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DRAKE AT THE SUIT OF JOHN DOUGHTY.

By W. Senior.

IN the discussion of those incidents in Drake's voyage of 1577-80 which are commonly called the Doughty affair the question whether or not Drake held a commission from the Crown empowering him to administer military law is usually raised. The legal proceedings which were taken against Drake almost immediately after his return by Doughty's brother John, who had accompanied the expedition, are material to that question, inasmuch as the production of such a commission would have been a good answer to them. Had Drake been provided with a commission in terms similar to those in the letters-patent which were drafted for the projected voyage of Grenville and his companions in 1574[1] that fact alone, whether it did or did not render the conviction and punishment of Thomas Doughty a *chose jugée*, would at least have made the argument that it had done so the first to be advanced against anyone attempting to reopen the matter. One would therefore expect to find in what is recorded of John Doughty's law-suit by men who remembered it some mention of the point. But so far as appears it was not taken. The only inference to be drawn is that there was nothing upon which to found it.

How much substance the point would have had, if Drake had been granted a similar commission, will be apparent from the following sentences which, at the risk of wearying the reader at the outset, I quote from the document of 1574 just mentioned. " And the same offendors "—that is to say "persons of the companye rebellyously or obstinatly resisting against there (the grantees') commandementes or aucthorytie "—" to slaye execute and put to death or otherwise correct without other Judiciall proceedinges but by the lawe martiall accordinge to there discression, and that all paynes & execucions of deathe so to be done and inflicted shalbe accompted & judged lawfully done as by our speciall will & commandement & by the law martiall. . ." Again, " these our letters patents & everything therein conteyned shalbe most largely amply & beneficially construed & expounded in all thinges for the establishement of the governance power & aucthoritye of the said (grantees) and most strictly and strongly

1 S.P.Dom. Eliz. vol. 235, No. 1.

against all persons that shalbe subject unto or offend againste . . . . . the power appointmentes & Commandementes of the said Governors." [2]

John Doughty's futile effort to have the law of Drake has been very little noticed, probably because nobody imagined that the laconic law-reports of the seventeenth century could anywise eke out the material of the naval historian. It is true that Sir Julian Corbett has cited the allusion to Doughty's case which was made by Sir Edward Coke during a debate on martial law in the House of Commons in 1628, and which is epitomised by Rushworth as follows: " Drake slew Doughty beyond sea. Doughty's brother desired an appeal (of murder) in the Constable and Marshal's Court. Resolved by Wray (Sir Christopher Wray, then Lord Chief Justice) and the other judges he may sue there." " By this curious chance," adds Sir Julian, " we know that the assertion which has always been made, that the execution of Doughty was never called in question, is not true." But having thus referred to the fact that the full court of the Queen's Bench held that John Doughty was entitled to proceed with his " appeal " in the Court of Chivalry, as the tribunal of the Constable and Marshal[3] was called, the author of " Drake and the Tudor Navy " did not pursue the matter further. It is possible, however, to explain why John Doughty failed, in spite of this decision of the Queen's Bench that *primâ facie* he had a right to try his fortune in the courts. It was not upon the production of Drake's commission, for no such document was ever mentioned. Nor was it upon the merits of the case, for he never got a hearing. He was non-suited upon a technical point of law which Elizabeth by a few strokes of her pen could have rendered non-existent had she pleased.

Two lawyers, Sir Edward Coke and Sir Richard Hutton, both of whom were living in 1581 when Doughty instituted his proceedings, and both of whom afterwards became judges, have left a brief note of them. Coke had already been called to the Bar in 1578. Hutton was called in 1586, but would have been old enough four or five years earlier to be interested in the case as a student. Neither of them at any rate had any other kind

2 All these commissions to execute martial law in time of peace were strictly speaking illegal and were so declared afterwards by the Petition of Right. But the point—should any one take it—that Drake's commission was kept a secret in Elizabeth's day because it contravened Magna Charta need not be seriously discussed.

