They thought further that the power of committing for a Contempt undoubtedly possessed by the House of Commons in England "ought never to be suffered in these inferior Assemblys in America who must not be compared either in power or privileges to the Commons of Great Britain and that it was observable that the Assembly themselves had studiously avoided to declare the Libel to be a Contempt or Breach of Privilege either in the Charge or Sentence pronounced notwithstanding that the Contempt to themselves, the then existing Assembly was the only legal or colourable Ground upon which they could take cognizance of the matter in order to punish the Offender."

They thought, too, that it was a high and unwarrantable invasion both of the Royal Prerogative and the liberty of the subject to order the Sheriff not to obey His Majesty's Writ of Habeas Corpus.

The Lords of the Committee agreed with the Law Officers and so reported to the Privy Council, June 26, 1759. The Privy Council sitting at the Council Chamber, Whitehall, that day agreed and Dr. Smith's appeal was allowed. The Privy Council "in His Majesty's name expressed his high Displeaseure at the unwarrantable Behaviour of the House of Representatives of Pennsylvania in assuming powers that do not belong to them," and not obscurely hinted that the injured party might sue for damages.
Libel on the Assembly.

Dr. Smith arrived home with his judgment, October 3, 1759. February 12, 1760, Governor James Hamilton laid before his Council the Judgment and the next day communicated to the Assembly His Majesty's high displeasure. It is not of record that anyone cared a straw.\textsuperscript{55}

There is no record of any action for False Imprisonment.

Returning now to William Moore whom we have left committed to gaol and denied the right to a Writ of \textit{Habeas Corpus}. He also appealed to the King-in-Council at the same time as the Provost and the two Petitions were considered and disposed of together and with the same result. Moore does not seem to have lodged his Judgment with the Governor.\textsuperscript{56} So ended the novel experiment of the House of Assembly to punish the contumacious.\textsuperscript{57}

It remains to discuss the powers of a Colonial Legislature to deal with Contempts, &c.

\textbf{POWERS OF A COLONIAL LEGISLATURE IN IMPEACHMENT AND CONTEMPT.}

\textit{Impeachment.}

Impeachment in England is of remote origin—some of the authorities\textsuperscript{58} say that the earliest recorded instance was toward the close of the reign of Edward III: but the practice was considerably older. The first case I have found was in the third year of that King when at a Parliament, March 13, 1329, Mortimer had Edmund, Duke of Kent, impeached of High Treason—he was "by the unanimous consent of his peers, adjudged to death."

Next year, Mortimer himself was impeached of High Treason, and "then the earls barons and peers, having examined these articles (of Impeachment) came into
parl. before the King, and they all delivered their opinions by one of their body 'that all things contained in the said articles were notorious, and known to themselves and all the people;' wherefore they as judges in parl. by assent of the King, did award and judge the said Roger (Mortimer) as a traitor and enemy of the King and Kingdom to be drawn and hanged . . . . which was performed accordingly on the 29th of November (1330) at a place then called the Elms and afterwards Tyburn.'

It is true that the Lords and Commons may still have sat in one Chamber—the first division into two Houses is placed by some as being in 1332—but it is to be noted that Commoners took no part in these judgments; and the proceedings were true Impeachments.

Impeachments were in not uncommon use in England until after the Stuarts had disappeared. The practice of impeaching before the House of Lords, however, arose from their position as "Judges in Parliament." This, the Governor, Lieutenant Governor or Deputy Governor of Pennsylvania never was: and there is and was not a grain of foundation for the argument of the House of Assembly that that Officer should or could play the part of the House of Lords in such a capacity.

I can find no instance of the successful assertion of such a right in any English Colony.

There can be no doubt of the legal and constitutional propriety of the Governor's course in this case of William Moore.

Contempt.

As to the power of a Colonial Legislature to deal with Contempt, there has been a complete reversal of opinion. We have seen that in 1758 the very able and learned Law Officers of the Crown, the Attorney-General and Solicitor General, gave it as their official opinion to the Lords of Trade that "the paper in Question was a Libel and if it had been published whilst the
Assembly was sitting which it aspersed, They wou'd have a right to have punished the Authors and publishers thereof as a manifest Contempt." This must be taken to have been the view of the Privy Council as a body; and if the Privy Council had been a Court and bound by its own former decisions, the theory would have been imbedded in the law.

To understand the position of the Privy Council, its history must be borne in mind. By the theory of the Common Law, every subject has the right to take his grievances to the Foot of the Throne—from very remote times the King delegated the duty of hearing appeals against injustice to his Privy Council: Henry VII systematized this in 1487 by the Act, 3 Hen. VII, cap. 1, which formed the Court usually called the Court of Star Chamber: this Court became so oppressive—though originally designed to baulk and punish oppression—that, in 1640, it was abolished by the Act, 16 Car. I, cap. 10. This Act provided that neither the King nor his Privy Council should have any jurisdiction over the lands, goods, &c., of any of "the subjects of this Kingdom." Thereafter, the Privy Council had no jurisdiction over matters in "this Kingdom," i.e., in England; but its Common Law jurisdiction continued over the remainder of the subjects of the King. It is not a Court—in theory, the Petition to the King of one claiming to be wronged is committed by the King to the Privy Council for their advice, and upon that advice he acts.

