding that the court below transmit the record and process of the indictment together with all the proceedings concerning the same to the King in Council.[137] But in the interval the Provincial Court sentence was reversed upon writ of error to the Court of Appeals; consequently there was no occasion for further conciliar intervention.[138]

A long period elapsed before any further felony causes came before the Council. In May, 1771, one Michael Brislane petitioned to be heard on an appeal from a July 17, 1770, judgment of the Montserrat Court of Errors, affirming an April 24, 1770, death sentence for murder rendered by the local Court of King's Bench.[139] The Committee, upon consideration of the petition and hearing appellant's solicitor, advised that the appeal should be dismissed as inadmissible, and it was so ordered.[140] However, the Committee forwarded a memorandum to be laid before Lord Dartmouth for some directions to be transmitted to the Leeward Islands governor. The communication was to the effect that the Council were of the opinion that the special verdict ought not to have been received by the judges below, since it did not find facts, but only evidence thereof. Though the evidence seemed sufficient to have warranted the special verdict, yet the court was not to judge of the relevancy of evidence and to try facts, but only to declare the law upon such facts as were found by the jury and to give judgment accordingly. Since the verdict was a mere nullity, no judgment ought to have been given against petitioner, and it would be proper for the governor to grant a reprieve in order for the crown law officers and petitioner, respectively, to take such measures as they thought fit.[141]

[135] *Proc. Md. Ct. Appeals, 1695–1729*, 137–38.
[136] *PC* 2/83/288.
[137] *PC* 2/83/295.
[138] See *Proc. Md. Ct. Appeals, 1695–1729*, 156–64.
[139] *PC* 2/115/175.
[140] *PC* 2/115/119, 187. Lieutenant-Governor Losack informed the Earl of Hillsborough that when an appeal to the King in Council had been prayed by the prisoner, he hesitated to affix the colony seal on the proceedings for use on appeal. But he acceded when the Attorney General rendered his opinion in favor of the appeal (*CO* 152/31/EE 38).
[141] *PC* 2/115/120, 191. The special verdict is set out in 5 *APC, Col.*, #181.

This conciliar limitation upon appeals in felony cases should not be taken as an inherent limitation upon the royal prerogative,[142] but rather as a fusion of history and convenience.[143]

In this connection it is convenient to consider the question of appeals in criminal matters under the charter reservations. The language of the Massachusetts charter clearly ruled out any appeals except those civil in nature.[144] The reservation in the patent to William Penn was so general that it was maintainable that criminal appeals were included therein.[145] In Pennsylvania on May 8, 1718, Hugh Pugh and Lazarus Thomas, convicted of murder at a late Court of Oyer and Terminer and sentenced to death,[146] in a petition to Lieutenant-Governor Keith insisted upon an appeal to the King as their undoubted right by the constitution of England and of the province and prayed a reprieve until the royal pleasure should be known. The petition of appeal recited the appeal reservation in the charter and gave reasons for the appeal—all revolving around the use of the affirmation by the grand and petty juries.[147] First, seventeen of the grand jury and eight of the petty jury were Quakers or reputed Quakers and were qualified only by affirmation, contrary to 1 Geo. I, st. 2, c. 6.[148] Secondly, the provincial act by which judges, jury, and witnesses were qualified was passed after the alleged murder was committed and

[142] See Dr. Lushington in *Regina* v. Joykissen Moorkerjee (1 *Moore P.C.* [n.s.] 272, 295); Lord Kingsdown in The Falkland Islands Company v. *Regina* (*ibid.*, 299, 312); Sir John T. Coleridge in *Regina* v. Bertrand (4 *ibid.*, 460, 473–74).

[143] See Dr. Lushington in *Regina* v. Eduljee Byramjee (5 *Moore P.C.* [n.s.] 276, 289–91).

[144] 1 *Acts and Res. Prov. Mass. Bay*, 15. There is no evidence that this charter provision had any effect in the passage by Parliament of 14 George III, c. 39, which permitted removal of criminal trials in certain cases to other provinces or to Great Britain. Against this act it was objected that the province possessed full power under the charter to try such cases, that the charter prohibited transportation of inhabitants outside the province by the governor, and that it was "inconsistent with the known principles of common law, the common safeguard of the subject, the general, constitutional, and necessary system of colonic jurisprudence, and the special rights and privileges of the Massachusetts inhabitants" (*The Petitions of Mr. Bollan, Agent for the Council of the Province of Massachusetts Bay, Lately Presented to the Two Houses of Parliament* [1774], 20–21).

[145] See *Charter and Laws Prov. Pa.*, 84.

[146] 3 *Mins. Prov. Coun. Pa.*, 40. The criminal act had taken place three years earlier at a public vendue which resulted in a fray among the Welsh settlers. Pugh and his cronies seized the opportunity to settle old scores and fatally cudgeled one Jonathan Hayes who had innocently intervened. The trial was delayed because no trial could be had without use of the affirmation which Lieutenant-Governor Gookin had declared void (*MS James Logan Letter Books, 1717–31*, 17, 30). Twelve hundred people were alleged to have been present at the trial, and Governor Keith wrote that "there never was a court in America that sat with more solemnity, neither any proceedings in Europe that could be said to be more regular and fair" (1 *MS Penn Official Corres., 1683–1727*, 64–65). The outcome of the trial gave great satisfaction to the Quaker element (*MS James Logan Letter Books, 1717–31*, 17), but supporters of the Established Church sought to utilize the trial in complaints to England. However, it was defended that two of the four judges (Jasper Yeates and William Trent) were noted Churchmen and that John Moore, an old antagonist of the Quakers, prosecuted in behalf of Hayes, joining with the crown attorney (*ibid.*, 20).

[147] 3 *Mins. Prov. Coun. Pa.*, 40–41.

[148] *Ibid.*, 41. This statute extended to the colonies. By 7 and 8 William III, c. 35, it was

after another act of the same nature had been repealed by the late Queen.[149] Thirdly, the act was not consonant to reason, but repugnant and contrary to the laws, statutes, and rights of the Kingdom.[150]

The Lieutenant-Governor and Council, convinced of the notoriety of the crime and the justness of the conviction, yet admitting a right of appeal when well-founded and offered according to the form and direction of the law, declared it absurd that a condemned person could use such right without regard to circumstances to extort a reprieve against the execution of a just sentence. Therefore, the petitions being improperly offered as to time and place, it was thought by no means expedient or prudent to interrupt execution of the sentence imposed.[151] However, the attempted appeal served to stimulate legislation to settle the question of the validity under English law of a trial by jurors who had taken an affirmation rather than an oath.[152] Later, in 1736, we find the Supreme Court granting appeals to two Marylanders, Rumsey and Carroll, from respective fines of £50 and £10 imposed as the result of the boundary dispute with Maryland. Because of the harsh conditions of security, the appeals were never prosecuted.[153]

### ACTS OF PARLIAMENT AND CONTINENTAL COLONIAL ACTS

Having now considered at length the scope of appeal regulation by royal instruction, it is desirable at this point to enter a caveat against overemphasizing their direct effect in the plantations at large. In the first place, instructions were usually sent only to royal colonies. Secondly, other regulatory methods were utilized in various colonies, including the extension of acts of Parliament governing the English appellate process to conciliar appeals.[154] This last manner of regulation was apparently a peculiarity of Jamaica practice, for there, upon

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provided (Section 6) that no Quaker or reputed Quaker should by virtue of the act be qualified or permitted to give evidence in any criminal causes or serve on any juries.

[149] For the act permitting qualification see 3 *Stat. at Large Pa.*, 39; the repealed act referred to was presumably A Supplementary Act to a Law about the Manner of Giving Evidence (2 *ibid.*, 425) disallowed by the Queen in Council in February, 1713/4 (*ibid.*, 543).

[150] 3 *Mins. Prov. Coun. Pa.*, 41.

[151] *Ibid.*, 41–42. One Council member suggested that it would be prudent to grant a reprieve solely out of regard for the security of the government, but was overruled. For discussion of the friction generated between imperial and colonial authorities by use of the affirmation see Root, *The Relations of Pennsylvania with the British Government, 1696–1765* (1912), 234 *et seq.*

[152] See Fitzroy, *Punishment of Crime in Provincial Pennsylvania*, 60 Pa. Mag. of Hist. and Biog., 250. For the resultant statute see 3 *Stat. at Large Pa.*, 199.

[153] Daniel Dulany to Lord Baltimore, Oct. 29, 1736 (*Dulany MSS.*, Box 2, #4). *Cf.* the July, 1737, petition of Rumsey and William Cannon to the Council Board that they be discharged from indictments in the Supreme Court of Pennsylvania or that they be tried and allowed to appeal (3 *APC, Col.* p. 339).

[154] We have seen no evidence of the 1746 statute mentioned by Kellogg (*The American Colonial Charter*, 1 Annual Rep. Amer. Hist. Assn. [1903], 268, note) as defining appeals.

allowance of appeals to the King in Council from the Governor and Council sitting as the Court of Errors, it was in some cases ordered that security be given in accordance "with the act of Parliament" or in accordance with both that act and the royal instructions.[155] Similar orders were made in the case of writ of error proceedings from the Supreme Court of Judicature to the Court of Errors.[156] The statutory source is not definitely stated in the records, but presumably the act of Parliament referred to was 3 James I, c. 8. This act provided that in certain cases no execution should be stayed by any writ of error unless appellant with two sufficient sureties entered into recognizance in double the judgment sum to prosecute the writ with effect and to satisfy all debts, damages, and costs in case of affirmance. Apparently no notice was taken by the colonists that the act included only causes in the courts of record at Westminster, or in the counties palatine, or in the courts of Great Sessions of Wales. Whether or not this act and two of a similar nature (13 Charles II, St. II, c. 2, and 16 and 17 Charles II, c. 8) extended to Jamaica was a perplexing subject, and eventually, in 1776, a local act was passed to resolve the doubts.[157]

Evidence of a similar extension of acts of Parliament in other colonies is meager. In an April 25, 1765, opinion of Attorney General John Rutledge of South Carolina on the method of proceeding in appeals from the lower courts to the Governor and Council, we find further mention of acts of Parliament regulating colonial appeals; for this opinion stated that appellant must give security to the effect required by the governor's instructions and by the statutes of 3 James I, c. 8, and 16 and 17 Charles II, c. 8, which were in force in

[155] In Orby v. Long (January 25, 1709/10) appellant, in praying an appeal to the Queen in Council, declared that he would give such security according to the act of Parliament and the royal instructions as the court should think fit. The court ordered appellant to give security in penalty of £1,000 "to prosecute the appeal with effect according to the statute" (1 *MS Jamaica Court of Errors Proceedings*, 20). In Brown v. *Rex* appellant also prayed liberty to appeal to the Privy Council, expressing willingness to give security according to the act of Parliament and the royal instructions. The appeal was allowed on giving £1,000 security to prosecute with effect according to the statute. (*ibid.*, *sub* Oct. 27, 1725). In Russell v. Pusey an appeal was allowed on giving security according to the act of Parliament and the royal instructions (*ibid.*, *sub* November 16, 1732); in Price v. Price, on giving £10,000 security to prosecute with effect according to the statute (*ibid.*, *sub* August 22, 1734).

[156] At the October 4, 1709, Court of Errors hearing of the writ of error from the Supreme Court of Judicature in Orby v. Long, counsel for respondent demanded "whether the plaintiffs had given security according to the act of Parliament and Her Majesty's instructions in such cases and the instructions being read and it appearing noe such security had been given it was insisted upon that the said writt was irregular and moved that the same might be quashed and that the plaintiffs might pay costs before they obtained a new writ." The writ was accordingly quashed (*ibid.*, 12–13).

[157] See An Act to avoid Unnecessary Delays of Execution, *Acts of Assembly of Jamaica* (1786), 115. Under orthodox legal theory the two latter acts would not be considered in force in Jamaica, since they were passed after the conquest of the island and contained no clause of extension to the plantations. See *infra*, p. 465 *et seq.* But Jamaica paid little heed to orthodox theories concerning the extension of acts of Parliament to the plantations. See *infra*, p. 476 *et seq.*

effectually to prosecute.[185] In 1727 the circular royal instruction as to suspension of execution unless respondent furnished security was received in Pennsylvania [186] and added as an amendment to a bill passed in the same year for the establishment of courts of judicature.[187] This 1727 act thus re-enacted the 1722 provisions, with a change of the security requirement to double the sum recovered, and added the instructional provision as to suspension of execution.[188] However, 1731 saw the amending act disallowed as prejudicial to the royal revenue and as an encouragement of illegal trade in the province.[189] As a result of this repeal, the 1722 act again came into force.[190] In the main the appellate regulations of this act were the formal legislative authority during the remainder of the colonial period, although further limitation upon the right of appeal was embodied in a provision of a 1767 amending act. Appeals from the Supreme Court were prohibited in cases where general verdicts were given and limited to cases of a demurrer to evidence, a bill of exceptions, or in which a writ of error might legally be brought. Petitions for appeals in prohibited cases were to be disallowed, and the court was to proceed as if none had been moved for.[191] Although we have seen no evidence on the point, this enactment may possibly constitute an intercolonial effect of *Cunningham* v. *Forsey*.[192]

It is difficult to determine from inspection of the Pennsylvania Supreme Court records which act in practice regulated appeals. In most cases the appeal was allowed on payment of costs and giving security "according to the act of Assembly"—without designating the act.[193] In one instance a nonexistent act of 11 Anne is mentioned.[194] In another, security in double the amount of the judgment is mentioned,[195] thus excluding the 1722 act. Further instances mention £300 security, which coincides with the requirement of the 1722 act.[196]

[185] *Charter and Laws Prov. Pa.*, 391.

[186] 1 *Pa. Archives* (1st ser.), 196–97; *Charter and Laws Prov. Pa.*, 395. As to whether this instruction was binding see discussion *infra*, p. 604.

[187] 3 *Col. Rec. Pa.*, 278.

[188] An Act for the Establishing of Courts of Judicature in this province, *Charter and Laws Prov. Pa.*, 399.

[189] 3 *APC, Col.*, #193.

[190] See *Charter and Laws Prov. Pa.*, 404.

[191] An Act to amend the Act Intituled An Act for establishing Courts of Judicature within this Province, *Charter and Laws Prov. Pa.*, 409.

[192] See *infra*, p. 390.

[193] See Wilcocks v. Oldman (*MS Appearance Docket, Pa. Sup. Ct., 1758–64*, 394); Browne v. McMurterie (*ibid.*, 448); Fothergill v. Stover (*ibid.*, 450); Bryan v. Moore (*ibid., 1764–68*, 119); Coxe v. Moore (*ibid.*, 120); Elliot v. Moore (*ibid.*, 120); Weiser v. Denny (*ibid.*, 181); Swift v. Hawkins (*ibid.*, 591); Swift v. Jones (*ibid.*, 591); Swift v. Mitchell (*ibid.*, 591); Pike v. Hoare (*ibid., 1769–71*, 43); Blasthford v. Kennedy (*ibid.*, 49); Smith v. Reed (*ibid., 1772–74*, 60).

[194] Toxin v. Sweet (*ibid., 1772–74*, 89).

[195] Nixon and Harper v. Long and Plumstead (*ibid., 1764–68*, 93).