3 As to the original functions of these Officers of State in England, see Stubbs. Const. Hist., 6th Ed., vol. 1, p. 383.

of interest in it. Each of them records it as illustrating legal procedure in a book intended purely for the guidance of their profession. Had Drake's commission been pleaded in bar of a suit that these learned authors deemed interesting enough thus to record, it is strange that they should not have mentioned the fact.

In order that the reader unacquainted with legal history may appreciate precisely what happened, it is desirable first of all that some explanation should be given of the nature of the action that Doughty wished to take, and of the now long-obsolete court which he tried to set in motion. An " appeal of felony " or of " murder " in the old law had nothing to do with an appeal from one court to another and a higher one—the sense in which we in modern times commonly use the word : from an early date the verb *appellare* was used to describe the action of one who brings a criminal charge against another. And in such an appeal the accuser had as a general rule to offer battle.[4] Trial by battle was a method of trial by no means peculiar to the special tribunal to which Doughty, for reasons that will be presently apparent, had recourse. It might be had at common law, and it was not expressly abolished there until the year 1819, though by that time it had long fallen into desuetude. " Judicial combat in criminal cases is allowed," says Selden, " for the trial of a particular objected misdeed, cognizable by the ordinary course of common law . . . . it is likewise permitted for the purgation of an offence against military honour, which the high court of chivalry is to marshal by the law of arms." But if the " objected misdeed " related to military matters and also had taken place outside the realm the only proper tribunal to try it was the Court of the Constable and Marshal. Even Coke, who constantly displays in his writings a marked dislike to every jurisdiction lying outside the domain of the English common law, admits this. " If a subject of the King be killed by another of his subjects out of England in any foreine country," he says, " the wife or he that is heire of the dead may have an appeale for this murder or homicide before the Constable and Marshal." [5] This is in accordance with what the Queen's Bench judges had ruled in the particular case with which we are concerned. It may be assumed that John Doughty was prepared to prove the requisite relationship to the deceased, and it will probably be now clear that in the circumstances of Thomas Doughty's death,

4 Pollock and Maitland. History of English Law, vol. ii, pp. 466, 664.
5 Institutes Part I. Lib. 2, cap.3, sec. 102.

the only road open to the would-be prosecutor lay through the Court of the Constable and Marshal. It is also to be noted that John Doughty was not bringing an appeal in our sense from a judgment of Drake in a court constituted under a commission, but initiating a criminal charge as between subject and subject. The form of his proceedings is not without significance.

Now let us see how he would have to begin. The mode of trial began by a cartel or challenge containing the accusation, which was " exhibited " or presented to the judge of the Marshal's Court and concluded with a statement by the appellant that he was ready to maintain the same by his body. The appellant was also required to swear to the truth of the cartel and that he was not actuated by malice : and if, after due consideration of the circumstances alleged, the combat was granted, notice was sent by the officers of the court to the accused person. We need not go into the various methods by which the appearance of the latter was obtained, or into what happened if he contumaciously ignored the notice. I do not know whether Sir Francis Drake was served with the process of the Earl Marshal's Court ; but if he was it would probably be difficult for a newly made knight altogether to disregard the summons of a court of Chivalry and Honour. Sir Julian Corbett, in his allusion to John Doughty's proceedings, assumes that it was Drake who took action before the Court of Queen's Bench in the hope of having them quashed. This seems probable : the only other explanation of the case coming before the Lord Chief Justice would be that Doughty, desirous to proceed in the Marshal's Court, himself moved the Queen's Bench for leave to sue there. It is of little consequence which happened : although in a subsequent case to which reference will presently be made, the common-law Judges were consulted beforehand. The important point to notice is that Doughty got his leave.