As early as 1667, a Committee was formed in and by the Privy Council for hearing appeals: at the time in question there was a standing Committee for Colonial and Trade questions, "The Lords Commissioners for Trade and Plantations," "The Lords of Trade and Plantations," "The Lords of Trade," the Board of Trade," as it was variously called. This Committee dealt not only with appeals from Colonial Courts but
also with administration. The practice was for a Petition to the King to be lodged in the office of the Privy Council, the Privy Council at some subsequent meeting formally refer it to the Lords of Trade—that Committee to take the matter up and if it involved a legal question refer it for an opinion to the Law Officers of the Crown or one of them, i.e., the Attorney-General, the Solicitor General and in Admiralty and Civil Law questions, the Advocate General. The lawyers reported, the Lords of Trade solemnly approved and reported to the Privy Council which acted; and an Order was made in the name of the King by and with the advice of His Privy Council.

There was no Court, no adjudication, no judgment—only an opinion, advice and order; and accordingly, while, of course, much deference is paid to its own previous decisions, they are not considered binding by the Privy Council or its Committee. Moreover the decision in the case of Moore and Smith was not reported; the reports of decisions of the Privy Council began with Acton's *Reports of Cases*. . . London, 1811, the first case reported being heard, June 7, 1809.

The opinion, while not quoted, was considered to receive support from the powerful decision of Lord Ellenborough in the famous case of Burdett v. Abbot, (1811), 14 East, 1. Sir Francis Burdett had published a "libellous and scandalous paper reflecting on the . . . House;" the House had ordered him to be committed to the Tower; the Speaker, Charles Abbot, issued his warrant and Burdett was imprisoned accordingly. He brought an action of Trespass against Abbot who pleaded the facts: the plaintiff demurred and the demurrer was argued before the Court of King's Bench. The Chief Justice held that the House had the right to self-protection, including protecting "themselves against injuries and affronts offered to the
aggregate body”—this right was “necessarily inherent in the supreme legislature of the Kingdom” for “Is not the degradation and disparagement of . . . Parliament in the estimation of the public by contemptuous libels, as much an impediment to their effective acting with regard to the public as actual obstruction of an individual member by bodily force in his endeavor to resort to . . . parliament . . . ?”

This is very persuasive reasoning; and it came aptly to hand when, a quarter of a century later, Augustus H. Beaumont, the publisher of a newspaper, the Isonomist, in Jamaica had written and published in his paper, a paragraph reflecting on the House of Assembly and declared by the House to be a breach of its privileges—he was ordered to be committed to the common gaol, for which the Speaker issued his warrant. He brought an action against the Speaker, Richard Barrett, and his officers. The Grand Court held that the imprisonment was lawful, and this judgment was upheld on appeal to the Governor and Council in Jamaica. Beaumont then appealed to His Majesty in Council. Baron Parke (afterwards Lord Wensleydale) in giving judgment applied the language of Lord Ellenborough to the Colonial “legislative body which appears to possess supreme legislative authority over the whole island;” and the appeal was dismissed. Thereby, the power claimed for the Colonial House was affirmed.65 This did not long continue to be considered law; in 1842, the case of Kielley v. Carson et al, came before the Judicial Committee. Kielley was a surgeon and the manager of the Hospital at St. John’s, Newfoundland: John Kent was a Member of the House of Assembly, and, in the House, made some animadversions on the management of the Hospital: Kielley “reproached him in gross and threatening language for the observations he had made:” Kent reported this to the House: the House voted it a breach of its privileges and had him
brought to the Bar: there, he "made use of violent language towards Mr. Kent;" subsequently, he was committed to the common gaol on the Speaker's warrant. He sued the Speaker and others for the trespass—the Supreme Court of Newfoundland gave judgment for the defendants; and he appealed to the Queen in Council. Baron Parke again delivered the decision (after reargument); and, now, Beaumont v. Barrett was departed from and it was held "that the House of Assembly did not possess the power of arrest with a view to adjudication on a complaint of contempt committed out of its doore;" that "They are a local Legislature with every power reasonably necessary for the proper exercise of these functions and duties, but they have not what they have erroneously supposed themselves to possess—the same exclusive privileges which the ancient Law of England has annexed to the House of Parliament." This judgment was carefully reviewed and upheld in 1858. John Stephen Hampton, the Comptroller General of Convicts in Van Dieman's Land, refused to obey a summons to attend at the Bar of the Legislative Council of that Colony; the Council resolved that he was guilty of Contempt and ordered him to be imprisoned, which he was on a Speaker's Warrant. He sued the Speaker and officers and had judgment in his favor on the law in the Supreme Court of the Island. The defendants appealed: the decision of the Judicial Committee was given by Lord Chief Baron Pollock, and it was held specifically that "the Lex et consuetudo Parliamenti apply exclusively to the Lords and Commons of this Country (Britain) and do not apply to the Supreme Legislature of a Colony by the introduction of the Common Law there." Then came an even stronger case from Dominica. G. C. Falconer was a Member of the Legislative Assembly of Dominica, who, called to order by the Speaker, refused to obey, continuing his speech and using insulting language to the Speaker. Directed by the House
to apologize, he refused and repeated his very insulting language—language insulting if untrue, more so, if true. He obstructed the business of the House and he was held in contempt and committed to the common gaol. He brought an action and had judgment on demurrer: the Speaker and other defendants appealed, and the Judicial Committee in a decision given through Sir James W. Colvile, held that "the privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of the lex et consuetudo Parliamenti which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom . . . It cannot be inferred . . . that the like powers belong to Legislative Assemblies. . . . It is necessary to distinguish between a power to punish for a contempt which is a judicial power and a power to remove any obstruction offered to the deliberations or proper action of a Legislative body during its sitting which last power is necessary for self-preservation."

