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Connecticut and the British Government[*]

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I

IT is a well known fact that during our colonial period Connecticut and Rhode Island were endowed by their royal charters with larger powers of self-government and greater freedom from royal control than were any of the British colonies extending from Newfoundland to Barbadoes. In the British scheme of colonial management they occupied a position so anomalous and exceptional as to place them in a measure almost outside the category of colonies, according to the contemporary definition of that term. Whereas to the English official and merchant a colony was a dependency, the value of which varied according to the extent of its contribution to the prosperity of the mother country, these two colonies played practically no part in advancing the welfare of England; and, except as occasional incidents brought them to the attention of the Privy Council or the Board of Trade, they remained, particularly for the first half of the eighteenth century, small and relatively

* Reprinted from *Fane's Reports on the Laws of Connecticut.* Acorn Club Publications, 1915.

insignificant communities, largely unknown to the authorities at home and in no way serving, according to the phraseology of the day, as "a Dutiful Colony, attentive to the Interest and Welfare of the Mother Country." The Board of Trade described the situation accurately enough when it said in 1730, "We seldom hear from them except when they stand in need of the countenance, the protection, or the assistance of the Crown." In 1740, the board added, "The Crown has no revenue in this Government [Connecticut], nor is it known how they support their Government," and again in 1741, "they think themselves by their charters little dependent on the Crown, and seldom pay obedience to royal orders."

Why such a situation was allowed to continue, in the face of frequent protests by the Board of Trade and others concerned with colonial management, is an interesting question in the history of English party politics. The immunity from outside control which the colonies claimed under the terms of their charters was contrary to the principles of colonial relationship accepted at the time, and led to many attempts, before and after 1700, to bring all the charter governments under the immediate authority of the crown. Connecticut and others deemed these attempts illegal and oppressive, but the authorities at home, with a purpose in view that was entirely reasonable and legitimate, considered them necessary for the protection of the colonies against the French, and for the advancement of England's commercial welfare. Connecticut was charged with exercising many functions that lay beyond her corporate powers:—trying cases of robbery and murder, making capital laws, and punishing with death—none of which acts were authorized by her charter. She was likewise charged with performing many things derogatory to the royal rights and injurious to the

prosperity of British subjects. In some cases the charges were true. Connecticut had refused to unite with the other northern colonies under a common military head in time of war, had denied the authority of the vice admiralty courts set up for the prevention of illegal trade, had declared that she would not recognize the right of appeal from her courts to the King in Council, and had passed laws that were contrary to those of England. But in many other cases the charges were either baseless or exaggerated. Complaints from English officials in America of connivance with piracy and illegal trade must be taken very cautiously, and the grievances of disaffected colonists must not be accepted at their face value. Still there was some truth in the latter's contention that the government of the colony was in form a republic, which it was never designed to be and had no right to be, and that in operation it was arbitrary and oppressive, hostile to monarchy and church alike, separated from the crown as well as the church of England, and recognizing neither the authority nor the laws of the mother country. The constant iteration of these charges inevitably drew the attention of the Board of Trade and the Privy Council to the conditions in Connecticut and elsewhere, and led to the attempt, many times repeated, to pass an act of parliament depriving all the proprietary and corporate colonies of their charters, thus altering their status to that of the royal colonies.

But all these and other attempts failed. The "ill use [which the proprietary and corporate colonies made] of the powers entrusted to them by their charters and the Independency which [they] aspired to" did not prevail with parliament as a sufficient argument, owing in large part to the powerful and growing Whig influence, which viewed the proposed measures as but Tory instruments

designed to enslave New England. Connecticut had good friends at court. Fitz John Winthrop had gone over in 1693 to plead the cause of the colony, and had performed his work so well that in 1697 the Board of Trade wrote that he had "diligently solicited all things that concern the colony of Connecticut." He was succeeded by Sir Henry Ashurst (agent, 1698–1710), friend and son of a friend to New England, and he by Jeremiah Dummer (agent, 1710–1730), whose *Defence of the New England Charters*, first published in 1721, presented effective arguments in the colonies' behalf. Dummer was followed by Francis Wilks (agent, 1730–1742), an astute London merchant, who continued to defend the colony against the efforts that were made as late as 1740 to take away the charter or to join Connecticut and Rhode Island into a single province under a royal governor. During the period of Dummer's agency attempts were made also to persuade the colonies individually to surrender their charters of their own accord. But these attempts likewise failed, except in the case of the Jerseys, the Carolinas, and the Bahamas. The reply from Rhode Island, written by Gov. Cranston, and that from Connecticut, written by Gov. Saltonstall, are supplemental to Dummer's *Defence* and present with vigor and shrewdness the point of view of the colonies.

Though Connecticut continued to remain outside the range of direct royal control, the colony was frequently brought into relations with the government in England. In 1701, the attorney-general decided that though there was "no reservation of appeals to his Majesty in the charter granted to Connecticut," yet an appeal did lie to the King in Council "as a right inherent in the Crown," and in case the colony refused to allow an appeal, the Council could proceed "to hear the merits of the cause

upon an appeal, whether that appeal be allowed or admitted there or not." That the Council acted on this decision we know well. In 1702, the secretary of state directed the colony to enter into a regular correspondence with his office, giving him "such accounts from time to time of what occurs" in the colony, "as you shall think fit to impart to me for Her Majesty's service"; but in this particular the secretary's instructions were better honored in the breach than in the observance. Except for the answers to queries, few letters were written by the governors to the secretary of state until after 1762, and even then the number was not large or the occasions frequent. In all that concerned trade and the observance of the Navigation Acts, the colony was always open to the royal commands, and was included among those to which were sent any instructions deemed necessary in order to secure the proper execution of the trade laws. Though the election of the governor of Connecticut did not have to be confirmed by the crown, each governor took the oath required by the acts of trade, in the presence of the General Assembly, and after 1722 was expected to give bond for the execution of the acts, though in fact he rarely did so. Circular instructions concerning such matters as piracy, ships' passes, prayers for the royal family, Greenwich Hospital dues, royal and admiralty rights, duties on negroes and felons imported, relations with the enemy in time of war, the Scottish Darien project, the post office, coinage, letters of marque, and the issue of bills of credit were sent to Connecticut and generally obeyed by that colony. Queries were sent over by the Board of Trade and answered by the governor, and the authority of the King in Council was always admitted in all that concerned boundary controversies, the title to the Narragansett country, and claims to the Mohegan lands. The colony

