# APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS

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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] *Prov. Md. Ct. Appeals, 1695–1729*, 137–38.
[136] *PC* 2/83/288.
[137] *PC* 2/83/295.
[138] See *Prov. Md. Ct. Appeals, 1695–1729*, 156–64.
[139] *PC* 2/115/175.
[140] *PC* 2/115/119, 187. Lieutenant-Governor Leslie 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 Mookerjee (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 *Ad.*, 460, 473–74).
[143] See Dr. Lushington in *Regina* v. Eduljee Byramjee (5 *Moore P.C.* [n.s.] 276, 289–91).
[144] 1 *Ann and Rec. Prov. Mass. Bay*, 15. There is no evidence that this charter provision had any effect in the passage by Parliament of 35 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 dependence, and the special rights and privileges of the Massachusetts inhabitants" (*The Petition 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 *Minr. 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.*, 30).
[147] 3 *Minr. 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 Canon 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 1728 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.*