The Legislature could remove, exclude or even expel, but could not "inflict a penal sentence for the offence." In 1886, a case came from New South Wales where a Member of the Assembly, "suspended from the service of the House," entered the Chamber but was put out and kept out. In an action against the Speaker, the Member succeeded in the Colonial Courts and in the Judicial Committee. The wholly intelligible and sound rule was laid down squarely that the powers incident or inherent in a Colonial Legislature are "such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute" and do not extend to justify punitive action—the maxim applies: Quando lex aliquid alieni concedit, concedere videre et illud, sine quo ipsa esse non potest—whenever the law grants anything to anyone, that also is considered to be granted without which the thing itself (specifically granted) could not exist.
The whole of this learning has become practically effete by a decision in 1896 from Nova Scotia—this in effect decides that while a Colonial Legislature (at least a Canadian Legislature) has not such extensive powers intrinsically, it may give itself these powers by legislation—and, if it so decides, it may give itself "the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal."

Powers to adopt as their own the privileges, powers and immunities of the Imperial House of Commons have been expressly granted to Canada and its Provinces, Australia and other parts of the Commonwealth of British Nations. When the older theory of the powers of a Colonial Legislature had vogue, there were many instances of the exercise of the power to commit for contempt.

To take but one Colony—Upper Canada (now Ontario)—in 1793, the Sheriff of the Home District narrowly escaped being laid by the heels for serving a Writ of Capias upon a Member of the House of Assembly—"House of Commons" as it sometimes called itself. In 1803, a Master in Chancery, David Burns, was arrested and brought to the Bar of the House for not obeying a Summons to attend a Committee but escaped punishment because he was an officer of the Legislative Council. In 1811, the Sheriff had to express his contrition for summoning as Petit Juror a Member of the House; and, in the same year, an Attorney narrowly escaped imprisonment for having a Writ served on a Member of the House.

In 1812, Robert Nichol was actually sent to gaol for "making a false, malicious and scandalous representation to the Person administering the Government relative to the proceedings of the House"—a parallel case to that of William Moore. He was released on Habeas Corpus, the Warrant being defective.
In 1808, Joseph Willcocks was committed to the Common Gaol for false statements made out of the House concerning Members: he remained in custody until the day Parliament rose when he was released by order of the House—he had not to wait and apply by way of Habeas Corpus as Dr. Smith seems to have been obliged to do in Pennsylvania.\textsuperscript{72}

There is, however, no authority that a Legislature can punish for contempt of any other Legislature—accordingly the Pennsylvania House was wrong in that regard also.\textsuperscript{73}

\textit{NOTES.}

\begin{itemize}
\item \textsuperscript{72} 8 Minutes, pp. 438, sqq.
\item \textsuperscript{73} Acts, Vol. IV, p. 375.
\item As bearing upon the case of Moore, it may be said that a most extraordinary document is printed in \textit{3 Pennsylvania Archives}, Philadelphia, 1853, at pp. 322, 323, of which the Editor, Samuel Hazard, says: “This is probably satirical and is inserted to show the state of feeling at the time.” (We are perfectly safe in substituting “certainly” for “probably.”)
\end{itemize}

The document reads:

\begin{quote}
"Confession of W—— M—— Esq., 1757.

The Honest Confession of W—— M—— Esq. on going into Banishment from the Province of Pennsylvania.

\begin{center}
\textit{Fiat Justicia Let Justice be done.}
\end{center}

I am now, by the Voice of the People, and by their Representatives, Judg'd a person not fit to be Employ'd in any Post under the Government: time was that I had an opportunity of making my Character appear Less Odious, and Indeed had it not been for my Conscious Misbehaviour, I should have appear'd, but who can face Truth without Conscious Innocence and integrity of mind.

