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

In this connection it is convenient to consider the question of appeals in
criminal matters under the charter reservations. The language of the Massa-
chusetts charter clearly ruled out any appeals except those civil in nature.
The reservation in the patent to William Penn was so general that it was
maintainable that criminal appeals were included therein.

In Pennsylvania, on May 8, 1718, Hugh Pugh and Lazarus Thomas, convicted of murder at a
Court of Oyer and Terminer and sentenced to death, in a petition to
Lieutenant-Governor Keith insisted upon an appeal to the King as their un-
doubted 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
securing the appeal reservation in the charter and gave reasons for the appeal—
all involving the use of the affirmation by the grand and petty juries.

First, several of the grand jury and eight of the petty jury were Quakers
or reputed Quakers and were qualified only by affirmation, contrary to
Penn’s deposition.

Secondly, the provincial act by which judges, jury, and witnesses were qualified was passed after the alleged murder was committed and

when an appeal to the King in Council had been prayed by the prisoner, he became
liable to have the appeal set aside by the Earl of Hillsborough that

it was improper for the governor to grant a reprieve in order for the crown law
officials and petitioner, respectively, to take such measures as they thought fit.

135 In 1671, in Bostock v. Bostock, 3 Mod. 20, 21, 22, the Governor
and Council of Massachusetts grant an appeal to the King in Council, but
without any reservation of the charter.

136 In 1732, in Bostock v. Bostock, 3 Mod. 20, 21, 22, the Governor
and Council of Massachusetts grant an appeal to the King in Council, but
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after another act of the same nature had been repealed by the late Queen,145

Thirdly, the act was not consonant to reason, but repugnant and contrary to the
laws, statutes, and rights of the Kingdom.146

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, de-
clared 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 sen-
tence imposed.161 However, the attempted appeal served to stimulate legis-
lation 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 1726, we find
the Supreme Court granting appeals to two Marylanders, Runsey 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 in-
struction, 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 gov-
erning the English appellate process to conciliate appeals.184 This last man-
er of regulation was apparently a peculiarity of Jamaica practice, for there was
provided (Section 6) that no Quaker or re-
peted Quaker should by virtue of the act
be qualified or permitted to give evidence in
any criminal cases or serve on any juries.

144 For the act permitting qualification see 3
Stat. at Large Pa., 351; the repealed act re-
ferred to was presumably A Supplementary Act
to a Law about the Manner of Giving Evi-
dence (ibid., 425) disallowed by the Queen
in Council in January, 1713/4 (ibid., 543).


153 Ibid., 41–42. One Council member sug-
gested 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 Pennsyl-
vania with the British Government, 1658–
1765 (1912), 234 et seq.

154 See Fitzroy, Punishment of Crime in In-
vincial Pennsylvania, 60 Pa. Mag. of Hist
and Biol., 259. For the resulting status see 1
Stat. at Large Pa., 199.

155 Daniel Dunlap to Lord Baltimore, Oct. 10,
1726 (Dunlap MSS., Box 2, #4). C. of the Im-
perial, 1277, petition of Runsey and William Cane,
to the Council Board that they be discharged
from indictments in the Supreme Court of Pennsyl-
vania or that they be tried and al-

owed to appear (3 APC, Col. p. 339).

156 We have seen the evidence of the 1766
statute mentioned by Kellogg (The duties of
Colonial Charter, 1 Annual Rep. Amer. Hist
Assn. [1903], 268, note) as defining appeals

157 In Orby v. Long (January 25, 1709/10)

appeal, in praying an appeal, 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
demand. The court ordered appellant to give
security in penalty of £1,000 “to prosecute
the party with effect according to the statute.”
(2 Md. Jour. Court of Errors Proceedings, 16;
Brown v. Reppent, also prayed liberty to appeal to the Privy Council, express-
ing willingness to give security according to
the act of Parliament and the royal instruc-
tions. The appeal was allowed on giving
£1,000 security to prosecute with effect ac-
cording to the statute. (ibid., sub Oct. 27).

158 In Russell v. Pusey it was alleged that
giving security according to the act of Parlia-
mament and the royal instructions
(3d, sub November 16, 1733): in Price v.
Price, giving £1,000 security to prose-

151 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 plaint-
iffs 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 no such security had been
given it was insisted upon that the said writ
was illegal 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).

159 See An Act to avoid Unnecessary Costs of
Exercising Acts of Assembly of Jamaica
(1785), 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. 456 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.