## NOTES ON THE PRE-REVOLUTIONARY JUDICIARY IN ENGLISH COLONIES.*

The impatience of Imperial control becomes more and more manifest in Volume IV. Before taking up the cases in this Volume, the amusing facts may be mentioned of Colonial complaints against a Governor for appointing as Chief Justice, a non-Christian (in other words he was a Jew): and against another Governor for appointing a Pirate. The former of these was in 1705, when five ex-Members of the Assembly of Barbados complained of Governor Grenville appointing "Col. William Holder . . . Chief Justice of Common Pleas . . . though he is not known to be of any Christian community, nor has yet been baptized"—the latter was in 1708, when E. Jones, Secretary and Provost Marshal of Bermuda complained of Governor Bennett, *inter alia*, "(32) That he has made Col. Anthony White, Chief Justice. White was formerly arrested by Jones as an accomplice of pirates." As to the former, the Board of Trade reported March 29, 1705: "Re Col. Holder, no proof has been offered of the allegation that he was never christened." What happened in the White matter does not appear: *op. cit.*, Vol. VI, pp. 32-35: 72-74.

The necessity of "an able lawyer being sent from England" to an American Colony, was urged by Governor Clinton of New York, in 1751: *op. cit.*, Vol. VI, p. 309: and this was emphasised in 1759, by the Board of Trade in a Guadeloupe case: "it has been found of absolute necessity to have a Chief Justice . . . in every Colony to preside in and direct the Proceedings in all cases of Property or of a criminal Nature." *Op. cit.*, Vol. IV, p. 431. It will be remembered that it was well into the last century, before the Home Authorities thought a Canadian fit to be Chief Justice of Upper Canada.

The Salary of a Chief Justice in many of the Plantations is said to have been £100 per year: and the payment of that sum to each of the Judges in Virginia in 1752, was approved by the Board of Trade: *op. cit.*, Vol. IV, pp. 175-6.

The continued and increased determination of many of the Colonies to control their own affairs is as manifest in the dealing with the Judge's office as in any other way. Jamaica in 1751-2 passed an Act, providing that all the Judges of the Supreme Court of Judicature should hold their offices *Quam diu se bene gesserint.* The Committee of the Privy Council, to whom this with other Acts

* The preceding portion of this article appears at pp. 317-324 of the current volume of the CANADIAN BAR REVIEW.

was referred, took the opinion of the Attorney-General (Sir Dudley Rider, afterwards Chief Justice of the Court of King's Bench), and the Solicitor-General (the Hon. William Murray, afterwards Attorney-General and Lord Mansfield, Chief Justice of the Court of King's Bench), they agreed that this directly affected the Royal Prerogative in a point of great moment . . . it does not appear that in . . . the said Island or the other American Plantations . . . it would be advisable, either for the Interest of the Plantations themselves, or of Great Britain, that the Judges in the former should hold their places, *quam diu se bene gesserint*: *op. cit.*, pp. 215-7.

North Carolina, in May, 1760, sinned in the same way: an Act was passed, providing that all Judges and Justices should hold their office *Quam diu se bene gesserint*: this was disapproved by the Board of Trade and the Privy Council. It may be stated that another statutory provision was also disapproved, that is, a provision that no person was to be appointed a Justice or Judge who had not been Called as an Outer Barrister in one of the Inns of Court in England and was of five years' standing there or who had not "practised the Law in the Principal Courts of Judicature of North Carolina or some adjacent Province": this was thought "an Unconstitutional Restraint upon the Power of appointing Judges," of the King. *Op. cit.*, Vol. IV, pp. 504-5.

New Hampshire in 1758, refused to make competent provision for the Salary of the Chief Justice and Justices of the Superior Court or the Court of King's Bench: the Puisnés resigned, and the Governor could find no one who would accept the Commissions: "and the Government (would) have fallen into a state of the greatest Confusion, had not the said Governor (Benning Wentworth) to prevent so great an Evil, agreed to allow the Chief Justice the Yearly Sum of Forty Pounds Sterling out of his own Salary untill His Majestys Pleasure should be known . . . " The Governor representing this state of affairs to the Home authorities, the Assembly were informed that they were to provide the proper Salary for the Judges for the future and reimburse the Governor. November 6, 16: December 1, 19, 1758: *op. cit.*, pp. 394-5.