I Confess that my applying to the Assembly for the Coppys of the several Petitions, was a Tacit Confession that I intended to appear in my own Vindication; and when summoned so to Do, I acted Inconsistent not to Obey it.

I Confess as to my Character, since I put up for any Post of honour or Profit, That I once made myself believe I could act the Patriot, and accordingly made Interest to be Choose for a Representative: Then I opposed Loudly all Proprietary Innovations, and was warm for the Liberty of my Country, but getting nothing, but the honour of serving
my Country, I found that a Post of Profit might, with my skill, be more Advantageous. Therefore I Lay'd down the Patriot Scheme and Took a Commission of the Peace.

I Confess this Commission (as Avarice was my Governing Passion) was very profitable, and to secure myself in my station, as I Improv'd my own so I help'd others to Pocket also; This you All know.

I Confess that the Judgment of the Assembly (In the nature of my case) could be no otherwise than as they have given it.

I Confess that my Vindication (so called) is Only my say so, and therefore no Vindication, and as it was Published and handed about to abuse and prejudice my Judges in the Eyes of the people, it must Appear as the weak efforts of my Vindictive Temper.

I Confess the Assembly does not yet know all my Oppressive Practices.

I Confess that my pride is such, that I would have it Thought, I give Advice and sway in the Cabinet Council.

I Confess, that as to my Loyalty, I begin to suspect it, as I do that of my Forefathers, but of this you'd say that some parents Propagate their Vices as well as their Diseases. This is a severe Twinge in my Conscience, and my toe put me in mind of it the Other Day.

I Confess that every Corrupt Majestrate should be Lop'd off, and hope my Banishment will be a Warning to all such.

I Confess my Judges in the Right, and pray that they may always keep Open the Door to hear the Complaints of the people against Injustice and Oppression.

May my unhappy Case be a Warning to all men in Power, from the Supream to the Inferiour Magestrate.

May I have the honesty to make Restitution, as I have it in my power, and may I have the Grace to amend my future life and Conduct. To assist me in this work of Reformation, and I desire the prayers of all Good Christians.

21 Decr, 1757. Paper given me by George Asler. Confession of Wm, Moore, Esqr, said to be wrote in Town.”

One of the Petitions against Moore is given, do. do., pp. 328, 329, as follows:

“Petition Samuel Lightfoot, 1758.
To the Honourable William Denny, Esq., Lieut. Governor of the Province of Pennsylvania, and the Counties of Newcastle, Kent, and Sussex, &c.

And to the Representatives of the Freeman of ye sd Province in General Assembly met.

The Petition of Samuel Lightfoot, of the County of Chester, in ye said Province, Humbly Sheweth, That as your Petitioner hath for several Years past, been Concerned to Act under a Commission of the Peace, and as part of the Service of those who so Act, is to hear and Determine complaints for Debts and Demands under forty Shillings. Your Petitioner hath suffered much Trouble, Shame and Disgrace, in the Discharge of this part of his duty. By the Proceedings and through the Practice of William Moore, of the said County, Esq., who Hath
Libel on the Assembly.

frequently taken Causes under his Consideration, and acted in them as he pleased, after the same Causes had been Heard & Determined as your Petitioner adjudged according to Law, by & Before him, to the Damage of the Publick, as also to the Scandal of your Petitioner.

One instance of the said Practice appears to the World, in the Memorial of the said William Moore, to the Petition (No. 9) of Adam Ramsour, where he asserts that there appeared to him a just Debt of fifteen Shillings, due to John Stone, from said Ramsour, after your Petitioner had adjudged between the said Parties, and that the Judgment of your Petitioner could be no Barr to the subsequent Judgment of Him the said William Moore.

The Particulars of the said case may be laid before you.

Now, although this Law for Determining Demands under forty Shillings, hath been long in use, yet it seems there is some ambiguity in it, or otherwise a misunderstanding in those whose Office it is to Execute the same. For your Petitioner is of opinion, That the Tenure of the said Law, and the Tenure of the Memorial abovementioned, are Contradictory, the one to the other. He therefore Humbly Prays, That you may be pleased to Revise the said Law, and supply or explain the same; Or otherwise to ease your Petitioner, and Secure the Publick from repeated and excessive Costs, as you in your Wisdom shall see Cause. And your Petitioner shall as in Duty bound ever Pray, &c.

SAM. LIGHTFOOT.

We, the Subscribers, Inhabitants of the above mentioned Province, believing that the Contents of the above Petition is of General Concernment, inasmuch as it may be the case of any Person concerned in Dealing, to have occasion to sue for Small Demands, or be liable to be sued for such; We therefore Humbly desire it may be duly Considered.