recognized the right of the Treasury Board and the Commissioners of Customs to appoint customs officials for the collecting of the plantation duty, who in the signing of clearances were to join concurrently with the naval officers named for the various posts by the governor. There is reason to believe that these officials, following the royal instructions of 1698, transmitted to the customs commissioners quarterly returns of seamen and shipping, though all such lists are now lost. The colony was ready also, in a lukewarm way, to aid the surveyor general of the woods and his deputies, whose business it was to guard the trees suitable for masts for the royal navy, though fortunately, perhaps, it was not often called upon to do so. In general, it expressed itself in terms of loyal obedience to the royal will, whenever it had occasion to write to the secretary of state or the Board of Trade, and it exacted of the freemen of the colony an oath to be true and faithful to their lawful sovereign, the King or Queen of England.

One of the most important obligations resting upon the royal colonies was the submission of their laws to the King in Council for confirmation or disallowance. This obligation rested also upon the colonies of Pennsylvania and Massachusetts, by their charters of 1681 and 1691. But Connecticut, Rhode Island, and Maryland (except for the period of royal control) were exempt from this requirement and no systematic attempt was ever made to bind them to it. The crown lawyers said that the King had no power to disallow any act of these colonies, not contrary to the law of England, and that as long as the charters remained intact the laws of these colonies could not be interfered with.

The matter first came into prominence in 1696, when in the instructions to the newly commissioned Board of

Trade, a clause was inserted requiring that body "to examine into and weigh the acts of the several plantations," an injunction which recognized no exceptions among the colonies as far as immunity was concerned. When, therefore, the board settled down to work and discovered that there were no laws of Connecticut or Rhode Island "amongst the rest that are in our custody," it took the matter in hand and on December 26, 1697, decided to instruct these colonies as well as the others to send over copies of their acts and laws, even though they were not obliged to do so by their charters. Rhode Island replied in 1699, sending over not an "authentick copy" but only an abstract, and from that time forward refrained entirely from further obedience to the royal command. But Connecticut proved less obstinate. The letter of the board, dated February 23, 1698, bade the colony transmit to it "authentick copies of all the acts or laws of that colony, with all possible diligence." This letter, which was addressed to the Governor and Company, was answered on July 1 by Winthrop, who had returned to the colony in 1697 and had been elected governor the May before. He sent at once a copy of the colony's act against pirates and promised to recommend to the assembly at its next session the request of the board, but inasmuch as a delay of four months ensued before the laws were actually despatched, the latter wrote again repeating its request that copies of the laws "in authentick form" be sent "without delay." But before this letter reached Connecticut, Winthrop had written, October 27, 1698, forwarding with the letter a copy of the printed law book of 1673.

The Gen[ll] Assembly [he wrote] of his Majesty's Collony of Connecticut (by their Committee) at their receipt of yo[r] Lordships letter of Feb. 23, 1697/8 were under consideration

for reviseing the Lawes of this Collony in order to some Emendations and Enlargements as should be found necessary for farther benefit and service to his Majᵗˢ Subjects; but could not possibly digest them for your Lordships perusall in tyme to send by the shipe now goeing from Boston; The Genˡˡ Assembly doe therefore in most humble regard to your Lordships Comandes herewith transmit to your Lordships favourable Opinion the present printed Laws by which his Majᵗˢ Subjects are at this time Governed, and allsoe the transcript of other Necessary and Locall Lawes Suitable to the constitution of the Affaires of this Wilderness."

This volume of the laws, which may now be seen in the Public Record Office, is that of 1673, and it is accompanied with later laws to date copied in manuscript. It was presented at the meeting of the board, April 13, 1699, and was acknowledged in a letter from the board, dated April 24. The latter, after expressing its satisfaction with the action of the colony, said that it expected the colony to transmit its laws in the future "without delay and in authentic form under the public seal, with the attestation of the governor and other proper officers.

The revision of the laws, to which Winthrop referred, was that ordered by the General Assembly in October, 1696, but not completed and issued until 1702. There is in the Public Record Office a copy of this book, and also copies of printed sessional acts from May 20, 1709, to May 23, 1712. The first was sent over in 1703, not by Connecticut, but by Gov. Cornbury of New York, who in his letter of June 30 of that year said, "I take the liberty to send your Lordshipps the Laws of Connecticot and with them a book writ by one Mr. Buckley, who is an inhabitant of Connecticott, by that you will be informed of the methods of proceeding in that Colony." Who sent over the sessional acts I cannot discover. There is no reference to them either in the New York or in the

Connecticut correspondence, and the acts bear no endorsements, such as were invariably made on documents and papers received by the board at this time. That the colony intended to send over more laws at the earliest opportunity is evident. In an answer to queries, dated January 24, 1709, appears the following clause, "We are preparing an Exact Body of our Laws to send y^{r} Lordships; the low circumstances of the Colony has kept us without a press, so that We have been necessitated to make use of manuscripts, for a considerable Number of our Laws; But are now endeavouring to put them all in print; which We hope will be accomplished in a Short time; And shall take the most speedy Care to transmitt them, according to y^{r} Lordships Directions." The press thus referred to was that of Thomas Short of New London, and the sessional acts of May 20 and June 11, 1709, were the first laws printed in Connecticut. On August 8, 1710, Gov. Saltonstall wrote from New Haven, "As to our Laws which we formerly acquainted your Lordships were preparing for the press, the Extraordinary Occasions of the Warr the two Last Summers in obedience to Her Majesties Commands, has prevented our going through with that work, but we are now Setting upon it, and hope to have it in a Good forwardness by the next Spring; And I shall be very carefull that your Lordships have a copie of them as Soon as they come out of the Press." In a letter from Popple to Saltonstall, of February 19, 1711, acknowledging this letter (and another of July 3, 1710), he writes, "They shall expect a Collection of the Laws of Connecticut as promised. In sending which Laws, you will do well, if there be any amongst them that are of a particular nature, to explain to their Lordships the Reasons for passing the same, unless such Reasons be express'd in the Preamble of the Act." But still the

laws were not ready, and nearly two years later, May, 1712, the General Assembly resolved that "a compleat body of the laws of this government be sent home to the Right Hon^{ble} the Lords of Trade, and that the Governor be requested to do it."

