NOTES ON THE PRE-REVOLUTIONARY JUDICIARY IN ENGLISH COLONIES.

In reading the six volumes of *Acts of the Privy Council of England: Colonial Series*, published by His Majesty's Stationery Office, London—a series that cannot be neglected by anyone who desires to know accurately how the Old British Empire was governed, and to observe the beginning and progress of ideas which led to the New British Empire, I observed certain references to, and dealings with Judges in the English American Colonies, which I thought might be of interest to my brethren on the Bench, and to the Profession as a whole.

Desiring accuracy in terminology as in everything else, I have not said "British Colonies": nor do I crave pardon of enthusiastic Scottish readers, because the Privy Council itself, when, in 1661, the Scots subjects of Charles II claimed, as such subjects, the right to trade with the "Plantations" under the Navigation Acts, said officially and plainly, "the Plantations . . . are absolutely English"; *op. cit.*, Vol. I, p. 318.

There are innumerable items of great interest to lawyers and students of history, which I do not intend to reproduce here—just instancing two, without treating them at any great length.

The first is an echo of *Calvin's Case* (1608), 2 St. Tr. 559, the famous Case of the Postnati, in which it was decided that the relation between Sovereign and subject was a personal one, and that the young Scot, who was born in Scotland after the accession to the Throne of England by James I, was competent to hold land in England as being a subject of the King of England, though not *quâ* King of England. This might well have been the foundation of our New British Empire conception of fealty; but it seems often to have been overlooked. The case was applied in the Barbados in 1700; Alexander Skene, a Scotsman, was appointed to the position (one of emolument, it may be unnecessary to say) of Secretary of the Island: when he presented himself, for admission to this office, the Governor and Council of the Island refused to admit him "under pretence of his not being a Naturall Borne subject of England," which, undoubtedly, he was not. Skene petitioned the Privy Council of England, and, May 2, 1700, his Petition was referred to the Attorney-General Sir Thomas Trevor (afterwards Chief Justice of the

Common Pleas, and Lord Trevor) and the Solicitor-General, Sir John Hawles, K.C.: they reported that Skene was properly qualified, May 11, and orders were given accordingly, May 16, 1700: *op. cit.*, Vol. II, p. 353. (That Skene afterwards had a quarrel with the Governor over fees is not of importance to us here—it was the natural thing with Governors as they were usually sent out at that time).

The other incident to which I refer took place in Maryland in 1711; a Member of the Bar, in Annapolis, Maryland, Thomas Macnamara was found guilty of Homicide by Chance Medley—at least, so his Petition to the Privy Council put it—he was burnt in the hand, and deprived of the right to practise as an Attorney: he petitioned the Privy Council, who, June 23, 1711, referred his Petition to the Committee for Appeals, corresponding almost exactly to the present Judicial Committee: this Committee, July 5, took the opinion of the Attorney-General, Sir Simon Harcourt, (afterwards Lord Keeper, Lord Harcourt and Lord Chancellor), who advised that Macnamara "being found guilty of Homicide *per infortunium*, he Ought to have been discharged, and not burnt in the hand, and that he Ought not for that reason to have been discharged from his Practice of an Attorney." The Committee reported, August 16, that Leave should be given to the Petitioner to remove the proceedings by Writ of Error and to "Command the Courts of Maryland forthwith to Restore the Petitioner to his Liberty of Practicing as an Attorney . . . ." And, September 3, this Order was made: *op. cit.*, Vol. II, pp. 653-4.

Coming, however, to the Judiciary, the first entry I find concerning them is in June 13, 1663, when the Council is settling the Royal Instruction to Francis, the first Lord Willoughby of Parham, on his appointment to the Governorship of the Barbados—this was not William, the second Lord Willoughby of Parham, as the editors of this Volume suppose—he was instructed, "You shall . . . appoint such Judges and Justices as are of knowne ability and integrity, and see that great Care be had, that Justice be uprightly, indifferently, and with ease, administered to all our good people . . . ": *op. cit.*, Vol. I, p. 357.

Lord Willoughby, himself, as Judge in Admiralty as well as Governor, got into trouble: and the story is characteristic of the times.