Moses Coates, Jun.,
Thomas Valentine,
David Davies,
Moses Coates,
John Milhous,
John Edwards,
Amos Davies,
Jonathan Valentine,
Enoch Butler,
Jonat'n Coates,
Adam Ramsower,
Noble Butler,
John Jacobs, Jun.,
Thos. Milhous, Jun.,
John McCord,
David Owen,
Joshua Baldwin,
David Caldwalader.

Petition Indorsed Sam. Lightfoot agt Justice Moore, 7 Jan'y, 1758."

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His Warrant of Commitment is given, do. do., p. 333: it reads:

"Commitment of Wm. Moore, J. P., 1758.

Pensyvlna ss:
To James Coultas, Esqr., Sheriff of the County of Philadelphia. The House of Assembly of this Province hath this day adjudged William Moore for writing, Signing and publishing a false, Scandalous, Virulent & Seditious Libel against the last House of Assembly of this Province, and Highly derogatory to & Subversive of the Rights & Privileges of this present House, and also for a Contempt Committed against this House in refusing to answer Certain Petitions exhibited against him Complaining of Misdemeanours & Corrupt Practices in his Office as a Justice of the Peace for the County of Chester. These are therefore in Behalf & by order of the said last mentioned House of Assembly to require & Charge you to receive the said William Moore into your Custody within the Common Goal of your County, under your Charge, & him therein safely to keep & detain untill you shall receive further orders from this House. Hereof Fail not as you shall answer the Contrary at your peril.

Given under my Hand this Eleventh day of January, in the year of our Lord one thousand seven Hundred & fifty Eight.

THOS. LEECH, Speaker."

The Governor's letter to him on his acquittal is given, do. do., pp. 511, 512. It is as follows:

Gov. Denny to Justice Moore, 1758.

"Mr. Moore:

It is now near twelve months since I received an address from the Assembly of this Province charging you with Oppressive, extortionate and illegal Practices in the office of a Justice of the Peace for the County of Chester which you have long had the Honor of holding, and requesting in warm terms that I would remove you from that, and all other offices you enjoy'd, under this Government. From the moment I received this Address I determined to make the strictest Enquiry into the Truth of the several charges that were made against you, and to rid the People of your Tyranny and Oppression, if, in the Court of that Inquiry, any of the complaints made against you, should appear to me to have any just Foundation, of which I gave the Assembly the strongest assurance. To this end I soon afterwards appointed a Day to hear you and your Accusers Face to Face of which I gave them and you notice. The Reasons why I did not make this inquiry on that day, and have occasioned this matter to be so long delayed, are so generally known that I need not now make mention of them. The Assembly at my request furnished me with no less than twenty seven Petitions preferred against you, several of which containing Complaints of a mere private nature. I did not think they properly lay before me, but I referred the Parties to seek Redress in the Courts of Law in the ordinary Course of Justice, but I have spent Two Days with Patience and Attention in hearing every thing that could be alleged against you in support of such of them as charged you with malepractices in your office as a Justice. I am very sensible of the Difficulties and hardships
you necessarily have been under in producing witnesses to defend yourself against charges of this nature, especially when I consider that most of the Transactions complained of are of many years standing. It is a great pleasure to me to find that you have been able to surmount all the Difficulties, and to acquit yourself of every matter laid to your Charge, which you have fully done to my satisfaction, and I think myself obliged in justice to your injured character in this publick manner to declare that the Petitions appear to me to be entirely groundless, that you have acted in your office with great care, uprightness and Fidelity, and are so far from deserving Censure and disgrace that you merit the Thanks of every good man and Lover of Justice.”

In connection with the claim of the House to punish for contempt, it may, perhaps, be of interest to note that Lieutenant-Governor Patrick Gordon, December 17, 1728, when addressing the House of Representatives, said:

“In the mean time Gentlemen, I must put you in mind that a Legislative Assembly in Conformity to a British House of Commons is invested with a very great deal of authority. I hope, therefore, you will not be wanting, as well in regard to yourselves as succeeding Assemblies to make all such sensible of their Error who shall dare to treat it with Indignity . . .”

The House had complained, April 25, 1728, that eight of the twenty-three Members had refused to attend the Sittings. 3 Col. Rec., pp. 298, 299, 349.

The following will be of incidental interest.

A Petition to the Governor of Pennsylvania from the Inhabitants of Cumberland County for arms and ammunition, August 17, 1755, another, August 12, 1756, and a third, August 28, 1756, are given, 2 Pennsylvania Archives, pp. 385, 386, 757-759.

Adam Hoops wrote to the Governor from Camogogig, November 3, 1755, that he had received an Express from “Peters Township that the Inhabitants of the great Cove were all Murthered or taken Captive & their Houses & Barns all in Flames . . .”: horrible particulars are given: do. do., pp. 462, 463.