There is ample evidence, therefore, to show that both the General Assembly and Gov. Saltonstall planned to send over a copy of the new book of laws, which as it happened, did not appear until 1715. In point of fact, however, the book was never sent, or, if sent, never reached the Plantation Office. But Saltonstall may have sent over the series of sessional acts, ten in number, which were issued from 1709 to 1712, supplemental to the book of laws of 1702 and its continuation, also printed by Thomas Short, containing the acts from 1702 to 1708. He certainly had not done so before Popple's letter of February 19, 1711, was written, and it would appear strange that he should send the laws passed after 1708 and not those of the earlier dates contained in the continuation. There is, however, nothing to prove that he ever sent over any laws at all, and against his doing so must be placed the serious objection that no reference to these sessional acts is to be found anywhere in the Board of Trade papers. So particular was the secretary of the board at this time to record and acknowledge all letters and enclosures received that failure to find such entries is presumptive evidence against the receipt of the acts accompanying any letter sent to the board. Yet these sessional acts are today among the Connecticut laws that the board had in its possession, and how they got there is something of a mystery. That the board itself and its secretary were unaware of their presence among the papers of the Plantation Office later letters will show, and the absence of all endorsements upon them seems to

indicate that they found their way into the office through some unofficial channel.

We are compelled to believe, therefore, that from 1698 to 1731 the colony sent over no additional copies of its laws. During the later years of this period, the affairs of Connecticut were brought prominently before the home government by the controversy over the intestacy law, which was disallowed by the King in Council, February 15, 1728. When drafting its representation to the King on the subject, the Board of Trade discovered that "The people of Connecticut have hitherto affected so entire an Independency of Great Britain that they have not for many years transmitted any of their laws for His Majesty's consideration." Already had the board written to Connecticut, June 30, 1728, reminding the colony to send over "a compleat Collection of the Laws, which has been so often promised some years ago by several governors," and now it wrote to Gov. Talcott bidding him "transmit authentic copies of the Laws passed," while the secretary, Alured Popple, added in a postscript, "I find by a letter from your Predecessor Mr. Saltonstall dated so long ago as the 8th of August 1710, he promised the then Lords Commissioners a copy of your laws as soon as they should come out of the Press, tho' it has not been received here." At the same time the board wrote to Gov. Montgomerie of New York, June 30, 1731, saying, "These proprietary governments have long since been required to transmit hither Authentic copies of their Laws, which their former Gov^{rs} have promised some years ago, though such copies have not been received here," and it requested Montgomerie "to secure a set as soon as possible." But Montgomerie died before the letter reached New York, and the acting governor, Rip Van Dam, president of the council, sent the request to Con-

necticut. On October 14, the assembly of that colony appointed a committee to consider the question. The committee reported favorably, stating that this was the first intimation the assembly had received that Gov. Saltonstall had not sent the law book to England, and adding, "We Submit it to the wisdom of this Assembly, whether in poynt of prudence, it may not be best by Some meet persons Strictly to view our Lawes, in order to make alterations or adetions, as this assembly Shall think proper."

On November 4, Talcott wrote to the board as follows:

'Tis a pleasure to me to be informed by Mr. Popple's Letter of May 31st past that your Lordships have received my Letter with our Answers to your Queries; and I am Concerned that the Book of our Laws from Gov^{r} Saltonstall came not safe to your hands; I remember I heard his Honour say he was about Sending Over a Sett of our Laws but whether he sent them or whether they Miscarried I can't tell.

By Mr. Popple's Letter of June 10th last he Informs me that your Lordships desire that I should send you our Laws that affect the Trade Navigation or Manufactures of Great Britain; in Answer thereunto and that I may as much as in me Lyes make good Govern^{r} Saltonstall promiss, I have herewith sent you the whole Sett of Our Laws by which your Lordships will Se that our Laws do not Incumber the Commerce Navigation or Trade.

Your Lordships will be best Informed of the Reason Necessity and Usefulness of our Laws by Considering the State and Circumstances of our Countrey so very many ways differing from that of England.

The Book of Laws I send you have been Sometime out of the press Since which some Laws have been altered and some Repeal'd which notwithstanding I am forced to send with the Rest unless I should print the Book anew for this purpose which I fear would Delay the time beyond your Lordships Expectation.

In acknowledging the receipt of this volume, which

was sent by way of Boston to the agent of the colony, Francis Wilks, for presentation to the board, the latter expressed regret that some of the laws had been altered since they were printed, and said that it would be impossible for them "to make any judgment" of those sent without seeing "those also by which they were altered." The board requested Talcott to "transmit Transcripts of such Laws as shall be passed for the future." To this Talcott answered, calling attention to the fact that with the laws were bound up sessional acts, which indicated "what of our Laws are altered and Repeal'd."

The volume thus sent over for the inspection of the Board of Trade consisted of the Law Book of 1715 and all sessional acts passed from that time to and including the year 1731. It was sent November 4, 1731, and reached the Plantation Office in Whitehall, February 18, 1732. Two weeks later, on April 5, it was despatched to the board's legal adviser, Francis Fane, with the injunction that he examine the laws and render an opinion "upon the said Acts, whether the same or any of them are repugnant to the Laws of this Kingdom." Fane was living at the time in St. James's, Westminster, but a short distance from Whitehall, across the park. He completed his first report covering the whole of the 1702 text, as it appeared in the 1715 reprint, in a year and four months, submitting it to the board, August 10, 1733. The second report, containing comments on the reprinted sessional acts to and including part of those of October, 1706, was handed in April 1, 1734. The third, continuing his comments on the reprinted sessional acts to and including part of those of May, 1708, was completed December 2, 1734. The fourth, dealing with the same to and including part of those of June, 1709, was delivered May 17, 1735. The fifth, covering the same to and including part of those