[196] Streiper v. Logan (*ibid., 1772–74*, 241). In 1736 two Marylanders, Rumsey and Carroll, were fined £50 and £10, respectively, by the Supreme Court as an incident of boundary strife. Both were granted appeals to the King in Council upon respectively giving £300 to prosecute with effect in 18 months and to pay all charges. Daniel Dulany to Lord Baltimore, Oct. 29, 1736 (*Dulany MSS*, Box 2, #4).

That this is not merely coincidentally double the judgment can be shown.[197] Evidence from the Privy Council Register is no less confusing.[198]

In the three Lower Counties on the Delaware an act was passed under Lieutenant-Governor Gordon for establishing courts of law and equity which contained the same provision regulating appeals as the 1727 Pennsylvania act.[199] This provision was also included in the 1760 act for the better regulation of the Supreme Court.[200] Since no act from the Lower Counties was ever submitted for royal approbation, these acts escaped the fate of the Pennsylvania prototype.

In the chartered and proprietary colonies there was little danger of legislative appellate regulation conflicting with royal instructions, since these instructions were seldom dispatched to such colonies. But in the royal colonies local legislation might conflict with, reproduce, or supplement instructional regulation. In some instances the Board of Trade directed legislative bodies not to pass statutes covering matters already settled by the royal instructions.[201] Presumably such confirmatory enactments were regarded as a lessening of the royal prerogative.[202] As a matter of convenience, statutory embodiment, if confirmed by the crown, prevented alteration by the prerogative alone if the occasion arose; for, as stated by the Board of Trade in 1731, "an Act of Assembly cannot be repealed whatever inconveniencys may ensue from it without the consent of the people."[203] In this declaration the Board was following a 1722 opinion of the crown law officers distinguishing between the force of the royal prerogative in mere conquered countries and in colonies granted legislative powers.[204]

A vigorous presentation of the view that the domain covered by instructions was posted against intrusion is found in a report by Attorney General Northey upon a 1715 Leeward Islands act for judicial establishment and regulation of the administration of justice. It was represented that this act contained several regulations of appeals and writs of error to the King in Council, an

But Hurst v. Kirkbride, the next appeal after Streiper v. Logan (*supra*), was granted upon £1,000 security (*MS Appearance Docket, Pa. Sup. Ct., 1772–74*, 252).

[197] See the Rumsey and Carroll fines, *supra*, n. 196.

[198] From the mention of an eighteen-month prosecution limitation, the 1722 act is apparently intended in Pike v. Hoare, where reference is made to an Act of the "Assembly of Philadelphia" (*PC* 2/114/488) and again to an "Act of Parliament" (*PC* 2/114/694).

[199] *Laws of the Government of New Castle, Kent, and Sussex upon Delaware* (1741), 42–43.

[200] 1 *Laws State Delaware, 1700–1797* (1797), 376–77.

[201] See *CSP, Col., 1712–14*, #395.

[202] Francis Fane, legal adviser to the Board of Trade, was asked for his opinion "whether the Assembly's taking upon them to confirm what His Majesty has done by virtue of His Majesty's said prerogative, is not lessening His Majesty's said prerogative" (*ibid., 1728–29*, #758).

[203] 3 *APC, Col.*, #238.

[204] 1 Chalmers, *Opinions*, 222–23. *Cf.* Campbell v. Hall (1 *Cowper*, 204).

improper inclusion in that such regulation should be by means of instructions only.[205] The act was therefore disallowed in January, 1717/8.[206] But, as we shall see, this extreme view was not stoutly maintained. The height of legislative caution is seen in a 1772 Grenada act which enacted that appeals from the common law and chancery courts were to be regulated by the royal instructions, saving the royal prerogative of allowing appeals or writs of error in any case by special order.[207]

Acts in royal colonies regulatory of the appellate process fall into three categories. Some follow the instructional pattern, some reproduce in part English statutes, and others are *sui generis*. Considering the first group, let us examine the legislative career of Maryland as a royal colony. Until 1699 the appellate system of this colony was regulated by a 1695 act.[208] In that year the earlier act was repealed, but the appellate regulation established thereby was substantially re-enacted. From the Provincial Court an "appeal" or writ of error to the Governor and Council was provided when the debt or damages recovered exceeded £50 sterling or 10,000 pounds of tobacco. Appeal from any chancery decree to the Governor and Council was allowed without any minimum limitation. In the case of appellate affirmance of Provincial Court judgments, appeal to the King in Council was denied unless judgment exceeded £300 sterling or 60,000 pounds of tobacco. Further appeal to the King in Council in chancery causes was also available when the original debt or damages exceeded the above minimums.[209] There was no conflict with the royal instructions, since they contained no regulation of appeals to the Governor and Council and established a £300 minimum for conciliar appeals.[210]

In November, 1699, a July act of the same year for ascertaining the laws of the province was disallowed by the King in Council.[211] Allegedly this disallowance was understood in the province as in effect disallowing the above act regulating appeals.[212] At any rate, a 1704 act for appeals and regulating writs of error re-enacted the provisions of the 1699 law.[213] In England it was apparently presumed that the 1699 act was in force, for 1703 instructions pointedly omitted any minimum for appeals to the Governor and Council.[214] The appellate system continued to function under this 1704 act until 1711. In that year complaint was made to England by the President, Council, and Assembly of the province objecting to the governor's custody of the seal, because on appeal from the Chancery Court he judged his own decree. The

[205] *CSP, Col., 1716–17*, #422.
[206] *PC* 2/86/87.
[207] 1 *Laws Grenada and the Grenadines* (1774), 144, 235.
[208] See *supra*, p. 87.
[209] 22 *Md. Archives*, 469.
[210] See 1 Labaree, *Royal Instructions*, #446.
[211] *CSP, Col. 1699*, #1018. For the rationale of this disallowance see *ibid.*, #979, 1009. For the disallowed act see 22 *Md. Archives*, 558.
[212] *CO* 5/727/251–55.
[213] 26 *Md. Archives*, 286.
[214] 1 Labaree, *Royal Instructions*, #448.

Board of Trade, upon this complaint, represented that under the 1699 and 1704 acts an appeal was allowed from the Provincial Court to the Chancery Court and from thence to the Governor and Council and that this intermediate appeal to the Chancery Court, not allowed in other plantations, made it inconvenient that the governor should have custody of the province seal. Further, the minimum limitations upon appeals to the King in Council were an impairment of the royal prerogative which might be injurious to the subject. Although it might be fitting to restrain the governor from admitting appeals below the instructional minimum, yet as the King was the fountain of justice the power of receiving subminimum appeals should be reserved to him. Therefore, disallowance of both acts was advised. With these acts repealed, the appellate system would subsist by the royal instructions, as in other plantations.[215] The acts were accordingly disallowed on June 14, 1711.[216]

The province was not content, however, to operate under the governor's instructions alone. After some legislative wrangling as to content,[217] an act for regulating writs of error and granting appeals from and to the courts of common law in the province passed late in 1712. This act omitted all reference to chancery appeals, but re-enacted the previous provisions as to common law appeals.[218] Upon receipt of this act the Board of Trade informed Edward Lloyd, president of the Maryland Council, that the clause relating to appeals from the Governor and Council to the Queen in Council should have been omitted, the matter being sufficiently provided for by the instructions. Lloyd was advised to endeavor to have a new law passed under threat of disallowance.[219]

In November, 1713, this communication was laid before the provincial legislature, with recommendations to re-enact the existing law, omitting the clause directing appeals to the Queen in Council.[220] Upon this recommendation an act was passed which repealed the 1712 act and omitted all reference to appeals to the Queen in Council. The same minimum for appeal from the Provincial Court to the Governor and Council was maintained.[221] Following restoration

[215] *CO* 5/727/251–55. This appellate hierarchy appears to be a misinterpretation of the clause that any person entitled to relief in equity from a Provincial Court or county court judgment should exhibit his bill in chancery before entrance of an appeal before the Governor and Council; see 22 *Md. Archives*, 469; 26 *ibid.*, 286.

[216] *CSP, Col., 1710–11*, #881.

[217] On November 4 conferees of both legislative houses agreed on the necessity of an act agreeable to the former law excluding the provision relating to appeals from Chancery to the Governor and Council. A clause was also to be added restraining appeals from Chancery to the Queen in Council unless amounting to £300 sterling or 60,000 pounds tobacco (29 *Md. Archives*, 92). The council opposed the added provision as unnecessary under the instructions (*ibid.*, 94), while the lower house approved the addition (*ibid.*, 145–46). But the latter body capitulated to the view of the upper house (*ibid.*, 151). See also *CSP, Col., 1712–14*, #145.

[218] 38 *Md. Archives*, 150.

[219] *CSP, Col., 1712–14*, #395.

[220] 29 *Md. Archives*, 234–35, 308.

[221] *Ibid.*, 336.

of the colony to proprietary status in 1715, there was no immediate legislation to replace the royal instructions. This absence may be accounted for by the fact that the royal instructions were replaced by proprietary.[222] Within a few years, however, provincial acts restored to chancery suitors appeals to the Governor and Council from any Chancery Court decree.[223] Then, by a 1729 act it was provided that such appeals should be subject to the same regulation and limitation regarding prosecution as appeals from the common law courts.[224]

Although somewhat out of logical sequence, it will be convenient to consider at this place the later proprietary instructions in Maryland. The earliest instructions we have seen, those of March, 1753, to Governor Sharpe, incorporated the royal instruction as to appeal to the Governor and Council in force when Maryland was a royal province.[225] The correlative royal instruction as to further appeal to the King in Council was also adopted, but the proprietor was substituted for the King in Council. The Governor and Council was also given discretion to allow appeals in causes under the £300 sterling minimum.[226] Appeals were also to be allowed to the proprietor "for consideration thereof" from all fines imposed for misdemeanors amounting to or exceeding the value of £200 with the same provision as to security as in the equivalent royal instruction.[227] Although no instructional minimum was set for appeals to the Governor and Council, Sharpe was directed to have an act passed restraining appeals as most convenient.[228]

Despite this instructional mention of an appeal to the proprietor, we have never seen such an appeal. In the light of complaint of undue proprietary control over the colony courts, such an appeal would certainly have received notice.[229] Perhaps this instruction explains the ambiguous statement made

[222] See *infra*, n. 225.

[223] 34 *Md. Archives*, 270; 36 *ibid.*, 524.

[224] *Ibid.*, 454.

[225] *Md. H.R. Portfolio* 2, #4, article #62. For the royal instruction followed see 1 Labaree, *Royal Instructions*, #448.

[226] *Md. H.R. Portfolio* 2, #4, article #63. For the adopted royal instruction see 1 Labaree, *Royal Instructions*, #449. But in 1763 we find an understanding that appeals must amount to more than £500 (*Carroll Papers*, 11 Maryland Hist. Mag., 332). But compare Mereness, *Maryland As a Proprietary Province* (1901), 245; 32 *Maryland Hist. Mag.*, 169.

[227] *Md. H.R. Portfolio* 2, #4, article #65. For the equivalent royal instruction see 1 Labaree, *Royal Instructions*, #458.

[228] *Md. H.R. Portfolio* 2, #4, article #64. But note that the Nov., 1713, act was still in force; see *Laws of Md.* (1765), 12 Anne, c. iv.

[229] In answer to charges that the Maryland judicial system was dominated by the proprietor, it was said that "if either of the parties concerned in the cause are dissatisfied with the determination of the Court of Appeals [Governor and Council], they have a dernier resort, and may carry the matter home by appeal or petition to the King and Council. This is an absolute security against fraud, or errors of judgment, because any sentence complained of, may, if wrong, be at any time reversed" (*An Answer to the Queries on the Proprietary Government of Maryland, Inserted in the Public Ledger* [1764], 20–26 [Md. Hist. Soc.]). See also Barker, *The Background of the Revolution in Maryland* (1940), c. vii.

by the Maryland Court of Appeals in granting several appeals, i. e., "saving nevertheless His Lordship's right and ordered that it be entered by way of protestation against the said appeal in the manner wherein it is prayed." [230]

There is also some evidence that pre-1715 royal instructions had a continuing force during proprietary rule. In 1737 Attorney General Daniel Dulany brought an information against Charles Carroll in the Chancery Court for refusal to pay quit-rents on lands in Prince George County. Carroll demurred on the ground that the proprietor had an adequate remedy at law, but the demurrer was overruled by Chancellor Ogle, and defendant was ordered to answer. In February, 1738/9, Carroll petitioned the Chancellor for leave to appeal to the King in Council from this order. The petition was rejected in March, on the ground that it was contrary to the royal instructions to grant such an appeal from any court other than the Court of Appeals, the supreme court of the province. Carroll again protested that the same objection of proprietary bias existed against the Court of Appeals and that "the said instructions from the crown are not of that force they are pretended to be of, the said instructions being given when the inhabitants of this province had the happiness to be under the immediate government of the crown." Cessation of further process was prayed until the royal will as to the appeal could be ascertained, but attachment was ordered to issue against defendant. Finally, in May, 1739, Carroll capitulated and took an appeal to the Court of Appeals.[231] Caution must be exercised in generalizing from this case. The outcome might be different where the court favored a stand contrary to the tenor of the pre-1715 royal instructions.

Further provisions concerning Maryland appeals are found in the trade instructions issued by the crown in 1753 to proprietor Lord Baltimore. One article related that customs officers in the prosecution of seizures and personal informations in the plantations had been greatly discouraged and denied liberty of appealing to the King in Council. Therefore, Governor Sharpe was to allow customs officers the privilege of such appeals in order to a final hearing and determination according to the merits of the case.[232] The March, 1726/7, circular instruction as to suspension of execution pending appeals to the King in Council was also embodied in these trade instructions.[233]

South Carolina was another colony where the instructional form was followed in legislative appellate regulation. A short-lived 1720 act provided that

[230] See Hunt v. Holland (1739, *Md. Court of Appeals MSS*); Lord Proprietor v. Maccubbin (1739, *ibid*).

[231] *Calvert MSS*, #322. When the Court of Appeals affirmed the Chancellor, Carroll took an appeal to the King in Council. Daniel Dulany to Lord Baltimore, 1741 (*Dulany MSS*, Box 2, #13). But the appeal was never entered at the Council Office.

[232] *Md. H.R. Portfolio* 2, #5, article #23.