New York in December, 1761, provided a Salary for the Chief Justice and Judges, but only up to September 1 of the next year and on the express condition that they held their Commission during good behaviour: and absolutely refused to grant a Salary to any Judge, unless his Commission was made during good behaviour. All the Judges resigned except Chief Justice Pratt "whose disinterested Zeal prevented a total stop being put to the Administration of Justice in the province . . . " The Governor made a representation to

the Home authorities, as did the Chief Justice—Chief Justice Pratt is described as having been "at the head of his Profession at Boston, where he left a beneficial Practice and came to New York with the best Character, as well with respect to his integrity, as to his knowledge in the Law, and now Acts alone in the service of the Publick at his own Expence." This Act was repealed, August 12, 1762: the Privy Council gave Pratt a Salary out of the Quit-rents of the Province, "to continue only until the Assembly shall return to a sense of their Duty and make proper Provision . . ." The matter was amicably settled: *op. cit.*, Vol. IV, pp. 550-1: Vol. VI, pp. 337-9.

To anticipate a little, Nova Scotia, July 4, 1782, passed an Act providing for the support of the Puisné Judges of H.M. Supreme Court conditional on their being appointed during good conduct: this was disallowed, May 16, 1783: *op. cit.*, Vol. V, p. 539.

While it is not always said, it can, I think, be seen in practically every case that there was a growing and acutely felt conviction at Westminster "that there is nothing so essentially necessary to the preservation of His Majesty's government in the American provinces as the careful and strict maintenance of the just Prerogative, which is the only means by which these Colonies can be kept dependent on the Mother Country, . . . ": *op. cit.*, Vol. VI, p. 295: Board of Trade, April 2, 1751.

One Judge, Benjamin King, Judge of the Vice-Admiralty Court of Antigua, was proceeded against by *ex officio* Information by the Attorney-General in the Court of King's Bench, and, July 12, 1748, fined £100 for having unlawfully and "extorsively" received fees to which he was not entitled: and he does not seem to have taken anything by his Appeal to the Privy Council, May 2: *op. cit.*, Vol. VI, p. 82. The resignation of three Judges of Bermuda in 1753, seems as mysterious now as it was then—they said they were dismissed, while the Governor said they resigned: *op. cit.*, Vol. VI, p. 319.

Some removals there were: one, that of Chief Justice William Grover of Georgia in 1761 is at least curious—he is said to have been removed for what he said on giving evidence before a Committee of the House of Assembly: the Committee of the Board of Trade said, "That a Chief Justice in submitting himself to be examined before a Committee of the Lower House of Assembly, or to attend that House without leave first obtained for that purpose from Your Majesty's Governor of the Colony, is a Precedent which they (i.e., the Lords of the Committee) apprehend to be of dangerous Consequence and entirely subversive of the Constitution of the General Assembly of the Provincell": *op. cit.*, Vol. IV, pp. 536-8. (Those

familiar with the inner history of old Upper Canada will recall a refusal to attend the Legislative Assembly's call on the part of an officer of the Crown—but "that is another story.")

It was part of the general unrest in Governmental circles at the period, that Governor Clinton of New York removed Daniel Horsmanden from being Judge of the Supreme Court and Recorder of the City of New York. The Governor described him as coming to New York a fugitive from the Sheriff of Essex, and living, at first, as a person of some estate; but his bills all coming back protested, he had to live on the hospitality of the gentlemen of the City: the faction that arose in Cosby's time took him up and had him appointed a Judge; and he had continued to be a principal actor in all public dissensions. He had been guilty of opposing the Governor: however, on appealing to the Privy Council, he was reinstated by the Governor, and passes from the picture: *op. cit.*, Vol. IV, pp. 58; 208; 280: Vol. VI, pp. 269-271.