of May, 1711, was returned December 13, 1735. The sixth, commenting on the same to and including part of those of October, 1712, was sent in January 20, 1736. The seventh, beginning with the remaining acts of October, 1712, and continuing through those of October, 1714, was returned December 22, 1737. The eighth, beginning with the acts of May, 1715, and extending through those of October, 1717, was delivered December 15, 1738, thus completing the original 1715 reprint and two years of sessional acts. The ninth and last, carrying the laws through the session of May, 1721, was sent to the board June 16, 1741. The remaining laws, covering the period from October, 1721, to October, 1731, numbering 197 acts and 15 resolutions, and contained in 120 pages of text, were never dealt with at all. Fane was nine years in making his report and then did not complete it. In an era of procrastination in governmental business, there can hardly be found a more striking example of dilatory work than this. Yet Fane was an efficient man and a judicious and learned lawyer, but the task was a long one, covering altogether 584 acts and 18 resolutions, of which 387 acts and 3 resolutions are included in his reports. During this period he was called upon to examine scores of laws from the other colonies, and to attend to his private law practice and his duties as a member of parliament. His reports were never presented, as far as we know, at the meetings of the board, and no action was ever taken, either of approval or disapproval, on the recommendations which they contained. The reports were, therefore, of no significance, as far as the colony was concerned, and are of interest to us today only as containing the opinion of an English lawyer upon the laws passed by the colony for its own governance.

Fane's leisurely attitude towards the task set him by the board and the latter's failure to act upon the lawyer's

reports can probably be explained by the events of the decade following the receipt of the laws. The crown lawyers had made it perfectly clear that the legislation of Connecticut and Rhode Island could be brought under royal control only by a special act of parliament, and it was manifestly to the interest of those concerned in England that such an act should be passed. The period was one of growing parliamentary supremacy, during which colonial questions were frequently under discussion and important measures relating to the colonies were placed upon the statute book. The Hat Act, the Act for the Recovery of Debts in the Plantations, the Molasses Act, and the various measures concerning rice, masts, and naval stores, aroused active discussion, both in parliament, in the form of debate and deposition, and out of parliament, in the form of a great mass of pamphlet literature which presented in lively fashion and with considerable acrimony the relative importance of the Northern Colonies and the West India islands in the British commercial scheme. The Board of Trade, which Partridge declared was no "Friend to the Northern Colonies," because it upheld the royal prerogative, the interests of British subjects, and the doctrines of the mercantilists, who rated the Sugar Colonies of greater importance to Great Britain than the Northern or Bread Colonies, sent in during these years three important representations to parliament, in which it presented the colonial situation in very elaborate and detailed form. In the last of these representations special stress was laid upon the failure of even the royal colonies to send over their laws promptly, and the statement was made that Connecticut and Rhode Island "not being under any obligation by their respective Constitutions, to return authentic copies of their Laws to the Crown for Approbation or Disallow-

ance, the board was very little informed of what is done in any of their Governments." The matter was taken up in the House of Lords, and Wilks reported to Talcott that he heard a member say "the Constitution of some of our Plantations was inconsistent with the Interests of England and ought to be new Model'd." Influenced by the representation of the board, the House appointed a committee to consider the matter, and among the resolutions reported were two which read as follows:

> That it is the Opinion of this Committee that each Colony, whether under the Crown or otherwise, be obliged to send over a Complete Collection of all the Laws understood to be in force there, to the Board of Trade; and that the Crown be empowered to repeal any Law, passed under any of the said Governments at any time whatsoever, which hath not actually received the Royal Approbation in Council, if such Law be found detrimental to the Prerogative, or to the Trade or Navigation, or Interest of Great Britain; any Privilege or Limitation by Charter or otherwise, for the Time or Manner of repealing such Laws notwithstanding.
>
> That all the Laws made in the Plantations as well under Proprietary or Charter Government, as in those where the Government is immediately vested in the Crown be, for the future, transmitted Home, for His Majesty's Consideration, within the Space of Twelve Months from and immediately after the passing of such Laws respectively; and therefore that no Law passed in any of the British Colonies be for the Future in Force or be allowed to have any effect until the same shall have received His Majesty's Approbation in Council, any Usage, Custom, Charter, Privilege, or Law, to the contrary, notwithstanding.

These resolutions and the others were agreed to by the House and the judges were ordered to bring in the heads of a bill at the beginning of the next session. Fortunately for the colonies, which were considerably agitated at the reports of their agents regarding this threatened attack

upon their liberties, the matter was eventually dropped and never came up again.

The refusal of parliament to act on the resolutions left Connecticut firmly entrenched behind her charter and reëstablished in her full right to pass any laws that she pleased, provided they were not contrary to the law of England. This conclusion must have lessened materially Fane's interest in a further examination of Connecticut's laws, and when in 1741 parliament was dissolved, he probably considered it unnecessary to go on with his task, which from this time forward could have had but an academic importance. These facts explain adequately the date of Fane's last report, June 16, 1741.

II

After 1731, the colony sent its laws to England on four separate occasions. The first occasion arose as follows. In 1739, the question of paper currency and the rates of gold and silver in America came up for consideration in the House of Commons. Fane was a member of the House and, as it happened, was the chairman of the committee of the whole House when this question reached the committee stage of debate. Among the resolutions from the committee that Fane as chairman reported to the House, was one moving an address to the King, desiring him "to require and command" the governors of the colonies to send over copies of their laws. The King, in response to this address, "commanded" the Board of Trade "to prepare a complete collection of the laws in the British colonies in America." The board, acting on this command, wrote, May 21, 1740, to Connecticut asking for a copy of the laws of the colony, and this, too, before Fane himself had completed his report on the laws in his own possession. It is quite possible that Secre-

tary Hill's letter to Fane, mentioned in the opening lines of the ninth report, was prompted by this command. On November 12, 1740, a week after the letter was received, Gov. Talcott promised to bring the matter to the attention of the council and assembly of the colony. Two weeks later he wrote, in the name of the Governor and Company, "We have ordered a Collection of the Laws of this Government to be prepared and transmitted to your Lordships by which you will see the laws that have been made and are in force in this Government." This letter and the book of laws, consisting of the reprint of 1715, with all sessional acts to 1740 bound in and paged consecutively, were received by the board July 14, 1741. This volume, bound in calf and containing 486 pages, is now in the Public Record Office. No use was ever made of it by the board and no report upon the laws since 1721 is to be found among the papers of the office. Probably it was not even sent to the legal adviser, who had only just returned, June 16, his opinion on the laws received nine years before. As Fane kept the volume previously sent him and as we do not find any trace of the duplicate sent by Rip Van Dam, the board now had for the first time since 1698, a complete and up to date collection of the laws of Connecticut in its possession.