[233] *Ibid.*, article #28. For the circular instruction see 1 Labaree, *Royal Instructions*, #450.

the Governor, Council, and Assembly should constitute a court of appeals in law and equity in causes involving more than £100 sterling. In causes exceeding £500 further appeal might be taken to the King in Council upon proper security.[234] In 1721 an act establishing a Court of Chancery consisting of the Governor and Council made elaborate provisions for appeals to England in causes exceeding the value of £300. It was necessary to petition for the appeal within a month after decree given, and appellant was to give security double the value of the matter in difference to answer judgment and award of damages in case of affirmance. Execution was not to be stayed upon appeal, provided security was given equal to the value of the matter in difference to make restitution in case of reversal within three years of the decree appealed from.[235] This statute varied in some degree from the royal instructions of 1720,[236] but as we have seen it was arguable that these instructions did not apply to chancery appeals.[237]

### INSULAR LEGISLATION

From those acts roughly following the instructional pattern we turn to the insular possessions where English statutory influence pervaded legislative regulation. In 1711 a Nevis act was passed conferring error jurisdiction upon the Governor and Council in matters under £300 current money and over £20, and upon the Queen in Council in matters over £300. It further provided that all appeals in the nature of writs of error should be granted, upon reasonable security, by the local Courts of Queens Bench and Common Pleas. Instead of a certificate, a warrant from the Chief Justice or, in his absence, the next named commissioner (upon plaintiff in error posting security) should oblige the clerk of the court to return a transcript of the record before the judges in error. No executor, administrator, or guardian, however, should be obliged to give security on writs of error, or any person for any suit commenced on a penal bond. Security was to be double the judgment sum in writs of error and appeals in all actions, debt as well as others.[238]

The appealable minimum provisions of this act were clearly in conflict with the royal instructions for the Leeward Islands limiting appeals to the Governor and Council to sums exceeding £300 sterling, and to the King in Council

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Since these 1753 instructions are the only ones we have seen, we are unable to date the inception of the articles in question.

[234] Smith, *South Carolina As a Royal Province* (1903), 124–25.

[235] An Act For Establishing a Court of Chancery in This His Majesty's Province of South Carolina (7 *Stat. at Large So. Car.*, 163). A 1746 act altering the Chancery establishment made no alteration in the appeal provision (*ibid.*, 191–93).

[236] See 1 Labaree, *Royal Instructions*, #449.

[237] See *supra*, p. 236 *et seq.*

[238] An Act Establishing the Courts of Queens Bench and Common Pleas; and settling due methods for the administration of Justice in this island (*Acts Assembly Nevis, 1664–1739* [1740], 67, 72).

to £500 sterling.[239] In addition it is not clear whether the act contemplated an appeal *per saltum* in matters over £300, and thereby ran counter to conciliar appellate policy.[240] The influence of 3 James I, c. 8, and 16 and 17 Charles II, c. 8, is patent in this Nevis enactment.

In the same year (1711) an act was passed in St. Christopher reducing the minimum for Governor and Council error jurisdiction to £100 current money from the customary £300 current money. Appeals to the Privy Council were to be guided by the £500 sterling minimum of the instructions. The same provisions were made as to appeals in the nature of writs of error and as to double security in all actions as in the Nevis act.[241]

Ten years later an Antigua act contained elaborate regulations of the appellate process, but it was more consonant with instructional standards. By this 1721 statute, writs of error to the Governor and Council were to be signed by the governor upon appellant's certification of bond given at the Secretary's Office, with two sufficient sureties in double the value of the matter in question to answer the debt or damages, with such costs and charges as should be awarded in case of affirmance. All such writs of error were to meet the instructional requirements, but in the absence thereof no limitation was imposed. No executor, administrator, or guardian was obliged to give security on said writs, except where required by the laws of England. Upon appeal to the King in Council the same exemption, with the addition of actions upon a penal law, prevailed, unless directed otherwise by the royal instructions. Appeal to the King in Council from the Governor and Council was to be limited by the royal instructions as to minimum limitations and security provisions.[242]

Returning to St. Christopher, we discover a 1724 enactment that the Governor and Council should exercise error jurisdiction without a limiting minimum. Further, no execution in personal actions was to be stayed by writ of error unless appellant by two sufficient securities was bound by recognizance in double the judgment sum to prosecute with effect, and to pay all debts, damages, and costs in case of affirmance. In writ of dower or *ejectione firmae* appellant was to be bound in such sum as the court judged reasonable. However, this security provision was not to extend to executors, administrators, or any popular action or actions upon a penal law or statute. An appeal to the King in Council was to lie according to the instructions, with appellant giving security as aforesaid. Apparently the exception in favor of executors, administrators, and guardians was abrogated in the case of appeals to the King in

[239] 1 Labaree, *Royal Instructions*, #448–49.
[240] See *supra*, p. 226.
[241] *Acts Assembly St. Christopher, 1711–35* (1739), 7–8.
[242] *Acts Assembly Leeward Islands* (1734), 183, 197–98.

instructed to settle by local act the method and limitation of appeals to the Governor and Council.[257] Therefore, no royal instructions were issued in this matter until 1753. A 1696 act fixed damages in case of affirmance upon appeal from the county courts to the General Court and prohibited such appeal without security given to prosecute and stand the award.[258] By a 1705 act the scope of the appellate review of the General Court in personal actions was governed by the amount of the judgment or decree appealed from. Where such judgment or decree did not exceed £20 sterling, no errors could be assigned other than "errors in matter of right." In causes between £20 and £50 sterling, errors in form taken below could also be assigned. But in personal actions, suits in chancery, informations, "or other controversies" of more than £50 sterling and in all real actions appellants could assign errors either in form or substance as in England upon writ of error. Provision for damages in case of affirmance varied with the nature of the action.[259] We have seen no precedent in English practice for variation in the scope of review with the amount of the subject matter. It is a peculiarly Virginian innovation. A 1710 act made further provision for security on appeal from the county courts to the General Court and for damages in case of affirmance.[260]

No limitation was placed upon appeals to the General Court until 1727/8. At this time it was enacted that no appeals should be allowed from any inferior court of record or court of chancery in any action or suit where the debt or damage or matter recovered, exclusive of costs, did not exceed £5 current money or 1,000 pounds of tobacco, unless the title or bounds of land should be called into question.[261] Following this enactment the article for settling the method and limitation of appeals was dropped from the instructions.[262]

By an act of 1748, appeal to the General Court was limited to final judgments and decrees, the minimum was doubled, the 1705 provisions as to the dependency of the scope of appellate review upon the amount involved adopted, and the usual provision made for damages in case of affirmance.[263] But this act suffered disallowance on the ground of variance from the 1705 statute, for it altered the minimum original jurisdiction of the General Court from £10 to £20, and instituted a £10 minimum for appeals to the General Court. These prohibitions might be attended with great inconvenience and detriment to trading subjects; therefore the 1705 act was more eligible as less oppressive.[264]

[257] *Supra*, p. 79.
[258] 3 Hening, *Stat. at Large Va.*, 143.
[259] *Ibid.*, 287, 300–301.
[260] *Ibid.*, 503, 513–14.
[261] 4 *ibid.*, 182, 188.
[262] 1 Labaree, *Royal Instructions*, #446.
[263] 5 Hening, *Stat. at Large Va.*, 467, 481–82. Part of these provisions were also embodied in An Act for establishing County Courts, and for regulating and settling the proceedings therein (*ibid.*, 489, 505–6).
[264] 4 *APC, Col.*, p. 139. *Cf.* Flippin, *Royal Government in Virginia* (1919), 308–9, where no knowledge is indicated of the 1727/8 act or of the disallowance of the 1748 act.

No mention whatever was made of the 1727/8 act or of the royal instruction for legislation to limit the appellate jurisdiction of the General Court, a classic example of administrative inefficiency. The action is even less justifiable when we consider that in most colonies the Governor and Council exercised appellate jurisdiction only in causes over £300 and exercised no original jurisdiction, except, perhaps, in chancery.

An indirect limitation upon appeals is found in a provision of another 1748 act regulating the practice of attorneys. This clause, "to prevent frivolous suits in the general courts, and trifling and vexatious appeals from the county courts, and other inferior courts," provided that no attorney practicing in the General Court should be allowed to prosecute or defend any cause in the inferior courts under threat of pecuniary penalties. The statute was somewhat weakened by the exception of barristers-at-law and certain inferior courts from the operation of the act.[265] This practice ban was lifted in 1757,[266] but was reinstated by a 1761 act and subsequent enactments.[267] Since the General Court records have been destroyed, it is impossible to determine the operative effect of these statutes.

By a 1753 act the provisions of the disallowed act relating to appeals were re-enacted.[268] Although this legislation escaped disallowance, its early operation came into conflict with 1753 royal instructions dispatched to Virginia containing regulations for appeals to the Governor and Council at variance with those locally enacted.[269] After several years of conflict the instructional minimum was withdrawn by the crown in favor of "the regulations and directions of such acts as, having been passed in our province and ratified and confirmed by us, are now in force within the same."[270] We have seen no evidence that the above Virginia act (27 Geo. II, c. 1) was ever confirmed, and with the loss of the General Court records most of the evidence as to practice has disappeared. From the Privy Council register and from the various remaining county court records it is a safe inference that in practice, it was the unconfirmed act which governed, rather than the royal instructions.

In contrast to the reaction against the instructions, relatively little complaint is found against regulation of conciliar appeals by colonial legislatures. However, in one case in which an appeal was taken from fines imposed upon intruding Marylanders by the Pennsylvania Supreme Court, it was complained that the "very terms of their law are injurious to the subjects right of appealing to his sovereign and little if anything less than a prescribing rules to His Majesty."[271]

[265] 6 Hening, *Stat. at Large Va.*, 143.
[266] 7 *ibid.*, 124.
[267] 7 *ibid.*, 399; 8 *ibid.*, 198, 385.
[268] 6 *ibid.*, 325, 338–40.
[269] 1 Labaree, *Royal Instructions*, #453.
[270] *Ibid.*
[271] Daniel Dulany to Lord Baltimore, Oct. 29, 1736 (*Dulany MSS*, Box 2, #4).

pearance could be made by a solicitor, attorney, or even an attorney in fact, for this was a detail of no moment. Here the Privy Council seems to have followed the practice of King's Bench in writ of error proceedings. That court required only that plaintiff in error produce the record of the *scire facias ad audiendum,* the sheriff's return, and an entry of the defendant's default before allowing motion for judgment.[26] The showing respecting the scire facias corresponds with the Council's requirement of proof of summons. No default entries, however, were essential at Whitehall.

The weakness of the conciliar system appears in the delays attendant upon securing a hearing, in the infrequency with which appeals were actually heard at times appointed. To remedy this defect the Committee at various times issued several standing orders. In January, 1727/8, the Committee took notice that its meetings had been frequently postponed for want of counsel to attend, whereby great delays had arisen in causes depending before them, to the obstruction of justice and to the detriment of suitors. It was therefore ordered that when a day should be appointed to hear any appeals or complaints from the plantations or from the Channel Islands or any other causes, want of counsel should not be allowed as a reason for deferring such hearing.[27] In April, 1746, the Committee ordered that when appeals or other causes were set down for hearing before it, the party at whose request the appeal or cause was set down should be in readiness to be heard whenever a day was appointed.[28] In July, 1751, the Committee added that when appeals or causes should have been set down on the list of business for hearing, they should be heard in the order set down without any further notice or direction of the Committee for that purpose.[29]

Finally, in June, 1774, the Committee, for better facilitating the dispatch of plantation and other causes depending before it, ordered that certain days should be considered as standing days for hearing such causes. No cause was to be heard on these appointed days except such as had been set down and due notice thereof had been given to the opposite party on or before the Committee sittings in the preceding term. When appeals were set down for hearing, parties or their solicitors were to deliver into the Council Office their printed cases at least one week antecedent to the day on which the appeals were intended to be heard. In case of neglect by a party to deliver as directed, the

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entered an appearance or made application for dismissal for nonprosecution. However, respondent's right to raise the question of laches was reserved to the hearing of the appeal (*PC* 2/107/398).

[26] 2 Tidd, *Practice of King's Bench,* 1172.
[27] 3 *APC, Col.,* #142.
[28] 4 *APC, Col.,* #23.
[29] *Ibid.*

Committee would upon application of the opposing and conforming party proceed to hear the appeal without delay.[30]

Procedural variations appear in cases in which respondents failed to defend or appellants failed to prosecute their appeals. In the case of recalcitrance on the part of a respondent, the appeal might be peremptorily ordered heard on a specified date.[31] Reluctant respondents might also be summoned by affixation of summonses upon the Royal Exchange, Lloyd's Coffee House, and various plantation coffee houses in London.[32] Further recalcitrance would terminate in an *ex parte* hearing of the appeal,[33] but such hearing did not signify automatic reversal.[34] In the case of appellant's failure to prosecute an appeal within the allotted time, respondent could petition the Council Board for dismissal of the appeal for nonprosecution with costs.[35] Such application might be made with or without previous entry of the appeal at the Council Board.[36] Then

[30] 5 *APC, Col.*, #297. The days appointed were the day before the first seal (appointed by the Lord Chancellor) preceding every term, at ten o'clock in the morning and the day of the first seal at noon (seal days were motion days in the Court of Chancery). In case these days were insufficient for the dispatch of the causes, the Committee would sit occasionally upon the day of the second seal preceding Michaelmas, Hilary, and Easter terms.

[31] Knight v. Marshall (*PC* 2/84/304); Ford v. Hodgson (*PC* 2/86/189); Wharton v. Northrup (*PC* 2/91/257); Price v. Price (*PC* 2/93/506).

[32] See Forward v. Poulson (*PC* 2/88/530); Franklyn v. Buraston (*PC* 2/89/306); Codrington v. Byam (*PC* 2/89/306); Toller v. Burke (*PC* 2/92/390); Smith v. *Rex* (*PC* 2/95/10); Jones v. Harrison (*PC* 2/95/56); Boutin v. Innes (*PC* 2/106/58); West v. Mannerown (*PC* 2/118/55). Plantation coffee houses included those of Jamaica, the Leeward Islands, Maryland, New York, New England, Pennsylvania, and East India.

[33] Proof of proper summons of respondent was a condition precedent to an *ex parte* hearing. See Walker v. Paget (*PC* 2/104/85–86); Mitchell v. Tasker (*PC* 2/116/329).

[34] In the 1738 St. Christopher appeal of Boyde v. Johnson, heard *ex parte*, the appeal was dismissed and judgment below affirmed. This case of ejectment involved the effect of changes in the sovereignty of the island. In 1690 the English conquered the French part of St. Christopher, appellant's title being derived from a 1696 royal grant of a portion of these lands. But in 1697, by the Treaty of Ryswick, the conquered portion was restored to the French and the English patentees were ousted. Later, by the Treaty of Utrecht, the entire island was ceded to England. The respondents claimed as tenants at the royal will (Case of Appellant; L.C., Law Div.). Endorsed by Sir George Lee on this case is the following: "This case was argued before a Committee of Council by Mr. Murray and me on behalf of the appellants, no counsel appearing for the respondents, and their Lordships were of opinion to dismiss the appeal and confirm the judgment in error given 21st February 1736 because it did not appear by the special verdict that any claim had been made to the lands in question by Thauvett or any claiming under him since the Treaty of Utrecht and so the Statute of Limitations run against him, which as the Lords held took place in St. Christopher, it having passed in England before the colony was settled there, and secondly because it appeared that he was not in possession of the lands when he made his will and consequently could not devise any title in them to the appellant Boyd." For the conciliar course of the appeal see *PC* 2/94/308, 524, 558, 559, 592.

[35] For specimen petitions see Baylie v. Harvey (*PC* 1/51); Barton v. Bondinot (*PC* 1/58–B/B3); McSparran v. Mumford (*PC* 1/58).