In Benjamin Franklin’s Instructions to Captain Vanetta (John Van Etten) at Bethlehem in the County of Northampton, January 12, 1756, the Captain is directed (No. 6) to inform his men that $40 will be paid by the Government for every scalp of an Indian Enemy: also (No. 10) “that their Powder be always kept dry”: do. do., pp. 546, 547.

Some fifty soldiers of Vanetta’s Command signed an obligation, inter alia, “whoever of us shall get drunk, desert or prove cowardly in Time of Action or disobedient to our Officers, shall forfeit his Pay”: do. do., p. 547.

Petitions for arms and ammunitions or Protection were sent from Northampton County to “His Onner,” May 4, and again later, from the Frontiers, May 7; from Derry Township, May 16; from York County, July 21, 1751; from Berks County, March 15, 1758.

Libel on the Assembly.

The Militia Law, passed November 25, 1755, recognized the "Liberty of Conscience" of those of "other Religious Denominations" than the Quakers, who are not under the constraint of the Quaker tenet against bearing Arms but "have been disciplined in the Art of War and Conscientiously think it their duty to fight in Defence of their Country, their Wives, Families and Estates and such have an Equal Right to Liberty of Conscience with others": and allowed such persons to form themselves into a Militia. The Act was to be in force until October 30, 1756. This may be considered a great concession on the part of an Assembly of which a great part were Quakers. *2 Pennsylvania Archives*, pp. 516, 519.

In a letter from Governor Denny to the Proprietaries dated from Philadelphia, June 30, 1757, he says:—"I had the further Mortification to hear of the Enemy Indians coming within Thirty Miles of the Place of Treaty desolating a long Tract of Country and Killing and scalping many of the Inhabitants. Four dead bodies, one of which was a Woman with Child, were brought to Lancaster from the neighbouring Frontiers, scalped and butchered in a most horrid Manner and laid before the door of the Court House for a Spectacle of Reproach to everyone there, as it must give the Indians a Sovereign Contempt for the Province. They were however removed by my Order. . . ." Lancaster was the "Place of Treaty": *3 Pennsylvania Archives*, p. 194.

William Peters writing to his brother Richard from Philadelphia, September 29, 1758, says in a postscript "Kirk took Mr. Moore this afternoon at ye Coffee House and 'tis expected Mr. Smith will be in custody to-morrow": *3 Pennsylvania Archives*, p. 547.

In *6 Acts*, p. 125, is a report to the Privy Council by the Board of Trade, August 30, 1720, in which it is said that "Carolina (is) exposed to danger from the Indians from their European neighbours and lately from their own slaves who are too numerous in proportion to the white men there."

*E. g., Crabbe: History of English Law, p. 263; however, the doctrines of Impeachment were not settled at that time: Pike: Constitutional History of the House of Lords, pp. 179, 206.*


*Do. do., p. 91: Lord Ellenborough, L. C. J., in Burdett v. Abbott, (1811), 14 East 1, at pp. 136, 137, says: "The separation of the two Houses seems to have taken place as early as the 49 H. 3, about the time of the Battle of Evesham," i.e., August 4, 1265; but, as he says, the date "is a matter more of antiquarian curiosity than of legal importance."

*2 Acts, p. 383, The opinion is cautious and "upon the whole."

*The predecessor of the Judicial Committee of the Privy Council—now composed of Judges from all over the Empire—the final authority in the whole British world outside the British Islands—for the United Kingdom, the House of Lords is the final authority. But the House of Lords is a Court and bound by its own decisions—the Judicial Committee is not.*
Many cases of appeals from Colonial Courts are found in Acts.

It may be added that for some time before the Declaration of Independence, there was, as there is in some quarters in Canada today, a strong objection in the Colonies to an appeal to the King-in-Council. E.g., we find Cadwallader Colden, Surveyor General and Acting Governor of New York writing from Fort George, New York, December 10, 1764, to Sir William Johnson, Indian Superintendent: “No doubt you will or have heard of a Grand Dispute about allowing appeals to the King. The whole Body of the Law, Judges & Lawyers, are violently against it as it will undoubtedly lessen their Power and Influence...”


68 I speak from personal knowledge in a case of my own as well as from reported cases e.g., in the case of Read v. Bishop of London, (1892) A.C. 644, their Lordships refused to follow the decision twenty-three years before in (1869) L.R. 3 P.C. 651, because they did not concur in the reasoning of the earlier case.

The doctrine of *res adjudicata* is adopted but not that of *stare decisis*.

64 Reports of Cases... in the Court of King's Bench... By Edward Hyde East, Esq.,... London, 1812, Vol. XIV. The defendant, Abbot, was Charles Abbot, later the first Lord Colchester, not the celebrated Charles Abbott, Lord Tenterden. Sir Francis Burdett was a very prominent and active member of the Opposition—he was imprisoned again on political charges in 1820.