"The Royal African Company of England" received from King Charles II, September 27, 1672, Letters Patent with the sole right to "trade to Africa from Sally to Cape buon Esperanza" (alias the Cape of Goodhope). The "trade to Africa" was largely the Slave

trade in Negroes. Captain Nicholas with the *Charles,* one of the Ships of the African Company, captured the Ship *William and Susan* trading in defiance of his employers' monopoly; and brought Ship and cargo to the Barbados for condemnation in the Court of Admiralty there in which Willoughby sat as Judge. The owners of the captured Ship brought action at the Common Law in the Court of Common Pleas against Captain Nicholas: Special Bail was put in by the Factors of the African Company in the Island: they applied to Willoughby to have the Common Law actions dismissed and the matter disposed of in the Admiralty: he refused and, instead of the matter being threshed out in the Admiralty where it belonged, the Common law actions proceeded. The Company, April 6, 1666, complained to the King-in-Council: and a Letter was ordered to be written to Willoughby that it was His Majesty's "expresse Pleasure and Command That you forthwith dismisse the said Action and Bayle out of the Court of Common Pleas in that Island and transmit the Whole Case and pretence of the Plaintiffs together with all Papers . . . to this Board, His Majesty intending to take Cognizance thereof himself": *do. do.,* pp. 411-2.

Notwithstanding this express direction, Willoughby refused to order the Judge of the Court of Common Pleas to dismiss the actions or "send home the Bayle Bonds which were given in the said action by the Petitioners' factors, which caused the Plaintiffs to threaten the said Factors, That they or their Heirs shall suffer by them and give them Satisfaction": the Company made another application to the Privy Council "That a Second Order may be given to the Governor . . . or the said Judge not to fayle to dismisse the said Baile and to send the Bonds by the first Ship to this Boord." This Petition was referred, December 7, 1666, to the Committee for Foreign Plantations: *do. do.,* p. 421.

The Committee met at Whitehall, December 12: Present, The Lord Chancellor (Lord Clarendon, removed next year), Lord Treasurer (Lord Southhampton) Lord Privy Seal (Earl of Radnor), and Lord Chamberlain (Earl of Manchester) also Earl of Anglesey (afterwards Lord Privy Seal and Lord of the Admiralty) Lords Holles, Apsley and Arlington; Vice-Chamberlain (Sir George Carteret) and Mr. Secretary (Sir William) Morice (Secretary of State).

William Willoughby, the brother of Lord Francis Willoughby, who had died and been succeeded by three Commissioners *pro tempore* until the arrival of William who was to succeed as Governor, was present: and he undertook to fulfil the order of April 6, given to his brother in Barbados: *do. do.,* pp. 421-2. When he went out

to his Governorship, he failed to implement his undertaking—the action on the Bail Bonds went on in the Court of Common Pleas and was "neare vpon sued to an Execution" when the Company applied to the Privy Council once more. January 31, 1666, a Letter was written to this Governor, telling him in the plainest terms that the King resented his conduct and requiring him to "give speedy and effectual Order for the stopping of all manner of Proceedings in any the Courts of the said Island against any of the petitioners' ffactors or others for or concerning any thing relating to the mater aforesaid" —and to send to the Privy Council, all the Proceedings, Bail Bonds, &c.: *do. do.*, pp. 455-6.

This seems to have been effective, as nothing more is heard of the matter.

New England, after the "Glorious Revolution," when obtaining her new Charter in 3 Will. & M., 1691, tried in vain to have her Judges chosen by the Assembly: *op. cit.*, Vol. II, pp. 126-7: and Pennsylvania Judges were in 1702, called upon to take the "Oaths of a Judge or in lieu thereof . . . the affirmation allowed by the law of England . . . to Quakers . . . ": *do., do.*, p. 420.

Appeals, two in number from Jamaica in 1708, disclosed a curious situation as to the final Court of Appeal in that Island.

The Royal African Company, already spoken of as chartered in 1672, was very important in most of the West India Islands: the Act of (1698) 9, 10 Will. & M., cap. 26, provided that no Judge in any of the Plantations should be a Factor of this Company. Two Appeals from this Island brought to light an awkward situation. Sir Charles Orby and his wife had had Judgment against them in the Supreme Court: on an Appeal to the Governor and Council, which was the Court of Appeal for the Island, it was found that out of seven Councillors present, three were Factors of the African Company, while three others had taken part in the proceedings appealed from, consequently no Quorum could be formed to hear this Appeal. No relief being obtainable in the Colony, the Appellants petitioned the Privy Council, who, August 1, 1708, referred the Petition to the Committee. A few days later, August 18, 1708, was read by the Privy Council, the Petition of John Clarke from Jamaica: his tenant had succeeded in an action of Ejectment (*Doe dem. Clarke* v.—): the defendants had taken the case by Writ of Error to the Governor and Council, and the same snarl intervened—the Chief Justice, Peter Heywood and the two Assistant Judges, Francis Rose and John Ayscough, had taken part in the Judgment in the Court below, and three of the Councillors were Factors of the African Company.