[36] See Orgill v. Thomas (*PC* 2/100/345, 405, 528, 540); Pusey v. Pusey (*PC* 2/102/286, 291, 332, 352); Bayly v. Rodon (*PC* 2/105/291, 571; *PC* 2/106/29, 40); Bradburne v. McAnuff (*PC* 2/108/443; *PC* 2/109/246, 300, 324). Compare the allegation of respondent in Cross v. Atkins (Jamaica, 1763) that

followed the routine succession of Committee reference, peremptory order for hearing (in some cases), hearing, report, and Order in Council.[37] Less frequently found is the more direct procedure of a motion before the Committee for such dismissal.[38] In either case it would appear that the appellant had to receive adequate notice.[39] Since the Committee discouraged strict interpretation of the temporal limitation for prosecution of appeals, in several instances hearings on the merits were granted after a previous report advising dismissal for nonprosecution.[40] Obviously, valid reasons for the delay in prosecution were necessary to such procedure. Another ground for dismissal of an appeal without a hearing upon the merits was failure to post the requisite security.[41] In a small number of causes appellants were allowed to withdraw their appeals, in some instances being penalized with costs.[42] In other cases petitions of appeal were allowed to be amended by Committee order.[43]

In a small number of causes cross-appeals were entered,[44] the procedure on cross-appeal following closely that of the main appeal.[45] Usually both the main and cross-appeals were heard at the same Committee sitting.[46] In the event of

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no application could be made to dismiss an appeal which was not entered in the Council register and therefore not brought before the Committee (*Add. MS*, 36,218/212).

[37] More reluctance was shown to order dismissal without further opportunity for a hearing when the appeal had been entered at the Council Board. See Styles v. Kirkbride (*PC* 2/117/351; *PC* 2/119/32); Bennett v. Gardiner (*PC* 2/119/308, 392); Francia v. Hope (*PC* 2/104/444).

[38] See Nelson v. Beale (*PC* 2/94/240, 242, 244).

[39] See Crow v. Ramsey (*PC* 2/81/282, 284, 337, 348); *cf.* Cockrane v. Powell (*PC* 2/77/353, 362).

[40] Brenton v. Boreland (*PC* 2/92/184, 196, 456, 496, 519); Rennald v. Brooke (*PC* 2/100/568, 624; *PC* 2/101/30); Boutin v. Innes (*PC* 2/103/328, 346; *PC* 2/104/175, 205, 276; *PC* 2/105/49, 85); Mathison v. Taylor, by consent of the parties (*PC* 2/116/68, 74, 511; *PC* 2/117/374, 394); Beck v. Halsey, by consent of the parties (*PC* 2/126/89, 127, 180, 324, 348); MacNamara v. Brooke, agreement of parties (*PC* 2/91/296). *Cf.* Hiscutt v. Divarris, where such procedure was denied (*PC* 2/127/96, 215, 231).

[41] Ashley v. Applewhaite (*PC* 2/96/110, 116).

[42] De Paz v. Gabay (*PC* 2/91/191, 214); Mills v. Ottley (*PC* 2/103/244, 262; appellant allowed to withdraw petition and appeal on payment of £5 sterling costs where special verdict below was defective); Bayly v. Gale (*PC* 2/107/215, 217; the Committee indicated that withdrawal without costs was conditioned by the nonappearance of the respondent); Perrin v. Blechynden (*PC* 2/108/420, 427; without costs); Perrin v. Malcher (*PC* 2/109/299, 324; appellant was advised that his appeal was improper; no costs taxed); Maynard v. Stone (*PC* 2/109/120, 170; appellant was advised that his chancery bill was improperly drawn; no costs); Van Teylingen v. Severin (*PC* 2/114/409, 419). *Cf.* Heywood v. Lewn, (*PC* 2/115/356, 365 [Isle of Man]).

[43] See Thibou v. Pierce (*PC* 2/91/179–80); Colebrook v. *Rex* (*PC* 2/91/467); Garbrand v. Strachan (*PC* 2/93/84–85); Peters v. Bourke (*PC* 2/109/187); Cross v. Davis (*PC* 2/108/418); Jones v. Hall (*PC* 2/116/119–20). *Cf.* Francis v. Jeffries where an amendment to a petition for leave to appeal was allowed (*PC* 2/97/130–31).

[44] Cross-appellants were also required to give the usual security; see Estridge v. Tittle (*PC* 2/94/45, 56).

[45] See Crump v. Morris (*PC* 2/94/21, 164, 210); Charnock v. Saer (*PC* 2/94/371, 527, 558: *PC* 2/95/45, 105, 144); Palmer v. Sealy (*PC* 2/96/104, 218, 247, 248, 261); Hamilton v. Richardson (*PC* 2/98/316; *PC* 2/101/168, 179, 217); de Rotalde v. Ord (*PC* 2/116/510; *PC* 2/117/95, 380, 392).

[46] But in Stone v. Spragge decision on the cross-appeal was reserved for six months (*PC* 2/115/327, 342).

the demise of a party or parties appellant or respondent during the pendency of an appeal, it was necessary to petition or move for a revival of such appeal. Usually such revival was granted *pro forma*.[47] Seemingly, it was necessary to serve respondents with the order of revival.[48] The question also arose whether a court below could revive a cause after an appeal was taken.[49]

One of the few procedural snares was the necessity of adversarial notice on virtually all Committee hearings and motions.[50] The conspicuous exception to this requirement was in the case of *doleances* or petitions for leave to appeal where the hearing was usually *ex parte*.[51] As has been seen earlier, such hearings were obviously open to misrepresentation,[52] although some safeguard was available in insistence upon transmission of the proceedings below under

[47] But see Seawell v. Seawell where an appeal was held absolutely abated by appellant's death (*PC* 2/90/216–18, 227–30).

[48] See the deposition of service in Barrell v. Stoddard, April 30, 1734 (*Suffolk County Court Files*, #35,686).

[49] In Adams v. Sturge an appeal was taken from a July 7, 1755, Barbados chancery order whereby an unprosecuted appeal granted to one John Gibbons, deceased, from a Dec. 2, 1737, chancery order was revived against appellant. The petition and appeal also prayed that respondent should not be allowed to appeal at the present date and that the former appeal be dismissed with exemplary costs for nonprosecution (*PC* 2/105/158). Respondent in turn petitioned that in case the chancery order of July 7, 1755, should be found irregular, that the appeal granted Gibbons might be revived by conciliar order (*PC* 2/105/541). In his conciliar case appellant argued that the July 9, 1755, order was the first instance of any court of justice assuming to itself power to revive an appeal once made and depending before the King in Council. "From the moment that the party aggrieved has prayed liberty to appeal, the inferior court, if leave be asked in due time, is bound to grant it, *ex debito justitiae;* and can take no cognizance of matters relative to the prosecution of that appeal. It is the constant established practice, upon the death of an appellant, to petition for a revivor in Council, and in some cases it may be matter of judgment, whether it shall be allowed or not; and who may be proper parties to it." Appellant further asserted that by the governor's instructions it was commanded that no appeal be allowed unless prayed at the time of the decree or within fourteen days thereafter. "But if judges in the plantations can revive an appeal, in cases, where they cannot receive an original appeal; and, this, by virtue of their own authority, the salutary purpose of those instructions, to promote dispatch, and to prevent vexation, will frequently be evaded" (Case of Appellant, *Add. MS*, 36,217/172; L.C., Law Div.). Upon hearing, the Committee advised reversal of the July 9, 1755, chancery order (*PC* 2/105/554), and dismissal of both respondent's petition and the appeal granted from the Dec. 2, 1737, chancery decree (*PC* 2/106/46).

[50] See Angus v. Quillin (*PC* 2/112/103, *PC* 1/8 [41]); Pipon v. Le Febvre; over forty days' notice held insufficient, although usual Jersey period of notice was forty (*PC* 2/86/134). But *cf. Rex* v. Tapin where by consent of the parties the usual summons for hearing was waived (*PC* 2/86/135). A hearing might be expedited by requiring notice only to a party's London solicitor (Seale v. Pipon, *PC* 2/86/287; Le Couteur v. Pipon, *PC* 2/86/461). For a specimen deposition of service of notice see that in Macarell v. Parkes (*PC* 1/58-B/B1).

[51] For adoption of the term *"doleance"* in colonial and conciliar practice, see Taylor v. Clarke (*PC* 2/101/364, 396); Powell v. Hughes (Case of Respondent, p. 7, *Add. MS*, 36,217/48); Lidderdale v. Chiswell (Case of Respondent, *ibid.*, 201); Foster v. Dupouy (Case of Respondent, p. 8, *ibid.*, 216); Grant v. Newton (Case of Appellant, *Add. MS*, 36,218/82).

[52] See the representation of the Lieutenant-Governor and Council of Virginia in Randolph v. Beverley (*PC* 2/98/278–79). *Cf.* the intimation of the New York agent upon the *ex parte* admission of the appeal in Cunningham v. Forsey (*Chalmers MSS*, 4 New York, 20).

seal.[53] Affidavits were submitted and witnesses examined in some cases to determine whether the amount involved exceeded the minimal requirement.[54] In other cases *doleances* were referred back to the respective colonial governors to answer in writing before any decision was taken as to admission of an appeal.[55] In the opening years of the century the Council Board utilized directly the services of the Board of Trade to decide upon admission.[56] But the more mature procedure saw immediate reference to the Committee by the King in Council;[57] in 1717 Attorney General Northey termed improper such references to the Board of Trade.[58]

The grounds for conciliar application for leave to appeal included arbitrary denial of appeals below,[59] failure to meet the instructional or legislative minimums,[60] and inability to satisfy the conditions for appeal imposed below.[61] In the petition of *doleance* it was necessary to specify whether an appeal as of right had been denied or whether "equitable" application was being made.[62]

[53] Degge v. Kay (*PC* 2/102/241); Stanton v. Thompson (*PC* 2/105/34); Cockburn v. Beckford (*PC* 2/86/111).

[54] Stanton v. Thompson (*PC* 2/105/34); Johnstone v. Houdin (*PC* 2/110/184). In Lynch v. Mowat affidavits were produced to show that appellant, a stranger in Nova Scotia, could not obtain the requisite security locally to take an appeal (*PC* 2/124/542).

[55] Lason v. Sergeant; upon return of the answer cause was to be shown why the appeal should not be allowed (*PC* 2/81/111); Bevan v. *Rex* (*PC* 2/88/204). In Francia v. Hope the East India Company received a copy of the petition for leave to appeal (*PC* 2/95/664; *PC* 2/96/50, 69).

[56] See in this connection the use of the Board of Trade in the Connecticut appeals, *supra*, pp. 140–41, 144; in Brinley v. Dyer (*supra*, p. 141); in the *Cole and Bean* cause (*supra*, p. 145). *Cf. PC* 2/80/388; *PC* 2/81/238.

[57] See Gilligan v. Crow (*PC* 2/82/305, 314, 324); Arnoll v. Harris, Arnoll v. *Regina* (*PC* 2/82/305, 314, 319); usually the appeal was admitted directly by conciliar order, but here the governor of Barbados was directed to admit the appeals; Chilton v. *Regina* (*PC* 2/81/27, 30); Barrow v. *Regina* (*PC* 2/81/391, 404, 410); Slingsby v. *Regina* (*PC* 2/82/507; *PC* 2/83/23, 46). In Taylor v. Jones, upon petition for leave to appeal from a judgment of the Maryland Provincial Court, it was alleged that petitioner was not present below nor had any attorney there to pray an appeal (*PC* 2/81/324). The Committee advised that the appeal be admitted despite the lapse of time in making the appeal, in case the Governor and Council had no other legal objection thereto (*PC* 2/81/350, 356). But the appeal never came before the Council.

[58] 2 Chalmers, *Opinions*, 177.

[59] See *supra*, p. 140 *et seq.*

[60] In Worsham v. Applethwaite an appeal from a May, 1701, Barbados chancery decree was denied below on the ground that the original sum decreed did not amount to the appealable minimum of £500. Petitioner in his petition for leave to appeal alleged that the £412 sued for with interest thereon amounted to more than the necessary minimum; the Committee advised allowance of the appeal (*PC* 2/80/93, 119). *Cf.* Hagget v. Alford, where a petition for allowance of an appeal from a March 20, 1708/9, chancery decree was ordered dismissed, since it appeared that no appeals were admitted from the island unless the value of the sum appealed for exceeded £500, whereas only £173 odd was involved here (*PC* 2/82/455, 487, 490). See also the *doleances* from Rhode Island, *supra*, p. 248.

[61] See *supra*, p. 275.

[62] In Lason v. Sergeant petitioner complained of the denial of an appeal from a Nov. 7, 1704, judgment of the Superior Court of Judicature of Massachusetts and prayed admission thereto (*PC* 2/81/69). Upon a hearing the Committee advised that the governor be ordered to transmit an account in writing of the reasons for refusing to admit the appeal and also copies of all the proceedings relating to the cause. All persons concerned

In the majority of cases these petitionary applications met with success, but breach of instructional conditions might be regarded as of ill consequence.[63] There was no rigid temporal limitation upon the presentation of *doleances*.[64] Allegedly, when an appeal was granted upon *doleance* it was the usage to give security immediately and to present the petition and appeal by the next council day at the latest.[65] A certain laxity surrounded *doleance* procedure. Although conciliar routine required an Order in Council to admit an appeal upon *doleance,* in at least one case the Committee, omitting this step, proceeded immediately to hear the appeal.[66] In some instances we find it alleged that appeals not taken below were entered in the Council register without any *doleance* preliminaries.[67] It was also attempted, with varying success, to use *doleance* procedure in cases in which no appeal had been applied for and denied below.[68]

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were to attend at an appointed time to show cause why the appeal should not be admitted and to be prepared for a hearing on the merits in case of admission (*PC* 2/81/111, 115). When the papers ordered transmitted arrived, the Committee heard the matter and advised dismissal of the petition; the sum involved being under £300, the Massachusetts court could not have admitted the appeal. It was also advised that petitioner be at liberty to petition again upon the equity of his cause if he saw fit (*PC* 2/81/358).

[63] In Cowes v. Sharpe application was made in April, 1701, for leave to appeal from an April 28, 1693, Barbados chancery decree. No appeal had been taken at the time, because of alleged legal and economic disabilities. The petition was referred to the Committee to consider and report their opinion what the King might do with regard to the regularity of admitting appeals from the plantations (*PC* 2/78/191). The Committee reported that it found that appeals were by constant instruction to be made within fourteen days after sentence; if refused, application could be made to the King in Council. In the instant case it did not appear that application had been made within fourteen days. It therefore advised that it would be of ill consequence to allow appeals after so long a time and that the petition should be dismissed. This was accordingly ordered (*PC* 2/78/194).

[64] In Denny v. Cleland over four years lapsed between the judgment complained of and the admission of the appeal (*PC* 2/83/362; *PC* 2/84/320, 336). In Stanton v. Thompson an appeal was admitted in 1756 eight years after judgment below (*PC* 2/105/34, 42).

[65] Stanton v. Thompson (Case of Respondent, *Add. MS.*, 36,218/3).

[66] In Peterson v. Peterson a petition for leave to appeal was transmitted to the Committee in 1697 to examine and report the state of the matter with its opinion as to what should be done for petitioner's relief (*PC* 2/76/610). But the Committee proceeded to admit and hear the appeal without any report back to the Council Board (*PC* 2/77/37, 213). *Cf.* Lason v. Sergeant where the parties were to come prepared to argue the appeal in chief if upon *doleance* hearing an appeal should be admitted (*PC* 2/81/111–12).