The next occasion for sending the laws of the colony to England arose in 1751. In that year the Board of Trade, which had been given a new lease of life under Halifax in 1748, made a representation to the Council Committee, recommending "the framing a new body of good and well digested laws in all the colonies." The committee took up the suggestion, and in its report to the Council said, "And whereas some of the Proprietary and Charter Governments in America tho' empowered to make Laws are not required to transmit such Laws

to His Majesty for his Approbation or Disallowance Yet in regard Appeals are frequently brought before His Majesty in Council from the Judgments and Decrees made in the several Courts of Judicature within the said Governments the Determination whereof depends on being duly informed of the Laws subsisting there, It is therefore thought Expedient that those respective Governments should transmit hither as soon as conveniently may be a true and Authentick Copy of all the Laws now in force." The Privy Council accepted this report and ordered the board to proceed accordingly. On April 16, 1752, the latter wrote to the colony instructing the Governor and Company to send over its laws. Gov. Wolcott said in reply, December 20, 1752, "I herewith transmit to you a Book of our Laws according to their orders" [that is, of the Lords Justices, acting in the King's absence]. This volume, now in the Public Record Office, is the book of Acts and Laws, printed at New London by Timothy Green in 1750, with sessional acts to and including those of May, 1752. At the end, bearing a fine specimen of the colony's seal, is a certificate by Gov. Wolcott and Sec. Wyllys, stating that these were "the laws in force and published 20 Dec. 1752," the date of the despatch of the letter.

The next laws of the colony that were sent to England were transmitted by Gov. Fitch, June 29, 1756, without special orders, as far as we know, from the Board of Trade. In his letter of that date, Fitch wrote the board as follows: "I have also herewith sent printed copies of the Laws passed in the Colony since the Book containing the Statute Laws of the government which about five or six years ago was transmitted to your Lordships to which I begg leave to refer for the knowledge of the laws at that time; by that Book and the Additional Acts now

sent y^r^ Lordships will see what are the Laws now in force in this Government." This letter was read at the meeting of the board on August 8, and the acts were ordered to be sent to the legal adviser, Sir Matthew Lamb, "for his opinion thereon in point of Law." The sessional acts thus transmitted were forty-five in number, passed between October, 1750, and January, 1756. Lamb must have retained the acts thus sent him, for they are not to be found among the papers of the board, and no report on them has come to light although Lamb continued to be the board's legal adviser until 1768. The last laws despatched by the colony, regarding which we have any knowledge, were sent by Gov. Trumbull in July, 1770, to Hillsborough, who had been appointed in 1768 secretary of state for the colonies. They consisted of printed copies of the laws passed in 1768, 1769, and 1770, in the form of sessional sheets, continuously paged. These laws, of which no use was made, as far as I know, are among the papers that accumulated in the hands of the secretary of state, now included in the Colonial Office series.

From this brief survey of Connecticut's relations with the home government, certain conclusions may be drawn. The colony was, as a rule, willing to meet all reasonable demands of the authorities in England that did not infringe upon what it considered its charter rights. These rights it interpreted in the broadest possible terms, claiming powers that, however desirable and necessary for Connecticut's well-being as a self-governing community, were not legally in accord with the original purpose of a trading charter or agreeable to the leading principles of British policy. That the colony was able to maintain its position in the face of the many attempts made to alter its status, was due partly to the ineffectiveness of the British system of colonial management, and partly to

the political and constitutional situation existing in the years from 1700 to 1750. Among the various individuals and bodies in England, vested with functions to perform and authority to exercise, there was so much ignorance, indifference, and carelessness that coöperation was always difficult and frequently impossible. The colonial machinery was old, badly constructed, and worked with no certainty as to the result. More important still is the fact that the period was one of constitutional change, when the power of the King, his Council and appointees, was declining and the authority of parliament was more and more filling the scene. In the conflict between Tories and Whigs, the royal prerogative and parliamentary control, and the principles that each represented, we find ample reason for the failure of the plans against the chartered colonies. The refusal of parliament to support the policy of the Board of Trade and to strengthen the prerogative of the crown, or to take effective measures itself to hold the colonies to their legal obedience, was the best security that the latter could have possessed against attempts to reduce them to the status of dependencies, the interests of which were subordinate to those of the mother country.

III

Before 1718, the Board of Trade customarily sent all colonial laws that came into its hands to the crown lawyers, the attorney-general and solicitor-general, for their opinion on points of law; but after that date it had a special legal adviser of its own. The first to hold this office was Richard West. He was followed in 1725 by Francis Fane, and he in 1746 by Matthew Lamb, afterward Sir Matthew. Lamb died in 1768, while holding the office, and there was an interregnum of a year and a half before

the appointment of the next incumbent, Richard Jackson, who remained the adviser of the board until its dissolution in 1782. Each adviser was required to be in attendance on the board at least twice a week and to make regular reports on the laws and legal questions submitted to him. For these services he was paid at first three and then six guineas for every attendance, and £300 a year for his reports on colonial laws.

Francis Fane, of the Middle Temple, armiger, and resident of St. James's, Westminster, was born about 1698, the eldest son of Henry Fane of the city of Bristol and grandson of Sir Francis Fane of Fulbeck, Lincolnshire, the poet and dramatist. His grandmother was Hannah Rushworth, daughter of John Rushworth, the well known clerk-assistant to the House of Commons during the Civil War, secretary, historian, and editor of the *Historical Collections*. His father lived at Westbury-on-Trym, where he died in 1726. His mother was Ann Scrope, daughter of a Bristol merchant and sister and co-heir of John Scrope of Wormsley in Oxfordshire, member of parliament from Lyme Regis in Dorset, from 1734 to 1752, the year of his death.