An extraordinary state of affairs is represented as existing in Georgia in the fifth and sixth decades of the 18th century. A Rev. Thomas Bosomworth, a Missionary to the Indians, married the half-breed daughter of an Indian Woman by a White man—she called herself, the Princess Causaponakeesa, Princess of the Upper and Lower Creek Indians; and with her husband, she made great claims on the lands, etc., of Georgia: a Committee of the Privy Council, approved the Report of the Board of Trade, of December 6, 1758, concerning her claim for some compensation: "her conduct since the Year 1747 has been highly criminal with respect to His Majestys Government and much more deserving of Punishment than Reward." Her conduct with the Indians and their consequent practices "have so much intimidated the Inhabitants of the Colony that there is great reason to doubt whether any Court of Judicature there would dare to decide against them through fear of the troubles they (i.e., the 'Princess' and her husband) might create by means of the Indians . . . ": *op. cit.*, Vol. IV, pp. 311-5.

Volume V shows a distinct exacerbation of the determination to be self-governed in the Colonies: the indications are such that one can only wonder at the want of knowledge of the coming cataclism—not much of this, however, is manifested in the Judiciary and the treatment of Judges.

It is noted that Governor Murray in the new Province or Government of Quebec, in 1767, "acquainted the Lords that the Expence of the Judges upon the Circuit Courts of Assize, Nisi Prius, Oyer and Terminer and General Goal Delivery . . . is attended with £500 a Year . . . ": *op. cit.*, Vol. V, p. 92.

One of the most striking episodes is related of Rhode Island in 1771: an Appeal to the Privy Council having been successful, when the appellant came to enter up his judgment in the Colonial Court, Henry Marchant, Counsel for the Respondents, "did aver and say that the King and Council had made up said judgments contrary to law, reason, equity and justice; and when the King and Council made up such a judgment, the King was no King, and therefore the Court ought to set aside such judgments and make up a judgment of their own according to law." Then, "At the March Court in 1770, James Helme, C.J., Searle and Comstock, JJ., gave judgment for carrying out the order of the Privy Council, and Benoni Hall and Greene, JJ., against. But at the annual choice of officers in May, the three Judges who had decided in favour of executing the judgment of the King and Council were turned out, and Stephen Hopkins, a known supporter of the other party was chosen Chief Justice (Some years previously, Hopkins had 'publicly declared that the King and Parliament had no more right to pass any Acts of Parliament to govern us than the Mohawks') Helme was made Second Judge for some political reason, but the other three were men of the same principles with Judge Hopkins." Marchant was heard again, October, 1770, when the case was continued to March, 1771: Hall, J., was absent and the Court of four was equally divided, Helme and Bowler, JJ. for carrying out the order of the Privy Council, Hopkins, C.J., and Stephen Potter, J., *contra.* "The Chief Justice then proposed to carry the case to the County of Providence, where Hall, J. attended and gave his judgment, as in 1770, against the order of the King in Council: Helme, J., entered his protest: he is called by many 'a Prerogative man.'" The Governor and Company approved the action of the three Judges: the Governor endeavoured to get the successful appellants to the King in Council to agree to a compromise: Marchant was sent home to induce the Privy Council to alter their judgment, and the Governor appointed him his joint agent in London: *op. cit.*, Vol. VI, pp. 505-7. The two Freebodys, who had thus been denied the fruits of their appeal to the King in Council, complained to the King again: their Petition was referred, February 3, 1772, to the Committee: the Committee, June 28, 1772, sent a copy of the Petition to the Judges of the Supreme Court, who were to return their answer within three months of receipt: the Answer came, and, December 18, 1773, the Committee fixed a day for hearing: June 20, 1774, the Committee reported that after their hearing Counsel on both sides, they advised that a peremptory order should be sent to the Judges of the Superior Court to comply with

the original order of the Privy Council of April 14, 1769: *op. cit.*, Vol. V, pp. 24-5.