[67] See Adams v. Sturge (Case of Respondent, *Add. MS.*, 36,217/178); Dunbar v. Shephard (Case of Respondent, L.C., Law Div.). In this case respondent alleged that there was nothing in the record to show an appeal was ever taken below. But this objection, allegedly fatal if insisted upon, was waived. The waiver proved unwise for judgment was reversed (*PC* 2/103/337, 344).

[68] In Powell v. Hughes, leave to appeal from Jamaica chancery orders of August 2 and 5, 1755, was petitioned for at the same time as an appeal from an August 15 order was entered (*PC* 2/105/274). To this application Hughes asserted that "there is no instance of such an appeal, as is now prayed, the respondent putting their whole cause upon the appellant's production of any such; the rule being to allow appeals here, when the party has prayed and been refused one below which is called a *doleance*. But the allowing appeals in the manner now prayed, would be productive of the most mischievous consequences, as a designing man might by omitting to

tions of directive orders.[435] In *Johnstown* v. *Burton* from Bermuda a supplementary enforcing order was necessary.[436] In Maryland, appellant in *Forward* v. *Poulson* was forced to secure a further order directing restitution.[437] As a result of the disobedience shown by the Antigua Chancery Court in *Franklin* v. *Buraston*, a letter of censure was dispatched in 1727 requiring instant obedience *in futuro* to all conciliar orders.[438] In a Virginia appeal the General Court refused to grant a writ of restitution unless appellant would enter into a rule for a new trial at the next court, necessitating application for an order for restitution forthwith.[439] From West Florida it was complained that a prohibition had been issued from the common law courts to stay execution of a 1773 Order in Council dismissing a Vice-Admiralty Court appeal for nonprosecution. A Committee report advised an order to the Chief Justice to issue a consultation, but the Order in Council thereon awaited further directions which never issued.[440] From Quebec also came complaint of refusal to obey an Order in Council, but the complaint lapsed upon reference.[441]

In most of these cases the basis of the recalcitrance is not apparent, but a Jamaica appeal affords insight into colonial climate of opinion. In *Bayly* v. *Jackson* an appeal was entered from a February 22, 1758, Jamaica chancery decree. Upon *ex parte* hearing, respondent failing to enter an appearance, it was ordered in April, 1762, that the decree appealed from be reversed and respondent's bill be dismissed.[442] Upon presentation of the Order in Council to respondent in Jamaica, appellant met with refusal to restore the £977/-/9 paid out by appellant pursuant to the February 22, 1758, decree. In the Jamaica Chancery Court on May 20, 1763, upon motion by Bayly, the decree was ordered reversed, but restitution was denied. The Chancellor stated that the Order in Council was silent as to restitution, that the appeal taken nineteen months after the decree was not within the instructional provisions, and that the conciliar order was not made upon the merits. Appeal from this chancery order was denied.[443] Then, upon *doleance* to the Privy Council the appeal was admitted in August, 1764.[444]

[435] Wright v. Ross (*PC* 2/81/261, 284, 296); Gilligan v. Crow (*PC* 2/82/368); Gilligan v. Crow (*PC* 2/84/109, 236, 251, 267). In Grey v. Hathersall application was made in 1743 that a 1726 Order in Council be directed to be recorded and carried forthwith into execution. But since it did not appear that the Barbados court had refused to record the order, the Committee did not think it necessary to give any directions therein (*PC* 2/98/8, 33). In Saer v. Charnock, a 1752 appeal, it was claimed by appellant that an earlier July 10, 1739, conciliar order had been perverted and distorted (Case of Appellant; L.C., Law Div.).

[436] *PC* 2/81/20, 31, 43.

[437] *PC* 2/88/481, 499, 509. *Cf. Proc. Md. Ct. Appeals, 1695–1729*, xlii–xliv.

[438] 2 *APC, Col.*, #1295.

[439] Corbin v. Corbin (*PC* 2/92/539; *PC* 2/93/89, 100).

[440] *PC* 2/118/318, 353, 374, 442.

[441] Levy v. Burton, *PC* 2/118/228.

[442] *PC* 2/108/187; *PC* 2/109/173, 200.

[443] Case of Appellant (*Add. MS*, 36,219/154).

[444] *PC* 2/110/472, 586, 600.

At the hearing before the Committee the appellant urged that, if it had appeared at the former hearing that the money in question had been paid respondent (it was paid into court), restitution would have been specifically ordered; that at any rate restitution was inherent in the reversing Order in Council. In effect, the Chancellor was complaining of the September 24, 1759, chancery order granting the appeal and was drawing into question the propriety of the ultimate decision.[445] In answer, the respondent contended that the supposed leave to appeal was fictitious; that the appeal was actually denied; that if the appeal was granted, it was a nullity, as being directly contrary to the royal instructions; that the time limited therein for taking appeals could be enlarged only by application to the King in Council. He asserted also that the Chancellor had refused restitution as the whole proceeding was secret and surreptitious.[446] To this contention of voidness, appellant in replication denied the doctrine and asserted the contrary as true. Otherwise the Committee would not have received and entertained the appeal, much less proceeded to hear and reverse.[447] The Committee thereupon reported that the governor had not heeded the April 12, 1762, Order in Council as he should have done by restoring appellant to all lost by the former decree; that the £977/-/9 paid out of court to respondent should be restored to appellant with interest; and that the governor should do everything necessary to restore the money to appellant. This was accordingly ordered on July 26, 1765.[448]

This review of the cases in which opposition was exhibited to enforcement of Orders in Council should not obscure the regular enforcement in numerous other appeals. Furthermore, this recalcitrance should not be regarded solely as a politically significant colonial practice, for there are a proportionate number of Channel Islands causes in which disobedience by the respective Royal Courts necessitated further conciliar enforcing orders.[449] But some corrective

[445] Case of Appellant (*Add. MS*, 36,219/154).

[446] Case of Respondent (*Add. MS*, 36,219/158). *Cf.* Lawrence v. Wilson and Taylor, where respondent also prayed dismissal on the ground that the appeal was granted five months after the decree appealed from; that consequently the governor had no power to grant such appeal under his instructions (Case of Respondent; L.C., Law Div.).

[447] *Add. MS*, 36,219/166.

[448] *PC* 2/111/272, 302. *Cf.* the June, 1755, disregard shown by the Jamaica Supreme Court toward an Order in Council on the imprisonment of Francis Delap (4 *APC, Col.*, #252), on the ground that the order was not directed and did not extend to the Supreme Court (*An Account of the Trial of Francis Delap, Esq.; Late Provost Marshal-General, upon an Information for a Misdemeanor* [1755], 14–15).

[449] See Andros v. Priaulx (*PC* 2/79/154); le Sbirell v. Messervy *et al.* (*PC* 2/80/387, 412); Tapin v. *Rex* (*PC* 2/86/279, 288, 382, 397; *PC* 1/3 [15]); Corbet v. Dumaresq (*PC* 2/85/461, 470; *PC* 2/86/4, 162, 169; *PC* 1/4 [20]); de Carteret v. Dumaresq (*PC* 2/88/571, 606, 614) where the Committee termed a refusal of the jurats to register an Order in Council as not only an unwarranted obstruction to justice, but also a contempt of the royal authority; Hamond v. Poingdestre (*PC* 2/89/89, 95). In a 1773 letter Lieutenant-Governor Corbet related that refusal to register Orders in Council in appeals was frequently based upon the plea that the Order in Council did not direct the Royal Court to make such registration (Corbet to Lord Rochford, Aug. 20, 1773 [*SP* 47/7]). In *The Tyranny of the Magistrates of Jersey* (London,

to direct a special verdict when desired was so absurd that the act was not proper to be passed into law.[50] However, there is no evidence that the act was disallowed.[51]

In 1724 Governor Hart of the Leeward Islands, commenting upon an act from St. Christopher containing a clause "that jurors shall be obliged (if the Council on both sides consent) to find a special verdict under pain of fine and imprisonment," confessed that this clause seemed extraordinary and was not a power practiced in Westminster Hall.[52] But he conceived that the legislative bodies

> were moved to find out this extraordinary remedy from the very great obstinacy they had observed frequently in jurors here, who contrary to the judge's directions, and even request, would often find an issue generally, although it rested on one or more intricate points of law, which the jury could not be presumed to understand, nor were obliged to judge of, that by such general verdict the party grieved is barred of having his right determined by them whose province it is, or of appealing upon the merits of his cause, to His Sacred Majesty in Council, which is the most certain resource the subject has of justice.[53]

We do not know how the acts in question came to be passed, since they run counter to the usual colonial feeling respecting the curtailment of jury prerogative, and it has not been possible to examine the remnant records in these islands to ascertain whether or not there was an increase in special verdicts. In Jamaica, however, we have found the situation was dealt with in an extremely shrewd manner, by the use of a procedural device which made it unnecessary to resort to clumsy and possibly unpalatable legislation. This development appears on its face to have been adopted to avoid jury recalcitrance upon directions to find specially. At the close of the evidence one or both parties moved for directed verdicts, and upon refusal exceptions were taken thereto. The party against whom judgment went then presented for sealing a bill of exceptions in which all the evidence of both parties was set forth.[54] Since all the evidence was in writing, the conciliar conditions precedent for judgment on the merits were satisfied and jury obstinance was avoided.[55]

[50] *CSP, Col., 1720–21,* #114.

[51] This act has been mentioned previously in connection with the controversy between William Gordon and Governor Lowther, *supra,* pp. 229–30.

[52] *CSP, Col., 1724–25,* #253. The exact wording of the statute was "that special verdicts shall be found by the jurors, where the council on both sides shall agree, and desire to have the facts found specially, upon pain of fine or imprisonment, at the discretion of the court" (*Acts of Assembly St. Christopher, 1711–35* [1739], 90).

[53] *CSP, Col., 1724–25,* #253.

[54] Crymble v. Doe *ex dem.* Crymble (2 *MS Jamaica Court of Errors Proceedings,* 90); Barclay v. Morley (*ibid.,* 112); Doe *ex dem.* Sharpe v. Witter (*ibid.,* 123).

[55] Certain other procedural advantages are inherent in this use of a general verdict with a bill of exceptions. Special verdicts might be imperfect or uncertain and thus be set aside

In those continental colonies in which the common law record was *de rigueur* the opinion seems to have persisted that special verdicts were desirable for appeal purposes, if not utterly necessary, but we have not seen any evidence that measures were taken as drastic as those in the West Indies. Most of the comment is professional. Thus, in a 1760 Maryland cause involving enforcement of proprietary rights a general verdict following a loose direction to bring in a special verdict was characterized as having "darkened the proper lights for an appeal." [56] Again, in 1763 Thomas Penn was advised in regard to a pending Pennsylvania suit of the necessity of a special verdict to obtain a conciliar judgment upon the merits. But his adviser, Henry Wilmot, declared that election to direct such verdict resided with the court, not with the parties, but that it would be "monstrous" in a jury to refuse to find specially upon such direction.[57] Counsel Benjamin Chew, better acquainted with Pennsylvania

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by the King in Council. See Mackaskell v. Robinson (*PC* 2/82/276, 287); Jones v. Tolleson (*PC* 2/86/381); Huggins v. Warren (*PC* 2/93/93); Mills v. Ottley (*PC* 2/102/87; *PC* 2/103/244, 262); Keeling v. Niles (*PC* 2/121/403, 556). *Cf.* Bayer v. Warner (*PC* 2/95/506). Similarly, in the case of an agreed statement of facts in lieu of a special verdict, see Burgess v. Hack (*PC* 2/94/293; *Add. MS*, 36,216/105). Also a partial court might accept a special verdict which found only the evidence of one party to the cause. In Elliot v. Perne from Antigua a special verdict had been asked for by counsel, and the Court of Common Pleas had seemed to grant it, "but when the verdict was ready to be produced, was brought in and it appearing not to be a speciall verdict drawn upp in forme, whereby the whole fact according to the evidence given might appear; the said Mr. Pember and this deponent made several objections against the verdict, as that they found but one part of the fact arising only from the defendant's evidence, and take no notice of the plaintiff's evidence which was directly contrary to that of the defendant's, notwithstanding which and some hours argument, that the verdict might be drawne upp in forme by the counsell on both sides and a case made of it, the court overruled it and positively refused we should have any other verdict than what appears" (*PC* 1/47; see also 6 *APC, Col.*, #190). The appeal was dismissed as not regularly brought by way of appeal from the Governor and Council according to the rules of appealing (*PC* 2/82/312, 317). Or the court might show partiality in the acceptance of evidence to ground the special verdict (2 *Correspondence of Governor Horatio Sharpe*, 9 *Md. Archives*, 382–83).

[56] *Ibid.*, 383. For further discussion of this case, Wright's Lessee v. Jones, see *Md. H.R. Portfolio* 4, #53 (d); Stephen Bordley to Governor Sharpe, July 4, 1760. For threats of removal from office because of irregular judicial behavior in this case, see *ibid.*, #53 (e) (f). For the ability to secure a new trial upon a general verdict found contrary to judicial direction in Maryland, see Edmund Jennings to Lord Baltimore, May 27, 1743 (1 *Gilmor MSS*, Md. Hist. Soc.).

[57] The suit was with the "Jersey Society" in regard to Callowhill Manor, and Wilmot was consulted as to a method for making the defendants consent to a special verdict. Wilmot wrote: "The necessity of a special verdict is evident, for if there be a general verdict no appeal can assist you for the evidence is not transmitted. So that though the verdict were ever so contrary to evidence, such evidence not appearing here, you could have no redress, and no evidence appearing to the contrary, the verdict must be presumed to be right. But if the whole facts as they appeared at the tryal be found specially, and the whole submitted by the jury in point of law to the court, then whichever way the court in Philadelphia determines, the other party (if he thinks he is injured) may appeal, and the whole merits (which must be transmitted upon the face of the record) will be determined here on the appeal, but there is no way to compel the defendants to consent to a special verdict. Nor can I conceive the necessity of the consent of the defendants to a special verdict. The

practice, differed as to the power of the court and the need for adversarial consent, but relied upon a bill of exceptions to secure a rehearing.[58] From Quebec, a few years later, came evidence that conciliar direction was necessary to secure a special verdict upon a new trial ordered.[59] Accordingly, in 1769

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jury are the judges of the fact, and that they may find as they will, but if from the several facts proved before them, there arises a point of law the court and not the jury is the judge of this. The court may determine the point and direct the jury to find accordingly upon the spot, if they please. But if the court doubts and thinks it worthy of consideration they direct the jury to find the whole specially and this never was refused here and I cannot conceive it would be refused by any jury in Pennsylvania. For it would be monstrous in a jury to refuse to find a point specially (which they have no right to determine) when the court (who only can determine it) doubt it and desire time to consider it, and to have it solemnly argued before them and all this without any consent of the parties, which is absurd to the last degree. For at this rate neither the court, nor jury, could doubt about the law, unless the parties would them leave and consent that they should doubt. This is not all, if a point of law arises here and the judge delivers his opinion upon it immediately, if the counsel of the contrary side being a man of abilities will assert that he thinks the point not clear, and ought to be further argued, there is not a judge upon the bench here that will not in such a case direct a special verdict that it may be further considered and all this without consent of the parties, which is absurd in itself. Suppose deeds or wills are proved, and the doubt arises upon the construction of them. The fact of the due execution of them the jury can judge of, but of the construction they are, as they always are, ignorant. If the court doubt the construction, or if the court, being clear are willing in compliment to council to postpone it to further consideration, is it not absurd to say that this shall not be done without consent of the parties? In short the consent of the parties is never necessary, and the jury are bound to find a special verdict whenever the court direct it" (Henry Wilmot to Thomas Penn, July 6, 1763 [7 *MS Penn Letter Books, 1761–63,* 341–42]). William Allen, consulted earlier, was of the opinion that by a bill of exceptions any matter might be appealed against, but that in some cases a special verdict might be directed (8 *ibid., 1763–66,* 71). For earlier expressions on the necessity of special verdicts for appeal on the merits see 2 *ibid., 1742–50,* 17, 166.