Fane became a barrister-at-law and was attorney-general to the Prince of Wales and Queen Caroline, son and wife of George II. He was appointed a King's Counsellor in 1727, in the rising tide of his prosperity, and in the same year was returned a member of parliament for the borough of Taunton, Somersetshire, serving through the two parliaments of 1727 and 1734 until 1741. In 1747 he was returned for Ilchester in the same county, and in 1754, two years after the death of his uncle, John Scrope, for Lyme Regis in Dorset. Thus his parliamentary career lasted twenty-six years and was continuous, except for the period from 1741 to 1747. That it was

an active career a study of the journal of the House shows. On his uncle's death, he succeeded to the Wormsley estates, but through the greater part of his career he must have resided in the city of Westminster, now a part of London. He was the most prosperous of his father's sons, was possessed of ample means, and was able to aid his brothers in obtaining official and parliamentary preferment. The first brother, Thomas, was an attorney in Bristol, and clerk to the Society of Merchant Venturers there; the second, Henry, was a clerk to the Treasury Board, and later one of the clerks of the Privy Council. A sister, Mary, who died in 1773, married Samuel Creswicke, D.D., dean of Wells Cathedral.

Fane died May 27, 1757, and bequeathed his manors and lands to his brothers, the estates in Somersetshire and Gloucestershire to Thomas, and those in Buckinghamshire and Oxfordshire, including Wormsley, to Henry. He never married, but had a natural child by one of his servants, Ann Hopkins, who was the daughter of another servant, a widow, Ann Hopkins of Brympton, where he purchased an estate in 1730. To this son, Henry Hopkins, who took the name of Fane after his father's death, he left a legacy of £25,000.

Had Fane survived his distant relative, John, the last son of the elder line, who died childless in 1762, he would have become lord of Apethorpe and Sharlston and eighth Earl of Westmorland. As it was the title went to his brother Thomas. The earldom had come into the Fane family when Lady Mary Nevill—daughter and heir of Henry, fourth Lord Abergavenny and descendant in the junior line of Ralph Nevill, first Earl of Westmorland—who had married Sir Thomas Fane as his second wife in 1574, obtained from James I the revival of the title, which had lapsed through an attainder. Under the new

creation, her son, Francis, became first Earl of Westmorland, by patent issued December 29, 1623. This event not only assured the rapid advancement of the Fanes in wealth and social distinction, but it also brought under their control the parliamentary borough of Lyme Regis, which remained at the disposal of the Westmorland family until after the passage of the first Reform Bill, that is, until December, 1832. During the greater part of Francis Fane's life, Lyme Regis was a close borough controlled in the interest of the Duke of Newcastle. For nearly a century, with but few exceptions, it was represented in parliament by members of the Scrope or Fane families, and after the death of John Scrope in 1752, by Fanes only, brothers, father and son, or uncle and nephew, among whom were Francis, Thomas, and Henry.

Francis Fane was commissioned legal adviser to the Board of Trade, by patent under the great seal, August 9, 1725. He was to attend at least twice a week and to hold the office during good behaviour. He undoubtedly owed his appointment to his distant cousin, Thomas, sixth Earl of Westmorland, who was president of the Board of Trade from 1715 to 1735, when he became lord lieutenant of Northamptonshire. Francis remained legal adviser of the board until 1746, in which year he was commissioned a member, an office which he retained until he retired in 1756. He was an eminent lawyer, possessed of ample legal knowledge, and his opinions are characterized by good sense and fairness. He played an influential part in our colonial history, as his comments on the laws of the colonies, extending through a period of twenty-one important years, formed the basis of nearly all the reports of the Board of Trade to the Council Committee, and so became determining factors in all confirmations and disallowances of colonial laws. After he

became a member of the board itself, he was able to continue his work the more effectively because of the experience and knowledge that he had gained in his study of colonial legislation. Thus for more than thirty years he was in touch with one aspect or another of colonial affairs, and probably knew as well as any other man of his time, unless it were the secretary of the board, the situation in America. His place as a member of the board must have been congenial to him, and he in turn must have been an efficient ally of the Earl of Halifax, after the latter became president of the board in 1748. Fane was an intimate friend of the earl's and often spent Christmas with him at his family seat of Horton.

IV

FANE'S nine reports cover three hundred and eighty-seven acts and three resolutions, and his comments upon them may be classified as follows: One of the acts had been repealed by the colony and so called for no opinion, but of the remainder seventy-five were open to objections and deserved to be disallowed by the crown. The other three hundred and eleven were good, proper, well contrived for the purpose intended, reasonable, containing nothing amiss, fit to be confirmed, open to no objection, or adapted to the conveniences of the colony. Of the seventy-five recommended for disallowance, twenty-eight were too severe or unreasonable, nine were too loose, inexact, or uncertain, seven were at variance with the law of England and for the purpose intended inferior to the corresponding English law, six gave too much power to the court of assistants, the county court, the justices of the peace, and the selectmen of the towns, five, though good in part or excellent laws in general, needed enlargement or modification, three omitted cer-

tain necessary definitions or limitations of the English law relating to the same subject, three concerned the question of intestacy and had already been disallowed, and two were incomplete or insufficient as regards the penalty imposed. Of the resolutions, one was unobjectionable, one just and proper, though likely to be more effective if made a law, and one, though agreeable as a law, was probably illegal as a resolution.