The first "amoval" of a Judge in British Canada was during the Revolutionary War, and in the Province of Quebec, formed of part of the "Government" of Quebec, mentioned in the Royal Proclamation of October 3, 1763: *Documents Relating to the Constitutional History of Canada, 1759-1791*, 2nd, ed., 1918, pp. 163, *sqq.* This Province of Quebec was formed by the well-known Quebec Act of 1774, 13 Geo. III, cap. 83: Guy Carleton (afterwards Lord Dorchester) was made Governor in Chief of the new Province: in his Instructions, dated, January 3, 1775, the names of the Council were given either by office or otherwise—one of them being "Our Chief Justice of Our Province for the time being"; the Members of the Council were to have "Freedom of Debate and vote in all Affairs of Public Concern"; he was to "communicate such and so many of these Our Instructions to Our said Council . . . as you shall find convenient for Our Service": he was not to "displace any of the Judges . . . without good and sufficient cause, which you shall signify in the fullest and most distinct manner to Us by one of Our principal Secretaries of State and to Our Commissioners for Trade and Plantations . . . "; "It is Our further Will and Pleasure that any five of the said Council shall constitute a Board of Council for transacting all Business . . . (Acts of Legislation only excepted) . . . "

Carleton selected five of the Councillors, to transact business excluding the others, amongst those excluded being Peter Livius, the Chief Justice, August 8, 1776: he subsequently dismissed Livius from his Chief Justiceship, and Livius complained to the Privy Council. The Petition, saying that Carleton had given no reasons for his act, prayed that he should be required to do so. The Board of Trade demanded his reasons from Carleton, and he replied that he had stated them in a letter to Lord George Germain, and had referred him to the Minutes of the Legislative Council for proof of the necessity for him acting as he did. The Board of Trade went into the matter carefully and found the real reason for Carleton's action were Livius objecting to the formation of a Board of Council of five, to the exclusion of the other Members; another objection taken by Livius was also involved: the Board considered Livius right in both instances. The Report of the Board of Trade was approved and, March 29, 1779, an order was made for the reinstatement of Livius: *do. do.*, pp. 594, *sqq.*: 698, *sqq.*: *Acts*, etc., Vol. V, pp. 463, *sqq.*

In later times, two Judges were amoved in Upper Canada; but in

the period we are here considering, I find only one other instance of amoval in a British Colony: and that story is now to be told.

John Dalling was in August, 1777, commissioned Governor of the Colony, the Province of Jamaica. His instructions were in the usual existing form, *inter alia,* giving him authority to suspend or remove officials (including Judges) and requiring him on reporting such action to His Majesty to transmit his reasons therefor.

A Court of Vice Admiralty had been established in Jamaica, chiefly, be it said, for the advantage of the trade of the British Isles, —of course wholly distinct from those established in 1768 in Halifax, Boston, Philadelphia and Charleston (which were not without influence in bringing about the famous proceedings of July 4th, 1776). The Jamaica Court had for its Advocate-General, Thomas Harrison, the Attorney-General of Jamaica, a man of capacity and prominence, who not content with appearing in Court as Counsel, not infrequently appeared as a party litigant.

In proceedings in this Court of Vice Admiralty, the conduct of the Advocate-General received the disapprobation of the Governor who exercised his authority to displace him. His reasons for so acting were not found satisfactory by the Lords Commissioners of the Admiralty at Westminster, and they directed him to reinstate Harrison. This direction the Governor declined to obey, thereby, as was later said in a Report of a Committee of the Privy Council (March 23, 1782) agreeing with and adopting the language of a Representation of the Board of Trade (March 9, 1782) appearing "to have denied . . . the Authority (of the Lords Commissioners of the Admiralty) over the Courts under their own regulation."

Harrison brought the matter before the Supreme Court of Jamaica; and during the course of but before final judgment in the proceedings, four Puisné Justices—"Assistant Judges" they are sometimes called—James Trower, Lewis Burwell Martin, John Grant and William Elpinstone, gave their opinion adversely to the Governor. Thereupon, on June 10, 1780, he dismissed all four, basing his action to a certain extent on "a presupposition of what might be in future their opinion upon the matter before them."

Dalling omitted "to transmit his Reasons for displacing the" Justices "altho' by his Instructions . . . pointedly directed so to do in every instance where he might think it necessary to exert the Power intrusted to him by" the King. The matter came up in the local House of Assembly, and "and Enquiry made into the Conduct of the" Justices "and into the Cause of their being displaced." These proceedings we may pass over for the time being.