[58] William Peters to Thomas Penn, Dec. 24, 1767 (10 *MS. Penn Official Corres., 1765–71,* 121–22).

[59] Among some observations of appellant's solicitor, Joshua Sharpe, on Christie v. Knipe and Le Quesne, a 1768 Quebec appeal (see 5 *APC, Col.,* #55), is the following: "We must further strongly insist to get the judgment reversed upon the merits and a declaration or opinion of the Lords that the action would not lay, for otherwise the appellant will be harrassed again with a new action and never be at rest and it is more than probable that if they bring a new action they will take care to avoid all errors in point of form and by a general verdict without letting the merits appear on the face of the record oust us from all relief upon an appeal.

"But if the Lords should not be of opinion to declare anything as to the merits or should incline to declare their reversal of the judgment should be without prejudice to the respondent bringing a new action, then we must urge that some direction be given that a special verdict should be found at the instance of either party and that the respondents should consent thereto, if they appear at all at the hearing, tho we are aware it may be said a jury is not bound to find a special verdict, but if the respondents consent they will be bound thereby and that the Lords would reverse any judgment given contradictory to such their order" (*Add. MS,* 36,220/159). *Cf.* the complaint of Francis Maseres, crown counsel in a Quebec suit for some duties on rum: "and as the fact of the existence of such duties was clearly proved, I exhorted them [the jury] to find a special verdict that the point of law might be determined by those who were the proper judges of it, the Chief Justice of the province here and the King in his Privy Council at home, and I represented it as their duty so to do; by which many of the pretended patriots at this place were much offended. But it is my sincere opinion that juries are bound in conscience to separate points of law from points of fact whenever they happen to

we find the authorities of this province favoring limitation of juries to special verdicts to prevent their passing on questions of law.[60]

### THE NEW ENGLAND RECORD

We have been discussing colonies in which the record corresponded with orthodox English procedure, but in New England, where evidence was taken down and made part of the record, opportunity to frustrate conciliar jurisdiction was more limited. It should further be observed that it is very probable that the practice in those parts, owing to the number and importance of the cases brought before the Council, undoubtedly colored the conceptions of the councilors as to the characteristics in general of colonial usage. Indeed, we have direct evidence that the home authorities were by no means clear respecting the attributes of the two procedures and their geographic distribution, for in 1751 Solicitor General Murray questioned whether it were not true that upon ejectment, *etc.*, in New Jersey the whole evidence was reduced into writing and transmitted and that general verdicts were not allowed. To this solicitor Ferdinand John Paris replied that the usage of reducing evidence to writing upon ejectments was very common only in the charter governments, where the courts exercised mixed jurisdiction of law and equity. In no colony where the jurisdictions were distinct was the evidence upon ejectments taken down in writing and annexed so as to answer to a special verdict. On the contrary, Paris had known many general verdicts in ejectments from such colonies without any evidence annexed.[61]

This bit of instruction was apparently not digested, for in 1755 Murray answered in the affirmative a query from the Kennebec Company whether appeals were allowed in ejectment actions in New England, but added that the difficulty was "to avoid having general verdicts below, which prevents the Council here to examine the matter of fact."[62] Partridge, the company agent, commented on this that it was the practice in New England to return all the

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be blended together in general issues, and to determine only the latter leaving the former to the court, and for that purpose to find special verdicts in such cases, and more especially when the judge exhorts them to do so, as was the case in that trial" (Maseres to Fowler Walker, November 19, 1767 [*Add. MS*, 35,915/249; *Maseres Letters, 1766–68*, 3 Univ. Toronto Studies, Hist. and Econ., No. 2, 56]). See also Maseres to Charles Yorke, August 11, 1768 (*Add. MS*, 35,915/280). *Cf.* Coffin, *The Province of Quebec and the Early American Revolution* (1896), 313–14.

[60] 1 *Doc. Rel. Const. Hist. Canada*, 358–59. For the part played by refusal to give special verdicts in passage of the Quebec Act see 17 *Parliamentary History of England*, 1397.

[61] *Paris MSS*, X 113.

[62] The question was asked in the interest of the Kennebec Company, which contemplated litigation concerning some disputed land titles (*Add. MS.*, 15,488/100). *Cf.* the comment by Richard Partridge: "The charter mentioning nothing of appeals in real actions the people in the Massachusetts insist an appeal will not lye to the crown in any real action or wherein title of land is concerned" (*ibid.*).

course, that no clear-cut solution was ever reached, if, indeed, in those quarters it was thought necessary or desirable. The prerogative of the crown over its overseas dominions was sufficiently large and unrestrained for long-continued evasion of definition to be feasible.

The controversies which we are about to discuss all related to disputed boundaries, a subject matter of the greatest jurisdictional significance, and the parties in the several causes, with one exception, were of equal capacity. The exception was the case between the Mohegan Indians and the colony of Connecticut, once described as "the greatest cause that ever was heard at the Council Board." [1] This litigation, which dragged on for decades, is properly considered in connection with the intercolonial boundary disputes, since the plaintiff tribe was recognized to possess attributes of internal sovereignty sufficient at least to maintain and prosecute an action.

Before discussing the specific cases, let us examine the basis of the jurisdiction. There were various available choices. In the first place, there was the possibility that the Privy Council possessed the power to hear a cause originally. In a controversy, for example, between two proprietors enfeoffed through the medium of charters granting palatine powers, the ancient precedents which made the Council a forum for tenurial disputes between tenants *in capite* were conceivably applicable. Some precedent existed for the exercise of original jurisdiction in the November, 1685, settlement of the boundaries between Pennsylvania and Maryland proprietaries. But in this case the judicial element was somewhat obscured by counter-contentions that the determination was made by the agreement of the parties, and *ex parte,* as well as by the fact that the crown was virtually a party.[2] There was, secondly, available the special commission, an implicit waiver of direct conusance, but by the reservation of appeal an adequate medium for maintaining final judgment over the controversy. We have already seen that this device was used in the Pawtuxet purchase claims where the domestic corporation analogy was intimated to be the basis of jurisdiction.[3] There was a much stronger precedent in the case of the Channel Islands, stronger chiefly because it had the unqualified certification of Sir Edward Coke,[4] whose authority was highly regarded in the colonies. Nevertheless, when the commission was again used in the

[1] See the statement of solicitor Thomas Life (3 *Trumbull MSS,* 76 a, b).

[2] For accounts of the controversy, see Shepherd, *History of Proprietary Government in Pennsylvania* (1896), 117–31; E. B. Mathews, *History of the Boundary Dispute between the Baltimores and Penns Resulting in the Original Mason and Dixon Line; Report on the Resurvey of the Maryland-Pennsylvania Boundary Part of the Mason and Dixon Line* (1909), 138–54. For the hearings before the Lords Committee of Trade and Plantations and the November 13, 1685, Order in Council see *The Breviate in the Boundary Dispute between Pennsylvania and Maryland,* 16 *Pa. Archives* (2d ser.), 394–95, 400–406.

[3] See *supra,* p. 121 *et seq.*

[4] *Fourth Institute,* 286.

Mohegan case (1704), it was justified on the ground that in the absence of excluding charter provisions the King might erect a court within the colony, reserving an appeal.[5] There was, furthermore, the possibility of directing that actions be brought in provincial courts to try titles and allowing the causes to come before the Council in the ordinary course of appeal. Finally, the Council could allow the colonies to negotiate directly, reserving a power of ratification.[6]

It should be observed that as to the general question of boundaries no single method of settlement became of course, for in a number of instances the problem did not reach the height of real controversy capable only of judicial settlement.[7] Moreover, even the existence of three early precedents—the Pennsylvania-Maryland settlement and the Pawtuxet and the Mohegan commissions—does not seem to have settled the minds of British officials respecting the proper mode of justiciation. Thus, in 1724, when Attorney General Philip Yorke was consulted concerning the settlement of the long-standing boundary dispute between the Baltimore and Penn proprietaries, he failed to enumerate the commission with appeal reserved as a possible procedural device. Yorke conceived that the Privy Council could only take cognizance of causes concerning the plantations by way of appeal, that it possessed no original jurisdiction. Since the controversy in question was between the proprietors of different provinces, he did not see how it could be brought before the Council by appeal. Complaint to the King in Council of encroachment and adjustment before the Board of Trade was suggested as a possibility. As to proceed-

[5] See *infra*, p. 425.

[6] See 2 Brodhead, *History State of New York* (1874), 388, 412; 4 *Doc. Rel. Col. Hist. N.Y.*, 628. As early as 1701 it was proposed, "that by some General Law, to be binding on all the Colonies on the Continent, a certain method be established, 1. To decide all Controversies between Colony and Colony." See *An Essay upon the Government of the English Plantations on the Continent of America* (ed. L. B. Wright, 1945), 47.

[7] A Connecticut-Massachusetts boundary dispute was settled in 1713–14 by commissioners from both colonies (Bowen, *Boundary Disputes of Connecticut* [1882], 58). A New York–Connecticut controversy was terminated by passage of a 1719 act in New York settling the boundary (1 *Col. Laws N.Y.*, 1039); this act was confirmed by the King in Council (2 *Report of the Regents of the Univ. on the Boundaries of the State of N.Y.*, comp. by D. J. Pratt, 1884, 299–300) without objection from Connecticut (*JCTP, 1722/3–1728*, 41). A Connecticut–Rhode Island controverted boundary was settled by 1727 crown approval of an agreement between the colonies (3 *APC, Col.*, #4). In the same year a Virginia–North Carolina dispute was settled by ratification by the King in Council of an agreement between the governors of the respective colonies (*ibid.*, #108). The boundary between North and South Carolina was also settled in 1729–30 in the same manner (3 *Col. Rec. No. Car.*, 124–25; 2 Labaree, *Royal Instructions*, #976–79). *Cf.* Skaggs, *The First Boundary Survey between the Carolinas*, 12 No. Car. Hist. Rev., 213–32; 15 *ibid.*, 341–53. Despite several appointments of commissioners, the boundary between Massachusetts and New York never was settled prior to the Revolution (2 *Rep. Reg. Boun. N.Y.*, 88 *et seq.*). The dispute between Pennsylvania and Connecticut over the Susquehanna lands also remained unsettled (Boyd, *The Susquehanna Company: Connecticut's Experiment in Expansion*, Pub. Tercentenary Comm. Conn. [1935], 35–42).

but which we propose to examine for the light it throws upon crown policy on the eve of the Revolution. The genesis of this dispute was the indefinite description of the northern boundary in the release from the Duke of York in 1664 to Berkeley and Carteret.[227] Some attempts made to settle the line, inspired largely by the New Jersey proprietary interests, culminated in the 1719 issuance of commissions in the respective colonies appointing commissioners to run the line.[228] Although accord was reached upon the western locus of the division line, the New York commissioners refused to complete the demarcation, alleging imperfection of the surveying instruments.[229] Two decades then elapsed before increased settlement with consequent jurisdictional and titular conflicts in the controverted territory again brought the need for settlement to the fore.[230] New York exhibiting indifference to co-operative efforts, the East New Jersey proprietors pressed for a New Jersey act, subject to royal approbation, for *ex parte* settlement of the boundary.[231] After some political opposition, in February, 1747/8, an act containing a suspending clause was passed in New Jersey for running the boundary line according to the 1719 survey, but subject to royal alteration, with or without the co-operation of New York.[232] Agent Ferdinand John Paris was skeptical of approbation, principally because of the administrative inclination for commissions [233] and the failure to provide for any appeal.[234]

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(hereinafter cited as *Rep. Reg. Boun. N.Y.*). The journal of the 1769 royal commission to settle the boundary is contained in 3 *N.Y.–N.J. Boundary MSS.*

[227] The boundary was defined as "to the northward as far as the northermost branch of the said bay or river of Delaware, which is forty-one degrees and forty minutes of latitude, and crosseth over thence in a strait line to Hudson's river in forty-one degrees of latitude" (Leaming and Spicer, *Grants, Concessions . . . of New Jersey*, 10).

[228] For a 1686 attempt see Tanner, *The Province of New Jersey, 1664–1738*, 641–42; Whitehead, *op. cit.*, 162–63. For the 1719 New Jersey enabling act see *Acts General Assembly N.J.* (1732), 94–95. The 1717 New York act, a financial measure, merely recited in the preamble the need to settle the boundary and the lack of funds for allocation thereto, and then allotted 750 ounces of plate to defray the expenditure thereof (1 *Col. Laws N.Y.*, 938, 941, 988). For the substance of the commissions see 2 *Rep. Reg. Boun. N.Y.*, 608–10; 4 *Doc. Rel. Col. Hist. N.J.*, 394–97.

[229] For the tripartite indenture between the East and the West New Jersey proprietors and New York as to the western terminal point see *ibid.*, 394–99. For the petition of the New York surveyor to the colony council see *ibid.*, 403–6. For the favorable report thereon see *ibid.*, 406–8. The New Jersey proprietors termed the petitioner's suggestions "groundless, weak, and untrue," asserting that the unfavorable trend of the survey for New York claims constituted the basis of the petition (*ibid.*, 408–31). For substantiation of the New Jersey charge see *ibid.*, 433–38, 442–43. A bill for the purchase of accurate instruments was abortively introduced in the New York Assembly (2 *Rep. Reg. Boun. N.Y.*, 644–45).

[230] 8 *Doc. Rel. Col. Hist. N.J.*, Part I, 266–67; 15 *ibid.*, 185.

[231] 6 *ibid.*, 138–40, 144–45, 162–63, 168–71, 216–19; 8 *ibid.* (Part I), 213.

[232] Lilly, *op. cit.*, 174–75; 8 *Doc. Rel. Col. Hist. N.J.*, Part I, 216–17. For a copy of the act see the New Jersey brief for royal approbation of the act (*Paris MSS*, E 3/1–4). New Jersey delayed transmission of the act to England in the vain hope that New York would coöperate in running the line (7 *Doc. Rel. Col. Hist. N.J.*, 142–44).