When we examine more closely the comments contained in the reports we are struck with the number of acts that the English lawyer deems harsh and arbitrary and liable to abuse. In this respect, he upholds the charges of those who had made complaints to England against the colony. Fane thinks that the civil and judicial authorities in Connecticut were allowed far too much discretion for the safety and welfare of the people, and he condemns the language of the laws as giving too frequent opportunities for injustice and even oppression. The modern lawyer will hardly be surprised that Fane should have commented adversely on laws that allowed a court to reject a suit at will or that vested it with power to inflict a punishment at its own discretion. Parties to a suit, he says, have a right to be tried by rules of law, and a penalty, whether fine, imprisonment, flogging, disfranchisement, banishment, or committal to the house of correction, should be determinate and not at the court's pleasure. The language of the law he deems often so vague and unprecise as to render doubtful the nature of the charge and so to destroy the usefulness of the measure; and he demands a much more exact definition of such offenses as lying, defamation, lascivious practice and carriage, reviling, profane speaking, misbehavior, pretended damage, heresy and the like, before he can feel satisfied that the punishment is in accord

with the crime committed. In the very vagueness of the description he sees opportunities for unfairness and injustice. For instance, he considers that "walking scandalously" or "committing a scandalous offense" is an insufficient reason for disfranchisement, and says that many of the charges in the Act against Breaking the Peace are trivial when compared with the authority vested in the magistrate or justice of the peace to punish them. He makes much the same comment on the laws giving the justices power over rogues and vagabonds, and the selectmen power over the estates and credits of idle and poor persons. He calls unreasonable the law which forbids a servant man or maid to buy and sell, and that unjust which requires a stranger to find surety in the colony before bringing suit in a local court.

The fact that Fane should have called especial attention to the severity of the penal code of Connecticut is characteristic of the changes coming over the spirit of the English common law at this period. The penalties imposed in the colony for lying, wearing woman's apparel, delinquency, and heresy seem to him excessive, and in some cases, as in that of delinquency, appear to involve the innocent as well as the guilty. In but one instance, that of forgery, does he demand a heavier punishment, though in a few others he recommends the imposing of a heavier penalty for a repetition of the offense. In the case of laws that impose stigmatizing or branding as a part of the punishment, he speaks with no uncertain sound. England, he declares, has abolished all such forms of punishment, except rarely that of branding in the hand, and their continuance can serve no good in any community. Branding on the forehead, wearing a halter, or displaying conspicuously a capital letter, as penalties for adultery, bigamy, unchastity, incest, and burglary, are more

likely, he thinks, to render offenders incorrigible than to reform them, or to transform them into useful members of society. Perpetual infamy would always bar the road to good citizenship. In the case of laws concerning bigamy and unchastity, he sees that a person might be condemned on a mere suspicion. He objects even to the posting of the names of tavern haunters as a form of publicity likely to be harmful, and in commenting on the Act against Manslaughter he condemns that part of the penalty which imposes a perpetual inability to give verdict or evidence as not only unknown to English law but as entirely unsuited to the crime.

Fane is not a little puzzled by the extraordinary character of the law imposing capital punishment according to the Mosaic code. Terrible as had been the English law in capital cases, it had never pretended to find warrant for the death penalty in the Scriptures, and Fane has to fall back on his own common sense in expressing an opinion upon this pentateuchal measure. The clause against idolatry he throws out altogether as useless; that against blasphemy he deems unnecessarily severe, since blasphemy was construed as only a minor offense in England; while that against witchcraft he interprets in the light of the Salem delusion and recommends its entire omission from the statute book. The clauses dealing with rape, man-stealing, and false witness seem to him deserving of very considerable alteration. In fact, throughout all his comments, the Puritans' somewhat formal adherence to the letter of Biblical law is a matter of much concern, and there is no doubt that the observance of the Sabbath as a factor shaping legislation sticks mightily in his throat. Why, he says, should a crime be punished more severely when committed on Sunday than on any other day in the week?

One group of laws he interprets as distinct infringements on personal liberty, and he approves of none of them. What right, he says, has a state to make it penal for any one to play games or to drink liquor in private houses, to indulge in innocent and harmless recreation on Sunday, or to leave one's house on that day except for the purpose of going to church? What possible harm can there be in young people's meeting together in company on a Sunday evening, or on the evening of a lecture day or public fast day? Why forbid them to meet in taverns or forbid anyone to drink strong drink there, when such practices may be entirely innocent and devoid of all criminal intent?

Among all the Connecticut laws three in particular are conspicuous as having been the subject of grave complaint on the part of one or more of the disaffected inhabitants of the colony, and it is interesting to note Fane's attitude toward them. These laws are the Act for the Suppressing of Heretics, the Act relating to Ecclesiastical Affairs, and the Act for the Settlement of Intestate Estates. Apparently Fane does not know that two of these laws, the first and the last, had been disallowed by orders in Council, one in 1705 and the other in 1728, else he would have made some mention of this important fact. He recommends that the Act against Heretics be annulled, not because it is "contrary to the liberty of conscience, indulged to Dissenters by the Law of England," which was the reason assigned by the Privy Council in 1705, but because it is extremely severe and liable to work hardship on account of the vague phraseology in which it is couched. The Ecclesiastical Act, which had been bitterly denounced by Quakers and Anglicans alike, because it allowed no ministry to be established in the colony "distinct and separate from and

in opposition to that which is openly and publicly observed and dispensed by the approved ministers of the place," he thinks on the whole a reasonable measure, though he makes the general remark that all the acts of the colony relating to ecclesiastical affairs need careful consideration. He objects to the Intestacy Act because it is contrary to the law of England, but he neutralizes somewhat the force of his objection by offering as a substitute either a law modelled after that of England or one based on "such other method as may best fit the colony."

In 1706, two Quakers, John Field and Joseph Wyeth, made formal complaint to the Board of Trade against eleven acts of the colony. These acts concerned arrest, children to be educated, courts, delinquents, divorce, ecclesiastical affairs, freemen, houses and lands, inhabitants, single persons, and the settlement and support of ministers. To four of these acts, those concerning arrests, children to be educated, courts, and inhabitants, Fane returns no objection, though he characterizes that portion of the Courts Act imposing secrecy, which was embodied later in a separate act, as "of no manner of service." He objects to the Delinquency Act, but not to the section disliked by the Quakers, and also to the Divorce Act, chiefly on the ground that it was contrary to the law of England, though he considers some law about divorce very desirable and necessary. He objects, as did the Quakers, and apparently for the same reason, to that part of the Freeman Act which permits disfranchisement for scandalous conduct on the ground that the power conferred is arbitrary and the offense undefined. He says that the act requiring an inhabitant who wished to sell his house and lands to tender them first to the town before offering them elsewhere an extraordinary one, improper for England though possibly necessary in a

country encompassed by enemies. He agrees with the Quakers, though of course unintentionally as he could have known nothing of their complaint, that to prohibit single persons from keeping house, except with the consent of the selectmen of the town where they live, is an unreasonable encroachment upon individual liberty. On the other hand, he has no objection to the law for the support of the ministry, which aroused such lively opposition from Quakers and Anglicans alike, and was resisted by both because it assessed all persons in the community for the maintenance of the Congregational church.