The Justices presented a Petition to the King complaining of being "degraded by . . . Dalling . . . pending the Proceedings in a certain matter." When the Petition came before the Board of Trade, the Petitioners asked to be heard by Counsel, but the Board found that Dalling had been granted Leave of Absence from his Government and that his arrival in England was soon expected; and as the Board did not find that he had authorized anyone to appear or to apply for the admission of Counsel on his behalf they deferred complying with the prayer of the Petitioners to be heard by Counsel. But they made a careful examination of the facts, and ultimately, March 9, 1781, laid the Petition before the Privy Council with an admirable representation of the whole matter and a recommendation of the reinstatement of the "degraded" Justices.

The "Representation" pointed out "that a due impartial and uninfluenced administration of Justice in Your Majesty's Colonies is a Matter in which the lives and Properties of Your Majesty's Subjects are most materially intrusted, and that the interference of a Governor in any Proceedings in a Court of Judicature which do not come in due course and officially before him and more especially pending the Cause, is highly improper and ever to be discouraged." Then, it is said: "That the Characters, Integrity and Conduct in Office (Except in this Instance) of the displaced Judges is fully admitted by Governor Dalling as standing unimpeached"; and that if he had done as was directed by the Admiralty and reinstated Harrison, none of the subsequent disagreements could have existed; and the Lords of Trade conclude their Representation by recommending that the four Judges be reinstated "in Order that Justice may be done to the Character and Integrity of the Petitioners and that the minds of Your Majesty's Subjects in the Island of Jamaica may be quieted, that the good of Your Majesty's Service may no longer be impeded and that Harmony and Confidence may be restored."

The matter was referred to Committee, March 16, 1781: the Committee reported March 23, agreeing with the Board of Trade, and the Privy Council accepted the Report and ordered the reinstatement, the same day.

The Legislature had not been inactive. In January, 1781, an Act was passed and assented by Dalling "to make the places of the Judges of the Supreme Court of Judicature and Justices of Assize in this Island more permanent and respectable." Although the Governor had "not thought proper to transmit . . . his motives for assenting to an Act of this Extraordinary Nature, without a Suspending Clause" as his Instructions directed, the Board of Trade thought that "the objection to the Act on the single ground . . . mentioned

should not prevent Your Majesty's gracious Compliance with what appears . . . to be the general wish of Your Majesty's Subjects in that Island." "The too frequent displacing of Judges in Your Majesty's Colonies, upon light and ill-founded occasions, certainly calls for some effective Check and Restraint, Exclusive of the late Examples in the provinces of East Florida and Quebec, which we might adduce in support of this opinion . . . " (The example of East Florida I have not been able to trace—that in Quebec was the removal already spoken of by Sir Guy Carleton of Chief Justice Peter Livius in 1778 on account of his perfectly proper actions in Council,—actions as we have seen approved as those of the Governor were disapproved by the Home Authorities).

Justice is done by the Home Authorities to the Jamaica Assembly, whose legislation "did not proceed from a Desire of Innovation but was grounded upon a very minute and solemn Examination into the State of Facts, and the Conduct of Governor Dalling in displacing four Judges of the Supreme Court . . . " The Board recommended the allowance of the Act, as did the Committee to which it was referred, December 26, 1781—the Privy Council received the Committee's Report, January 2, 1782, and agreeing, acted upon it, the same day.

The unwise Governor Dalling did not escape. Lord George Germain, Secretary of State for the Colonies, sent him a Despatch requiring him to come to Great Britain and giving him Leave of Absence for the purpose; through what is euphemistically called "a misconception of the significance of His Majesty's pleasure by Lord George Germain," he failed to cross the Atlantic, and, December 4, 1781, he was "peremptorily ordered to repair to Great Britain forthwith delivering the Public Seal, his Commission, Instructions and Additional Instructions to the Lieut.-Governor, Brigadier-General Archibald Campbell, who is to exercise the Government and command the Forces."

He obeyed, came to England and was promptly superseded: Archibald Campbell received the Royal Commission as Governor of Jamaica, July 10, 1782, and Jamaica and His Majesty's Service knew John Dalling no more: *op. cit.*, Vol. V, pp. 501-503.

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