65 Beaumont v. Barrett, (1836), 1 Moore's Reports of Cases heard... by the Judicial Committee... of the Privy Council, cited as 1 Moo. P.C.C. Baron Parke states, p. 78, that such imprisonments had been ordered by the House of Commons “in 1687, 1688, 1696 and 1709 and subsequently.”

66 Kielley v. Carson et al., (1842), 4 Moo. P.C.C., pp. 63-92. The appeal was allowed and the damages were ordered to be assessed on a Writ of Inquiry.


68 “Which, pursuant to motion, were noted down as follows: ‘Who the devil are you to call me to order? You are a disgrace to the House.’” The Speaker was Thomas William Doyle, the Appellant: Doyle v. Falconer, (1866), L.R. 1 P.C., 328. “You may tell me that I am in contempt one hundred times if you like but I shall speak. You may move it one hundred thousand times. I repeat what I have said. You are a disgrace to the House: you were expelled the House for robbery; the Minutes of 1845 can shew it:” do. do., p. 330.


70 Barton v. Taylor, (1886), 11 Appeal Cases, 197—the decision was voiced by Lord Selborne. The Latin maxim is the sententious language of Sir Edward Coke (commonly called Lord Coke, but he was not a peer) in the case of Oath before Justices, 12 Coke's Reports, p. 130: see Broom's Legal Maxims, 9th Ed., London, 1924, at p. 312, for a longer interpretation taken from the case spoken of in the Text of Fenton v. Hampton, 11 Moo. P.C.C., 347, at p. 360.

71 Fielding v. Thomas, (1896), Appeal Cases, p. 600, at p. 612—the Lord Chancellor Lord Halsbury, giving judgment.
Libel on the Assembly.

For a full account of these episodes see my Article: The Legislature of Upper Canada and Contempt: 22 Ontario Historical Society, Papers and Records, Toronto, 1925, pp. 186, sqq. 8 Report of the Bureau of Archives . . . Ontario, Toronto, 1912, pp. 225, sqq. Willcocks was an Irishman, a Member of the House, "agin' the Gov'rnent," who joined the American invader, became an American Colonel and was killed at the siege of Fort Erie.

Some account of the activities of Dr. William Smith in another direction may be of interest.

While many of the members of the Church of England in the American Colonies were as broadminded and tolerant as their successors in the Episcopal Church, there were many who had—or at least, said they had—the lowest opinion of the patriotism and genuine religion of those who did not conform to their Church.

One of the latter class was Sir William Johnson of the Mohawk Valley, New York, Superintendent of the Indian Department.

Many of his Papers, some injured by fire, indeed, have been published by the State of New York under the very efficient editorship of Dr. Alexander C. Flick, State Historian; so far, five volumes have appeared, bringing the documents down to December, 1767.

He was a convinced and fervent member of the Church of England: he had advised an Indian version of the Book of Common Prayer to be prepared for his wards, and we find him writing from his fine mansion at Johnson Hall, March 30, 1763, to the Revd. Dr. Barclay, a letter containing the following: "I am of opinion that this Edition will conduce to incline the Christian Indians to the Established Church, which will have a better effect upon them than what I see arises from their inclination to the Presbyterians as all those Indians who are Instructed by the Dissenting Missions (who are the only Clergy in these parts) have imbibed an air of the most Enthusiastical cant and are in short intermixed with the greatest Distortion of the features & Zealous Belchings of the Spirit, resembling the most Bigotted Puritans, Their whole time being spent in Singing psalms amongst the country people, whereby they neglect their Hunting & most Worldly affairs, & are in short become very worthless members of Society. I cannot omit mentioning my opinion of the great necessity there is for some Ministers of the Established Church to reside in these parts as well for the Whites as Indians, without which the former must in short time become altogether Presbyterians, which I have observed seldom betters them, Encreas[ing] the Misanthropy of the Splenetic, & rendering them enemies to all our Laws & the British Constitution; and as to the In[ds], who in general begin to incline to that Presbytery all those of that denomination, are likewise become the most troublesome & discontented Exchanging their Morality form a Sett of Gloomy Ideas, which always render them worse subjects but never better men." 4 Papers, pp. 72, 73.

He thought Dissenters and "their proselytes, a Canting Sett of Nominal Christians": 5 Papers, p. 439. He complains that the "Country . . . abounded with Dissenters"—4 Papers, p. 47; and it is
permissible to think that a great part of his objection to them was founded rather on their supposed want of loyalty to Britain than their want of conformity to the Church of England. It was, largely, in this view that he took an active part in the attempt to have a Bishop of the Anglican Commission appointed for the American Colonies: it was believed that this would do much to strengthen the Church and tend to increase loyalty in the Colonies to the Mother Country. Whether this conviction was well founded, we may, remembering George Washington, seriously doubt: but that it was widespread then and later does not admit of doubt. For example General John Graves Simcoe, first Lieutenant-Governor of Upper Canada urged both before and during his governorship, the paramount need of the appointment of a Church of England Bishop for his Province if it was to be kept loyal. See my Life of John Graves Simcoe, Toronto, 1926, pp. 347, 353, 358, 361.