The Petition was also, August 18, referred to the Committee, who reported, October 3, 1708, advising that the Papers should be sent to the Governor and Council, who were to state the facts and advise what should be done. No answer seems to have been made to this Letter: March 14, 1709, the Committee reported in the Orby matter, wifth a list of the Councillors of whom only five, a bare Quorum, were qualified to sit . . . March 31, 1709, the Council gave a direction that two qualified persons should be added to the Council to prevent a failure of justice. April 16, 1709, the Board of Trade reported that no answer had been made to their direction to warn Councillors to act no longer as Factors in the Slave trade; and recommended that if the three Councillors named should refuse to resign their agency, they should be dismissed and others (named) appointed in their stead. This seems to have been done: the judgment against Lady Orby was affirmed by the Governor and Council: but on Appeal, the Committee of Appeals (our present Judicial Committee of the Privy Council) having had it referred to them, August 28, 1710, reported, December 18, 1710, allowing the Appeal with costs in the Courts below, no costs in the Privy Council: *do., do.,* pp. 564-566: 570. What happened in the Clarke Appeal does not appear: Clarke, in his Petition, had claimed that "Such Writ of Error is only to Delay his having speedy Justice done him in the premisses," and it is probable that he was successful in the Colonial Appeal.

An extraordinary, and probably a unique case came before the Privy Council in 1709 from Barbados. Richard Downes was Chief Justice of the Court of Common Pleas: he owed John Bentley a debt of £800, and the only way of securing it was by an action in that Court: a Quorum of three was required, but, of the five Judges, one, William Roberts, could not sit in Civil cases, being a Factor of the African Company; another refused to sit, as Small-pox was rife—the Governor, Mitford Crowe, instead of nominating another Assistant Judge, *ad hoc.,* referred the whole matter for trial by Chief Justice Downes himself. Bentley applied to the Privy Council, and, July 8, 1709, the Petition was referred to the Board of Trade: the Board of Trade reported, August 2, and their Report was adopted and acted on, August 8, the Governor was ordered to appoint a sufficient number of Assistant Judges and, "For the irregularity in this case, Downes is to be removed from being Judge of the Common Pleas . . . ": *do. do.,* pp. 606-7 (This Governor, himself, does not seem to have been of a very high type—one John Sober in an affidavit swears that "he was so exasperated by the indecent and unbecoming manner in

which the Governor behaved to his wife and sister that he declared that though he must respect her Majesty's Governor, if Mr. Crowe had been a Private Man, he would then have said he was a scout and a Scoundrell . . . :" *do., do.*, p. 607: September 5, 1709.

March 22, 1720, the Council referred to the Committee for Appeals, the Petition of Bernard Cook of Barbados: he complained of the Governor, Robert Lowther, and some of the Justices of the Peace binding him over to a Petit Sessions of the Peace on a false charge of uttering words reflecting upon two married women, named, and "without allowing a Traverse to the Grand (i.e., General) Sessions, condemned him to be be Publickly Whipt and to have twice thirty-nine lashes on his bare back tho' he alleges they never convicted him therefore . . . ." On consideration, it was decided to send copies of the Petition to Governor Lowther and the accused Justices—both, or, rather, all parties to take depositions before four Commissioners named, two for the Petitioner and two for the Respondents—answers and dispositions to be exchanged and the whole transmitted to the Board. December 29, 1721, the Committee reported that there was no evidence to support the allegation that the proceedings were due to the displeasure of the Governor; but that the other allegations were proved—that Cook was ordered in Petty Sessions to pay £100 to the husbands of the women claimed to have been traduced, before leaving the Court, and, on failing to do so, was whipped in open Court by the common whipper of slaves, receiving twice 39 lashes in an inhuman and barbarous manner": the Justices had taken it upon themselves to try the matter of fact without a Jury, and refused Cook, a Traverse to the Grand Sessions: the Justices named, eight in all, had acted illegally and given two arbitrary and cruel sentences. January 20, 1722, these eight were ordered to be removed from the Commission of the Peace, and two of them, who were Members of the Council were removed from that office also: *do. do.*, pp. 775-6.