[233] Paris noted that nothing but a private

The New York Assembly immediately ordered agent Robert Charles to oppose royal approbation of the act,[235] although Governor Clinton wrote that neither crown nor provincial interests were involved in the boundary dispute, but only those of individual patentees.[236] Paris petitioned for approval of the act at the Board of Trade in February, 1748/9, but the Fabian tactics of Charles combined with administrative preoccupation to delay any definitive actions thereon until 1753.[237] Following elaborate hearings with prominent counsel participating,[238] in July, 1753, the Board of Trade represented that New

agreement between Lord Baltimore and the Penns had prevented a commission in the Maryland-Pennsylvania boundary dispute (Paris to James Alexander, Jan. 9, 1748/9 [*Paris MSS*, H 1]). He compared the immediate situation to that between the crown and Lord Fairfax, grantee of Northern Neck lands in Virginia, where a commission was sent to settle the extent of the grant with liberty to appeal from exceptions to the commissioners' returns (Paris to Alexander, Jan. 17, 1748/9 [*ibid.*, H 2]). For this commission see 3 *APC, Col.*, #281; Bond, *The Quit-Rent System in the American Colonies*, 68–71; Groome, *Fauquier during the Proprietorship* (1927), 58–69. The Kennebec Company endeavored to use this commission precedent in its dispute with the Massachusetts government, but Attorney General Murray stated that "as the questions do not arise between distinct provinces they cannot be determined nor the boundaries settled in this case, by King in Council originally. As the question is not merely with and against the King, but between the Kennebec Company and Massachusetts Bay; it cannot be determined upon the submission of the Kennebec Company by the King in Council originally as was the case of Lord Fairfax, but the matters must be first tryed in the courts of the province and before the ordinary jurisdiction there and afterwards for final determination they may by appeal come before the King in Council" (*Add. MS*, 15,488/111).

[234] Paris questioned by what means an appeal could lie from the newly erected court, if either side felt itself aggrieved by the sentence given. Any two parties in the colonies might go through the several courts there and appeal finally to the King in Council for settling the rights to a few acres. Was it fit that where many acres were settled between two provinces there should be no appeal? The King might be deprived of lands and quit-rents; subjects might be transferred from one jurisdiction to another. Were neither King nor subjects to have any appeal whatsoever in such case? (Paris to Alexander, Feb. 27, 1748/9 [*Paris MSS*, H 3]).

[235] 2 *Journals General Assembly N.Y.*, 251; 7 *Doc. Rel. Col. Hist. N.J.*, 120–21. For the Assembly's petition against the act see *John Chambers MS Commonplace Book*, 335–60 (Columbia Univ. Law Lib.). The Assembly resolved in 1750 that the expense of opposing the act should be assumed by the province (2 *Journals General Assembly N.Y.*, 282).

[236] 6 *Doc. Rel. Col. Hist. N.Y.*, 454–55. For New Jersey support of Clinton's contention see 7 *Doc. Rel. Col Hist. N.J.*, 153–54; for Lewis Morris' support see *ibid.*, 163–65.

[237] 7 *Doc. Rel. Col. Hist. N.J.*, 126, 168–69, 226–30, 235–36, 240, 297–300; 8 *ibid.* (Part I) 218–19; *JCTP, 1741/2–49*, 433, 440; *ibid., 1749/50–53*, 370, 393–94.

[238] *JCTP, 1749/50–53*, 428, 430, 432–36. Two procedural objections to the act were met with multiple answers by New Jersey. The first objection was that by the act New Jersey could run the line *ex parte* and so be judges in their own cause; secondly, the commissioners and surveyors, being East New Jersey proprietors, were interested parties. To this New Jersey answered: (1) The present act followed the language of the 1719 New York act for settlement of the Connecticut boundary (1 *Col. Laws N.Y.*, 1039), which act had received the royal assent (3 *APC, Col.*, p. 849); (2) interest was no objection, since every person in both provinces had an interest, however small, as the settlement might increase or decrease taxes; (3) the commissioners and surveyors appointed by New York in the case of the Connecticut boundary were interested as receiving a share in the lands gained from Connecticut, yet an amicable settlement was reached; (4) even if the commissioners were all East New Jersey proprietors, they lacked judicial power in the case; the surveyor general or deputies were the

# VIII

# THE PRIVY COUNCIL AND THE EXTENSION OF ENGLISH LAW

THE CHARACTERISTICS of Council proceedings were such that the records are most fruitful on matters of administration and procedure; they have much less to yield in respect of substantive law. In the sum total of this body's functions judicial activity was only a small fraction, and since the bulk of duties discharged was essentially advisory or administrative, the Council clerks were not concerned with common law standards of recordation, and still less with the contemporary urge for unofficial reporting. The circumstance that in point of numbers the Council was predominantly lay and that even when sitting as a committee hearing an appeal it was not envisaged as acting in the same capacity as the central courts tended to blur the outlines of what in reality it was doing—contributing by a series of *ad hoc* determinations to the creation of a special jurisprudence governing the dominions outside the realm.

Certain incidents of this Council jurisprudence have already been noticed in connection with policy and procedural questions discussed in previous chapters. Most of these incidents relate to matters of private law, and because of the sporadic quality of the appeal jurisdiction inherent in the limitations as to subject matter and appealable minimums, a sort of judicial isolation characterized the Council's work. Its decisions had as precedents little or no relation to the body of the law in England, because the Council possessed no *locus standi* in the judicial system of the realm itself and had a relation to the private law of a particular colony of little effect beyond the instant case. In other words, if the Council made some novel application of the rule in *Shelley's Case,* it added little to the real property law of England,[1] and its Order was unlikely to produce change in colony law, because colonial lawyers habitually clung to English printed precedents.[2] It was otherwise in respect to certain matters which may be described as basic problems of public law, which were

[1] One of the rare instances of a colonial appeal cited at Westminster is a Barbados case involving the construction of a will in which there were three appeals (3 *APC, Col.,* #225). The citation is to Morris v. Wood where Chief Justice Raymond and Lord Justice Eyre on March 24, 1730/1, held the gift to be an estate tail; see Colson v. Colson (2 *Atk.* 247 at 249, 2 *Strange* 1125) and Doe *ex dem.* Long v. Laming (2 *Burr.* 1100 at 1102).

[2] Our conclusion is based upon the scores of lawyers' briefs and trial memoranda of many colonial jurisdictions that have come to our attention. In so far as one may properly speak of colonial precedent, this has to do mainly with practice precedents. Provincial lawyers of

more or less continually in issue and concerning which the Council developed a body of rules that seem to us considerably more palpable than the variegated decisions in the private law field. These matters concern the problems of the extension and interpretation of acts of Parliament and of the interpretation of colonial acts (all of which will be considered in this chapter); the problems of avoiding colonial acts and of establishing certain constitutional standards for the dominions (to be considered at large in our next chapter).

### THE EXTENSION OF ACTS OF PARLIAMENT

As a matter both of chronology and of convenience, the point of departure for any study of statutory extension must be the formula of the early charters which conveyed legislative power with the proviso respecting agreement or nonrepugnancy with the laws and statutes of England.[3] This formula was currently employed in patents of incorporation as a monition respecting the manner in which the by-law powers of domestic corporations were to be exercised, such bodies being in all respects subject to the common law and the statutes of the realm. On the face of things there would seem to be some room

necessity were tied to provincial forms, the product in many cases of the peculiar development in each plantation. The number of manuscript "president" or form books that have survived are persuasive on this. In many of these collections the forms are copies or close adaptations of English exemplars. We venture to suppose that if the correctness of any such local form came in issue, English "precedent" would prevail (*cf.* the argument on writs of adjournment in *Jay MSS*, Box 3, 160 [NYHS]).

The evidence we have on the citation of colonial judicial decisions—and it is scanty—reminds one of the examples in English medieval sources, where counsel or court recall something done or said at some previous term. Much of this also has to do with practice. See, for a New York example, the citation of King v. Lydius (a local *cause célèbre*) in the later King v. Van Tassel (Goebel and Naughton, *Law Enforcement in Colonial New York*, 542–43); for Connecticut, the instances in *The Superior Court Diary of William Samuel Johnson, 1772–1777* (ed. by J. T. Farrell, 1942), 68, 137, 165, 255, 270; for Virginia, Reeves v. Waller, 1733 (*Jefferson Rep.*, 8). Where a peculiar institution like slavery was concerned, previous colonial decisions were cited on points of substantive law, e.g., Jones v. Langhorn, 1736 (*Jefferson Rep.*, 38–39); Brent v. Porter, 1768 (*ibid.*, 72); Blackwell v. Wilkinson, 1768 (*ibid.*, 78).

Two final exhibits on the matter are, first, Jefferson's comment in the preface to his *Reports* that in the years 1730–40 the judges of the General Court were chosen without regard to legal knowledge so "their decisions could never be quoted either as adding to or detracting from, the weight of those of the English courts, on the same points. Whereas, on our peculiar laws their judgments, whether formed on correct principles of law or not, were of conclusive authority. As precedents, they established authoritatively the construction of our own enactments and gave them shape and meaning, under which our property has been ever since transmitted." The second exhibit is from Maryland, Bett v. Bett (*Harris and M'Henry*, 409, 418), where counsel in 1771 argued: "A manuscript case is relied on, to which I give no credit. 1st Because the authorities in the books viz. *Carth.* 514, 2 *Stra.* 1255 are expressly contrary and it would be dangerous to overthrow solemn resolutions by loose notes."

[3] The charters are not entirely consistent. For example, in the charters for Massachusetts Bay (1629) and Connecticut (1662) the word "statutes" is omitted; the word "custom" appears in that of Maryland (1632) and Carolina (1663). Of course, taken in its largest sense the expression "laws of England" includes acts of Parliament as well as general usages.

from the Jamaica Ordinary, Lord Mansfield discussed several previous conciliar appeals.[61] Mansfield's unwonted timidity when he dodged a decision on the application of *Shelley's Case* in *Perrin* v. *Blake*[62] is explicable on the ground that the noble lord had already in *Taylor* v. *Horde* (1757)[63] embarked upon his attempted recasting of real property law and that the cause presented issues on the solution of which he desired the weight and prestige of the King's Bench itself.[64] In Quebec in 1769 we find that Orders in Council were regarded as precedents,[65] and we also find reference to the "decision" of the Privy Council in *Mohegan Indians* v. *Connecticut*.[66]

From this review it is evident that the Council itself regarded earlier orders as precedents in proceedings before itself and that in some colonial jurisdictions during the eighteenth century there was a disposition to speak of certain Council cases as precedents. Under the circumstances immediately prior to the action of the Jamaica Court of Errors, *Doe ex dem. Harris* v. *Barrett* constituted a deliberate defiance of a precedent established by an appropriate authority. This refusal to follow conciliar precedents was a more serious attack upon the Council's jurisdiction than the refusal to obey Orders in Council upon individual appeals. For here, instead of one litigant, countless suitors might be affected. True, an appeal could be taken in cases in which precedent was flouted, but to many this was obviously an illusory remedy.

Eventually the problem of statutory extension in Jamaica was solved by a provision of a 1728 statute declaring that "all such laws and statutes of England as have been at any time esteemed, introduced, used, accepted, or received as laws" in the island should continue in force. This act was neither affirmed nor disallowed by the King in Council.[67]

In 1722, or about the time when the Jamaicans were attempting to secure by statute what had been judicially denied them, the Privy Council had occasion to make a rather complete statement respecting the matter of reception of English law. It was declared by the Master of the Rolls on August 9, 1722, that it had been determined by the Privy Council on appeal that in the case of a new and uninhabited country discovered by English subjects, such country was to be governed by the laws of England, subjects carrying their laws with them as their birthright. But after such country was inhabited by the English, acts of Parliament not naming the plantations would not bind them. In the case of a conquered country the King might impose such laws as he pleased;

[61] 1 *Ambler* 415. For appellant's conciliar "case" see *Add. MS*, 36,218/144; for notes of Charles Yorke on the hearing see *ibid.*, 146.
[62] See *supra*, pp. 325–26.
[63] 1 *Burr.* 60.
[64] See 7 Holdsworth, *HEL*, 43–46.
[65] 1 *Doc. Rel. Const. Hist. Canada*, 360.
[66] See 27 *Pa. Mag. Hist. and Biog.*, 159.
[67] *Acts Assembly Jamaica* (1738), 216, 223. See also 1 Long, *The History of Jamaica* (1774) 219–20.

until such imposition the laws of the conquered country prevailed, unless they were contrary to religion, *malum in se,* or silent—in such cases the laws of England prevailed.[68] Although we have made an exhaustive search, we have found no clue as to the appeal upon which this determination was made. The declaration of the Master of the Rolls, while it actually added little to what already had been declared in the common law courts of England, was significant as an exposition of conciliar policy. What made the statement of particular importance was the fact that it was published in Peere Williams' *Reports* (1740), which properly enjoyed great reputation both in England and overseas. This accident of publication probably had more effect upon the colonial courts and lawyers at large (since it was available, as were precedents in general) than any particular conciliar decision made during the first half of the eighteenth century.

This so-called "Privy Council Memorandum," however, settled nothing as to the extension of statutes enacted antecedent to settlement, although the expression "carrying their laws with them" suggested no limitation upon the matter of adopting early acts of Parliament. On this point discussion continued unabated in the colonies during the 1730's. In Maryland in particular, between 1722 and 1732 the force of acts of Parliament proved a fertile ground of controversy, the details of which need not be recapitulated, as they have been set forth by an able hand.[69] It need only be added that as late as 1744/5 the Maryland courts were construing some clauses of the Statute of Frauds to extend to the colony and some not to extend.[70]

[68] 2 *Peere Williams* 75. *Cf.* the 1720 opinion of Richard West that "all statutes in affirmance of the common law, passed in England, antecedent to the settlement of a colony, are in force in that colony." Further, "let an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear" (1 Chalmers, *Opinions,* 194–95). In connection with Orby v. Long note the 1724 statement of crown law officers Yorke and Wearg that acts of Parliament might be of force in Jamaica by "long usuage, and general acquiescence" (*ibid.,* 220–21).

[69] See Sioussat, *The English Statutes in Maryland,* 21 Johns Hopkins Univ. Studies (1903), #11–12, c. 3.