Canada having in 1763 become de jure what it had been from 1760 de facto, a Colony of Great Britain, the scheme proposed by ardent Churchmen both in Canada and further south, was to have a Bishop with his seat at Albany—4 Papers, pp. 299, 342 (here, by the way, occurs a very common complaint then and thence hitherto, of the Scots monopolizing preferment): 448, (a reference to the handsome establishment designed for a Bishop at Albany), 501.

Dr. Smith comes into the story in 1765—he had of course, received his vindication at the hands of the Privy Council and was active in his duties as Provost of the new institution of learning in Philadelphia. He seems to have formed the acquaintance of Sir William on a journey from Philadelphia to Bristol in this year, and we find him in November sending to Johnson his best respects, and Johnson, November, 21, 1765, being "Extremely Glad to hear from Dr. Smith at any time" and sending his Compliments: 4 Papers, pp. 866, 867, 877.

Johnson writes Dr. Smith, January 30, 1766, from Johnson Hall, congratulates him on his safe return to America and says that he (Johnson) has refused the request of "a (non-Anglican) Clergyman & some New Settlers in the County . . . to patronize and assist them," he considered it "necessary in this Country as the Established Church is Weak and held in too much Contempt by the blind Zealots of other Communions who may one day repay with a heavy hand whatever Severitys they at any time Suffered or rather brought on themselves in England . . ." 5 Papers, p. 23.

In a letter to the Revd. Dr. J. Ogilvie, February 1, 1766, he repeats much the same sentiments: 5 Papers, pp. 27-29. In an Address to the Clergy of the Church of England, December, 1766, he repeated what he had already urged upon the authorities, i.e., that "at Least, two Bishops are absolutely necessary at present the one for the Northern (Johnson's own), the other for the Southern Colonies & that the Church can never flourish till such Establishments are made so as to have Ordination & a Regular Church Government in America. This plan would doubtless meet with great opposition from the Numerous Enemies of the Chh of England . . . Be Assured Gentlemen . . . that . . . that Church . . . as it forms a part of the Constitution of England is also
one of its surest Supports . . . : 5 Papers, pp. 461, 462. (Of course, everyone was an Enemy of the Church of England who did not believe in establishing it in America as the State Church.)

This was but backing up the Address to him, November 29, 1766, from the Clergy of the Church of England, in which it is said: "The Church of England, which hath ever been looked upon as so closely connected with the State that the Ruin of one must terminate in the Destruction of the other, is left to provide for itself in the most deplorable Circumstances. Nor do we conceive any probable means whereby a Remedy may be provided, unless by the Regular Establishment of such a Number of Bishops on the Continent as may be sufficient to take Care of the Church's Interest . . . We do therefore . . . most earnestly and ardently desire and entreat that you make such Representations of . . . the Necessity of Bishops being speedily appointed to reside in America . . . to the Board of Trade . . ." This was signed at King's College (now Columbia University), New York, 5 Papers, pp. 432-434. By the way, Johnson became in 1770, a Trustee of the Dutch Reformed College at New Brunswick, originally Queen's, now Rutgers College: 5 Papers, p. 526, note 2.

Dr. Smith took considerable interest in the project of a Bishop for America, but had apparently much more at heart the conversion of the Indians; he was much more liberal than Johnson and had no objection to the activities of the Presbyterians so long as they did "not act for any Scheme of temporal or exclusive Jurisdiction . . . There is Room for them & for us too": 5 Papers, p. 511. Oddly enough, he thought that "the excellent Policy of the Jesuits in framing their Paraguay Missions deserves our Imitation"; and Johnston entirely agreed with him: 5 Papers, pp. 511, 512, 530. This throws a flood of light on the real views of both Smith and Johnson.

The general feeling amongst members of the Episcopal Church at the time is expressed in a letter to Johnson from the Revd. Dr. Samuel Johnson (1696-1772) first President of King's College, New York, and Rector at Stratford, Connecticut, written from this place, November 1, 1766: he says " . . . the Interest of Religion in general . . . extremely suffers in America for want of a Bishop or two . . .", there is a "great & even scandalous Defect in our American Affairs" in the lack of them.

It would seem reasonably certain that the desire in this regard would have been met but for the growing discontent in the Colonies with the whole Colonial policy and administration. In the result, no Bishop was consecrated for the American Colonies before the Revolution, and we find Samuel Seabury, the first Bishop of the American Protestant Episcopal Church waiting for a year in vain in England to obtain consecration from the Bishops of the Church of England, and being forced to obtain it from the Bishops of the Episcopal Church of Scotland, 1784. Three years thereafter, in 1787, however, English Bishops at Lambeth consecrated William White and Samuel Provost, as Bishops of Pennsylvania and New York; and, in 1791, James Madison as Bishop of Virginia.