Volume III, from 1720 to 1745, contains singularly little of such matter as we are considering—it will be of interest to Barristers, that, June 20, 1722, there was considered a Petition of the Barristers and practising Attorneys of Barbados, for the disallowance of an Act of the Local Legislature allowing "licentiate lawyers to practise as Barristers in the Island": *op. cit.*, Vol. III, p. 31. What the result does not appear: it is to be hoped that the interlopers were not allowed to retain the unearned status. Others may be interested in the fact that some Jews of Jamaica actually complained of an Act of that Legislature: "passt there an Act for encourageing of white

people in that Island, assigning a Reward to any white people that shall settle there, excepting Jews, Papists and Nonjurors": *do. do.*, p. 30: November 18, 1731.

There was in 1729, a somewhat curious snarl between the Courts of North Carolina, in which Christopher Gale was Chief Justice, and the Vice-Admiralty Court: both complained of the Governor, Sir Richard Everard, and each complained of the interference of the other Court. The matter was left open, and the result of the Petitions to the Privy Council does not appear: *do. do.*, pp. 247, 251. A similar complaint was lodged in 1730 by Mr. Brown, the Judge of the Vice-Admiralty Court "in Pensilvania" of interference with his Court by the Governor and Chief Justice of the Province: this seems to have quieted down: *do., do.*, p. 287. The Judge of the Vice-Admiralty Court of Massachusetts Bay, Nathaniel Bayfield, was sued in the Inferior Court of Common Pleas by Samuel Swasey, Shipwright, for "extorsively" taking as his fee for a Decree in his Court, twenty shillings more than was allowed by law: succeeding in this Court, he had to meet an Appeal to the Superior Court; and in that Court, the Appeal was allowed, and Judge Bayfield saddled with "10 l. currency and 40s. in bills of credit and costs of Court." His appeal to the Privy Council was admitted, but the result does not appear: *do., do.*, p. 334—the Appeal in the Superior Court was heard in 1732, the proceedings in the Privy Council and Committee in June and July, 1733. The complaint of Lewis Morris against Colonel Cosby, Governor of New York for removing him from his place of Chief Justice without giving the reasons, was heard, November 29, 1733, and, January 10, 1734, the Governor was ordered forthwith to transmit his reasons; and, the charges being received by the Council, copies were, November 17, 1735, allowed to Morris: and, after hearing Counsel the Committee reported, November 7, 1735, that "the reasons for Morris's dismissal from being Chief Justice of New York, were not sufficient;" November 26, the Report was approved and acted upon: *do., do.*, pp. 397-8.

The fortune of James Gordon, Chief Justice of the Island of St. Christopher's, who, in 1743, complained of having been superseded and another appointed in his place by Governor Mathew, when, "having Affairs to transact in England he obtained his Majesty's leave of Absence from his said Post for one year," as Gordon "apprehands" assuming "a Power to himself in direct Violation of the Authority of the Crown," does not appear; but from the action in a South Carolina case, it is practically certain that the Petition succeeded. The South Carolina case was in 1734, when Robert Wright,

Chief Justice of the Plantation complained, March 20, to the Privy Council that he was duly appointed, November 30, 1730, as Chief Justice; but that subsequently an Act was passed "impowering the Governor to nominate two or more Assistant Justices to sit in Judgment and hear and Determine all Causes in the said Court together with the Chief Justice," which Governor Robert Johnson had done: this, the Chief Justice considered "an Incroachment on His Majesty's Prerogative and undoubted Right of Appointing Judges and as the persons appointed are intirely ignorant of the Laws and over-rule the Petitioner in all Judicial Acts . . . ," he asked the interference of the King. It is to be observed that this Act was an assertion of a right which had been denied to New England, when obtaining the new Charter in 1691: it is one of many indications, now becoming plain, of the impatience of rule from across the Atlantic, which was growing in the Plantations, everywhere, and was certain to result in revolt. After careful consideration, the Committee agreed that there was "Manifest infringement of the Prerogative": and the obnoxious Act was disallowed, March 4, 1736: *do., do.,* pp. 410-2. The proceedings in the St. Christopher Petition appear, *do., do.,* pp. 752-3: the result of the Petition of Thomas Harrison, complaining of Sir Thomas Robinson, Governor of Barbados, removing him from the Offices of Chief Baron of the Exchequer and Justice of the Peace, is equally undisclosed: *do., do.,* pp. 769-770, January 5-March 21, 1744.

(*To be Continued.*)

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