[70] In a Jan. 3, 1744/5, letter of Stephen Bordley to Richard Porter the writer stated, "as to the case put by you, there is but one thing which raises in me a doubt whether an action may be advised to be brought, and that is a statute which makes any such promise void unless the same be in writing, which, whether that part of the Statute would by the judges be construed to extend hither or not, is my doubt in the case; for if it does not extend hither, and the promise can be proved to have been verbally made, and the lady has by her carriage only, seemed consenting, without a promise on her part, the action may well be maintained; but if it doth extend hither it cannot be maintained, unless the promise or some note or memo thereof be in writing and signed by the party: and as to the extension of that statute, there are some clauses of it which have been construed to extend hither, and others not; nay the same different constructions as to the extending, have been made with regard to different parts of one and the same clause, and to a like construction the court showed an inclination last September; in some parts of this very clause, I know is introduced among us, tho that part relating to promises of marriage I believe never was determined upon; except in one instance which I now recollect and which was determined on your side

In 1728 Sir William Keith wrote that it was generally acknowledged in the plantations that the subject was entitled by birthright to the benefit of the common law of England. But the common law having been altered by acts of Parliament, it was still a question in many colonial courts whether any statutes not mentioning the plantations were of force until received by colonial act. Allowance or rejection of statutes often depended upon the influence of counsel with an unqualified bench and upon judicial partiality.[71]

A 1730 observer upon the judicial system of South Carolina commented vigorously upon the effect of a clause in the provincial act of 1712 that every part of the common law of England not altered by certain enumerated statutes should be of full force in the province. According to this commentator the common law as accepted in the province varied extensively from that in force in England, because many acts of Parliament changing, improving, or amending the common law were not enumerated in the 1712 statute. How far this might affect the prerogative of the crown or the interests of the subject or the correspondence which plantation laws ought to have with the laws of England was submitted for consideration. But it was advanced as extremely absurd for the provincial courts to pass a different judgment concerning the obligation of the statutes of England from that which would be given on appeal to the King in Council.[72] This observer then asserted that it was

greatly to be wished, that in all His Majesty's colonies and plantations in America, some general method was established for settling the forms and methods of proceeding in the courts of judicature and to declare certainly what manner of obligation English statutes made before the settlement of the several colonies, have in the plantations, it being credibly reported that throughout the whole continent of North America, there are not two colonies, where the courts of justice or the

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the question; and as the court seem inclined to introduce no other statutes among us than what have already been introduced, and carry that so farr, as to admitt one and exclude another part of the same clause and this part having never as I remember, been determined against you, and has in one instance been determined for you, I should think the chance is better than equal" (*MS Stephen Bordley Letter Book, 1740–47*, 101–2 [Md. Hist. Soc.]). Earlier in 1738 an appeal had been taken to the King in Council in Jennings v. Cumming from an Oct. 25, 1737, sentence of the Court of Delegates which upheld the validity of the will of one Amos Garrett, although not signed and sealed in the presence of three credible witnesses (*PC* 2/95/46; *MS Testamentary Proc., 1734–38*, 306–45 [Md. H.R.]). But the appeal was dismissed for nonprosecution (*PC* 2/95/301, 340). On the extension of the Statute of Frauds to Maryland see further Clayland's Lessee v. Pearce (1 *Harris and M'Henry's Rep.* 29); Carroll v. Llewellin (*MS Ct. of Appeals Misc. Proc., 1749–60*, 80–81 [Md. H.R.]).

[71] *CSP, Col., 1728–29*, #513 ii. Compare the views expressed by Keith in 1717/8 (3 *Mins. Prov. Coun. Pa.*, 34–35).

[72] *MS Observations on the Present State of the Courts of Judicature in His Majesty's Province of South Carolina* (1730), 25–26 (L.C.). The cases cited by the writer on the extension of the laws of England to the plantations were *Vaughan* 402; Privy Council Memorandum, 2 *Peere Williams* 75. For the act referred to see 2 *So. Car. Stat. at Large*, 401.

methods of proceedings are alike, and that there is as great a variety of opinion concerning the matter that has been here briefly hinted at.[73]

In 1735 John Randolph of Virginia, in discussing the controversy over the equity jurisdiction in New York, observed that the New York lawyers blindly followed a common error in their assumption that acts of Parliament were in force in the colony. The common law should be the only rule; if acts of Parliament were allowed to be pleaded, uncertainty would prevail as to which were in force. Those declaratory of the common law served rather as evidences of the law, than as statutes of binding quality.[74]

In none of the colonies where the question of the applicability of English statutes was discussed does there seem to have been much attention leveled at the royal charters as expressions of policy. Irrespective of the circumstance that a particular plantation had once been chartered or still cherished such an instrument of government, it was arguable that the standard of the law of England to which colonial enactment must conform or must not be repugnant implied at least the opportunity of judicious selection in the statute book by the chartered authority. An argument from charter provisions was made by Daniel Dulany of Maryland in 1728, but he settled upon the "Rights of Englishmen" paragraph of the patent for his disquisition, obviously because the lawmaking power was vested by the charter in Lord Baltimore.[75] In Rhode Island we have seen no more than intimations of reliance upon the charter. In a 1729 answer filed to an appeal to the Governor and Council from a probate order of the Newport town council it was averred that only such acts of Parliament were in force as specifically extended to the plantations or by some law or custom were introduced as being consistent with the public good and constitution of the colony.[76] Some years later it was also claimed that the courts had admitted such statutes "as relate to the common law."[77] The reference to custom or judicial practice, we think, may have been made with the rights of lawmaking granted by charter in mind.[78]

The Rhode Islanders seem to have had an exaggerated idea as to their constitutional (viz., charter) privileges, for in a 1741 cause the extension to the plantations of 5 George II, c. 7, wherein they were specially mentioned was contested by counsel on the ground of inapplicability;[79] the court prudently

[73] *MS Observations*, 26.

[74] John Randolph to Capt. Pearse, May 20, 1735 (*Wm. Smith MSS*).

[75] *The Right of the Inhabitants of Maryland to the Benefit of the English Laws*, in Sioussat, *op. cit.*, 98–99. For the clause relied upon see 3 Thorpe, *Federal and State Constitutions*, 1681.

[76] *MS Petitions to R.I. General Assembly, 1728–33*, #51.

[77] *Ibid., 1748–50*, #35.

[78] On this mode of thought see 1 Winthrop, *History of New England* (ed. by J. Savage, 1853), 388–89.

[79] In Peckham v. Allen the Superior Court of Judicature upon argument of a special verdict held that the act was in force in the colony. In his reasons of appeal appellant alleged that the act "was against law and equity and destruc-

tion which involved questions of private law.[231] What the politician and the lawyer had in common was this—a conviction that the Americans themselves were the proper judges of what was applicable to their situation.

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preme Court applied this rule, although the statute did not extend to the colonies. *Cf.* King v. Sealey and Jackson (*MS Mins. N.Y. Sup. Ct. Jud.* [*Rough*], *1764–67*, 15); King v. Neeley and Stephens (*ibid.*, 22); King v. Kain (*MS Mins. N.Y. Sup. Ct. Jud.* [*Engrossed*], *1764–66*, 100).

[231] There was some fear abroad in the colonies that if the colonies were regarded as conquered countries the inhabitants might be held to have forfeited part of their English liberties. On May 26, 1768, it was accordingly resolved in the Maryland lower house that "this province is not under the circumstances of a conquered country"; that "if there be any pretence of conquest, it can be only supposed against the native indian infidels; which supposition cannot be admitted, because the Christian inhabitants purchased great part of the land they at first took up, from the indians, as well as from the lord proprietary"; that "this province hath always hitherto had the common law, and such general statutes of England as are securitative of the rights and liberties of the subject, and such acts of assembly as were made in the province to suit its particular constitution, as the rule and standard of its government and judicature" (61 *Md. Archives*, 330–31).

Edward Long (1 *The History of Jamaica* [1774], 160–62) made a similar comment as follows: "The island of Jamaica being originally conquered from the Spaniards, settled by natural-born subjects of England, and at the national expence, there can be no pretence to question their title to the benefit of all the laws of England then existing, and the rights of Englishmen. These were their true, legitimate and undoubted inheritance, at the time of the conquest. I know that some antient reporters of law-cases have laid it down for found doctrine, 'that the West-Indian islands, being originally gotten by Conquest, or by some planting themselves there, the king may govern them as he will.' Nothing can more expose the absurdity of such an opinion, literally understood, than the position into which it is resolvable, and which amounts in effect to this, viz. if any English forces shall conquer, or any English adventurers possess themselves, of an island in the West Indies, and thereby extend the empire, and add to the trade and opulence of England, the Englishmen, so possessing and planting such territory, ought, in consideration of the great service thereby effected to their nation, immediately to be treated as aliens, forfeit all the rights of English subjects, and be left to the mercy of an absolute and arbitrary form of government; for such is a government founded and dependant upon the sovreign's will. This is no unfair construction of the maxim I have cited, yet it has received countenance from some other Law Reports, which assert, that 'The King, having conquered a country possessed by foreigners, gains by saving their lives' (i.e. by not murdering them in cool blood), 'a right and property in such people, and may impose on them what law he pleases [citing *Dyer*, 224; *Vaughan* 281]. The books inform us, that this savage doctrine was founded on a determination of the lords of the privy-council, at a colony appeal; and they most probably deduced it from the civil codes, whose institutes were framed for, and received by, enslaved nations. Wherever their lordships found it, their determination on this or any other constitutional point is not law (I mean the law of the land) and ought not therefore to have admittance amongst those collections of sage authorities which are to form the rule of judgement in our English courts of law." If the maxim applied to the conquered, not the conquerors, it was still not applicable, for by the fifth article of capitulation certain inhabitants were permitted to stay on the island "they submitting and conforming to the laws and government of the English nation." The conquerors could not have made this assurance unless at the time they were in absolute possession themselves of those laws and government. While approving the doctrine set forth at 2 *Peere Williams* 75 and 2 *Salkeld* 411, Long stated, citing Vattel, that "More modern civilians would have instructed their lordships of the privy-council, that, 'when a nation takes possession of a distant country, and settles a colony there, that country, though separated from the principal establishment, or mother country, naturally becomes a part of the state equally with its original possessions.'" Territory conquered at the national expense should be annexed to the sovereignty and become an additional member to the ancient dominion of the realm.

a smaller collection of acts disallowed for other varied instructional violations. Contained therein are acts from Barbados,[425] the Carolinas,[426] Jamaica,[427] Maryland,[428] and Massachusetts.[429] In no instance is any evidence found of a contention that such acts were null and void *ab initio* for instructional violation.[430] On the contrary, it was strongly asserted to save a 1739 Jamaica act from disallowance that failure to insert a suspending clause under the instructions did not even in itself constitute a ground for disallowance.[431]

Strong language, however, was used by the Committee and the Board of Trade in several instances of instructional violation. Reporting on several private acts of Virginia in May, 1760, the Committee stated that the instructions governing passage of private acts had been disregarded. It was further added that

> these regulations so essential to the security not only of the right and property of your Majestys subjects but also the just rights of your Majesty are coeval with the constitution of the British colonies, and being founded upon that Principal of equity and justice which has invariably taken place and been observed in all of them of allowing appeals to your Majesty in Council in all cases affecting private property, they do form an essential part of that constitution and cannot be sett aside without subverting a fundimental principle of it wisely framed for the security and protection of your Majesty's subjects in whatever may affect their private rights and interests.

[425] 3 *ibid.*, #394.

[426] 4 *ibid.*, #213, 281, p. 807; 5 *Col. Rec. No. Car.*, 106–7.

[427] 3 *APC, Col.*, #68, 125, 244.

[428] 2 *APC, Col.*, p. 838.

[429] 4 *ibid.*, p. 805; 4 *Acts and Res. Prov. Mass. Bay*, 5.

[430] *Cf.* the language in a January, 1762, Board of Trade representation upon a 1756 Jamaica act that duties granted by a 1728 confirmed act "could not have been regularly and constitutionally rescinded by a temporary act made to take place" before the royal assent could be known. But the act was merely disallowed (4 *APC, Col.*, #468).

[431] The act was "An Act to dissolve the marriage of Edward Manning, Esq. with Elizabeth Moore and to enable him to marry again" (Copy in Lib. of Cong., Law Div.). Solicitor John Sharpe argued that this was an instruction only between the crown and the governor and did not at all affect or interfere with the power of the Jamaican legislature. It was left to the discretion of the governor to be exercised in cases where he should judge it proper. The noninsertion of such clause would not in any respect vitiate the law, provided it was in other respects proper and reasonable to pass. The governor had judged that this was a case where it was not proper that such suspending clause should interpose. If the crown were of the opinion that this was a proper act to pass, that would show the governor's judgment to have been right. But if the crown was of the opinion that the act was not a proper act, the noninsertion of the clause would be no reason against rejecting it. The reason for the instruction was plainly to prevent acts from being passed on a year to year basis laying unequal duties and impositions on British traders. If the instruction was to be considered as having the extensive application contended for by its opponents, the governor was prevented from assenting to any law that had anything new in it—a construction never to be supported or insisted upon as it would put a total stagnation to all plantation government (*MS Proceedings and Argument of John Sharpe*, L.C., Law Div.). But the Committee advised that a suspending clause "ought indispensably to have been inserted" in the act which was accordingly disallowed (3 *APC, Col.*, #502). *Cf.* the first reason of Thomas Pownall in declining the government of Pennsylvania in 1758 (13 *Pa. Mag. Hist. and Biog.*, 441–42).

But the acts received the usual disallowance.[432] In a December, 1761, representation on a private bankruptcy act from New Jersey the Board of Trade objected to the lack of a suspending clause. It was represented that in

> an act materially affecting private property, the want of a suspending clause is not an objection merely affecting the conduct of your Majesty's Governor; for we humbly apprehend, that this clause was directed to be inserted in all acts of this nature, with a view to secure to the subject a right of appeal to the Crown, in what ever might affect his private property, and that it is therefore a necessary qualification, essential to the Legal and constitutional validity of the act itself.[433]

This act also suffered the ordinary disallowance.[434]

### THE PARSONS' CAUSE

With this background we now come to consideration of *Camm* v. *Hansford and Moss,* one of the cases which have the generic name of the Parsons' Cause. This cause was a result of legislation in the colony of Virginia regulating the salaries of ministers of the Church of England, the established church in Virginia.[435] Tobacco constituting the chief commodity of the colony in its infancy, it was provided by a 1661/2 act that an annual ministerial maintenance be made of £80, commutable into tobacco at 12 s. per 100 pounds or into corn at 10 s. per barrel.[436] The price of tobacco having declined, in 1696 an act was passed whereby ministers were to receive for their annual maintenance sixteen thousand pounds of tobacco, besides their lawful perquisites.[437] The economic consequence of such scheme of payment was that the real wages of the clergy varied as the market value of tobacco declined or appreciated.[438] In the main this act was affirmed by a 1748 measure which provided that every

[432] 4 *APC, Col.,* #421. For the acts, see 7 Hening, *Stat. at Large Va.,* 247, 296, 322. For the violated instruction, see 1 Labaree, *Royal Instructions,* #222.

[433] 9 *Doc. Rel. Col. Hist. N.J.* 333–34.

[434] 4 *APC, Col.,* p. 806. Some insight is available from the analogous field of land grants. In 1765 New York Attorney General John Tabor Kempe stated that the condition precedent to a gubernatorial grant of land was not contained in the governor's commission, but in his private instructions. "And tho if a Governor should act contrary to his instructions it would justly expose him to the King's displeasure, yet perhaps his acts might be nevertheless binding, and a grant contrary to the instructions good, if the governor pursued the powers in his commission" (4 *Papers of William Johnson* [1925], 818). See also the statement at a 1765 Committee hearing on the conduct of Governor Wentworth of New Hampshire in making land grants in territory claimed by both New Hampshire and New York that "if the Governor grants in direct Violation of his Commission, the Grant is void" (*WO* 1/404/13).

[435] See the report of Sherlock, Bishop of London, 7 *Doc. Rel. Col. Hist. N.Y.,* 360; Cross, *The Anglican Episcopate and the American Colonies* (1902), c. 1; McIlwaine, *The Struggle of Protestant Dissenters for Religious Toleration in Virginia,* 12 Johns Hopkins Univ. Studies (1894), c. 1.

[436] 2 Hening, *Stat. at Large Va.,* 45.

[437] 3 *ibid.,* 151.

[438] To the extent that ministers' disbursements were in fixed quantities of tobacco, gain or loss by fluctuation in the market price of tobacco was nullified. But it is probable that most of their disbursements were subject to price fluctuations. *Cf.* H. Jones, *Present State of Virginia* (1724), 71.