Fane criticizes a number of laws, not because contrary to the law of England but because they lacked some of the requirements or limitations of the English law in like cases. He objects to the Act for the Recovery of Debts because it contains none of the savings of the English statute; to that against forgery, because it is not sufficiently penal; to that relieving idiots, because it does not provide a certain method for ascertaining who should be deemed idiots; to that regarding transients, because it includes within its provisions others than vagrants and sturdy beggars; to that appointing commissioners for the draining of lands, because it omits some important conditions "which the law of England had made in like cases"; to that dealing with tavern haunters, because it involves a general presentment which was contrary to English law; to that limiting trials in civil causes, because it goes counter to certain practices in English courts; to that concerning manslaughter, because it includes a penalty unknown to English law; and to that suppressing unlicensed houses, because it introduces methods of conviction hitherto unknown. He objects to the poor law of the colony and to the law for the punishment of perjury

because they omit certain essential safeguards deemed necessary in England. In two instances he condemns a colonial practice even though it is in accord with that of England, as when criminals are deprived of counsel, except as to matters of law, a rule which he deems neither laudable nor justifiable under any circumstances, and when robbery and burglary are punished with death, as was the case in both England and Connecticut. He commends the law of the colony providing for the payment of members of the assembly, as consonant with ancient usage though long since abandoned by the British parliament.

Whenever he can do so, Fane favors the colony and approves of a number of laws which, strictly construed, were contrary to the law and practice of the mother country. He sees ample reason why the Connecticut law of treason should differ in some important respects from that of England; he approves of the colony's forms of writs and processes, though he thinks that better ones might be drawn; he deems the act regarding summonses better than the corresponding English law; he accepts all the colony's military arrangements as probably necessary in a new country though manifestly improper in England; and he is content to believe in a number of instances that the colony is the best judge of its own needs and most competent to determine what is essential for the happiness and welfare of its people. In commenting on the act levying executions, he notes that the measure is not agreeable to the law of England and that parts of it are not as good as the corresponding English practice, but he agrees that as a whole the law is neither improper nor unreasonable and he recommends that it be confirmed.

In a large number of cases, Fane approves of a law

because it relates to the private or domestic concerns of the colony and so, he thinks, lies beyond the legitimate sphere of royal control. In this class are all laws relating to home lots, fences, highways, common fields, rates and taxes, excise and imposts, nominations and elections, schools, militia, police, and internal trade. He raises no objection to the act for ascertaining the value of coins current within the colony, even though he should have known that the Board of Trade was accustomed to recommend all such acts for disallowance, because they interfered with the royal proclamation of 1704 and the Coinage Act of 1708, defining the rates at which gold and silver coins should pass in the colonies. Even more interesting is his attitude toward acts for the issue of bills of credit. At first, he classes all such acts, eleven in number, passed before 1738, in the group of those relating to the domestic concerns of the colony, but later he takes a different view of the matter. This change of opinion is due, of course, to the fact that in 1739 the question of colonial paper currency was brought up for consideration in parliament, and from that time till 1751, when the statute was passed forbidding the issue of paper money in New England, it became the subject of heated discussion. As Fane was intimately connected with the debate in its earlier and later stages, having had in charge, as we have seen, the measure of 1739–1740 and that of 1749, it is easy to understand why in his later comments he should recommend the disallowance of all such acts, on the ground that "the multiplying paper credit beyond what is necessary is liable to many inconveniences."

All things considered, Fane's comments are eminently fair and reasonable and have in many cases a very modern ring. They exhibit no bias in favor of one policy or another. Even when remarking on the Act for better Regulat-

ing Proceedings and Pleas at the Bar, in which regard for his own profession might well have led him to judge severely the looseness of the colonial standards, he merely says that there ought to be further qualifications required for those admitted to practice as attorneys, "some ability and knowledge of their profession being in my opinion absolutely necessary for the due exercise of their employment." If criticism of his opinions is justified, it would apply rather to the leniency than the harshness of his comment. Perhaps, had a greater issue been at stake, his remarks would have been more trenchant.

It must be remembered that Fane is reporting only on points of law. In but one instance does he appear to base his objection on rules of general policy or expediency, such as would have governed the recommendations of the Board of Trade. In commenting on the Act concerning the Importation of Rum, he opposes the act on purely commercial grounds, and in so doing discloses his sympathy with the British West India colonies, whose threatened loss of the sugar trade had been before parliament for a decade and had resulted in the two acts of 1733 and 1739. In no other case does he object to a law on other than strictly legal grounds, and consequently his reports contain no such definition of British policy as will be found in the representations of the Board of Trade or in the orders of the Privy Council. He is mainly concerned with laws that seem out of accord with English practice or likely to lead to inconvenience or injustice. He is always on the watch for regulations that seem arbitrary or oppressive or are encroachments on individual liberty. For that reason he condemns the Act against Oppression as likely to stifle business competition and so to bring about the very thing that it seeks to prevent.

As compared with his other opinions and those of his

predecessor and successors in the office of standing counsel to the board, Fane's comments on the laws of Connecticut are lacking in force and incisiveness. Many of the laws he passes over with seeming indifference. His attitude may have been simply that of a busy man towards an obligation that was neither important nor pressing. I doubt if he actually wrote out the reports himself. Were the volume that he used before us, we might be able to draw some conclusions from its pages. Probably we are safe in assuming that he contented himself with markings, underscorings, and marginal notes, and left the rest to a secretary. The opinions he presented were never known to the colony and probably were never seen by any one else than those immediately concerned. Nevertheless they are valuable and deserving of publication, not only for their interest as a commentary on the early laws of Connecticut, but also as a contribution to the larger question of the British attitude toward forms of colonial legislation that were already showing important points of divergence from the corresponding law and practice in England.

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