We have next to consider the character of the Court of the Constable and Marshal. It ought to be said that this tribunal, though an existing institution even in the sixteenth century, was not very often resorted to : and we cannot do better than transcribe the description of it given by Sir William Blackstone in his Commentaries. " The Court of Chivalry," he says, " which was a military court or court of honour when held before the Earl Marshal only, was also a criminal court when held before the Lord High Constable of England jointly with the Earl Marshal. And then it had jurisdiction over pleas of life and member arising in matters of arms and deeds of war as well out

of the realm as within it." This difference of jurisdiction between the Marshal sitting alone and the court composed of both Constable and Marshal was the rock upon which Doughty's case split. Blackstone proceeds (he is writing in 1765) " but the criminal as well as the civil part of its authority is fallen into entire disuse : there having been no permanent High Constable of England (but only *pro hac vice* at coronations and the like) since the attainder and execution of Stafford, Duke of Buckingham, 13 Hen. 8." There was no one holding the office of High Constable of England in 1581. The Earl Marshal by himself might deprive you of coat-armour for unknightly conduct, but he was not, unless the Lord High Constable sat with him, a criminal court.

An old statute of the year 1399 (1. Hen. IV. cap. 14) had ordained in terms " that all appeals to be made of things done out of the realm shall be tried and determined before the Constable and Marshal of England for the time being." For the trial of such cases the court must be constituted by the joinder of both officers. This was recognised as the law in a similar case (except that it was an appeal of high treason committed in Germany) which occurred in the reign of Charles the First, and may be read in the State Trials. At that time, as a preliminary step, the Judges were consulted, and they resolved that the trial might be by an appeal of Treason, on which the Combat might be joined : but the King, they said, must make a Constable, *durante bene placito*, for the Marshal could not take the appeal without him. Accordingly in this case Charles appointed the Earl of Lindsey Lord High Constable *pro tempore*. It is immaterial to our present purpose that these proceedings were not carried through. A Lord High Constable was in fact created. In the appeal of John Doughty against Sir Francis Drake Elizabeth declined to supply the necessary reinforcement to the only tribunal that, so constituted, would have had jurisdiction. " It was resolved " says Sir Edward Coke, " in the raigne of Queen Elizabeth, in the case of Sir Francis Drake, who strook off the head of Dowtie *in partibus transmarinis*, that his brother and heire might have an appeale. *Sed regina noluit constituere constabularium Angliæ &c. et ideo dormivit appellum.*"[6] We learn from the Reports of Sir Richard Hutton the further fact that " Petition was made to the Queen *by the Heir* to make a Constable but she would not." [7]

6 Commentaries, 1st Ed. 1628, fol. 75.

7 The Reports of Sir Richard Hutton, Knt., sometime one of the Judges of the Common Pleas, 1st Ed. 1656, p. 3.

There is nothing surprising in this ; it must have been a pretty hopeless petition from the start. Elizabeth's instructions to Mr. Tremayne to allow Drake to extract his ten thousand pounds from the treasure in the hold of the *Golden Hind* before the inventory was made had already been given at the end of 1580; and in April, 1581, she had knighted the person now accused. Nor can it be overlooked that the accuser, Master John Doughty, had been in some sort of trouble in 1576, before the expedition started ; there is on record his appeal to Leicester in the autumn of that year praying him to intercede with the Council for his release from the common gaol, " a very noysom place, replenished with misery." But what does seem curious is that John was only suppressed after all this legal pother, if in fact the Queen had already authorised Drake to pass judgment on Thomas.

We hear little of John Doughty after his failure to bring Drake before a court of justice, but that little is characteristic of the times. In May 1582 Drake laid an information against him for words uttered on the occasion of the former's receipt of knighthood : and simultaneously comes evidence, obtained from one Patrick Mason, under torture, of a Spanish plot against Drake in which John Doughty was alleged to be implicated. He must have been thrown into prison very shortly afterwards, because when in October of the following year he petitioned the Council from the Marshalsea that he might be either " charged and called to answer " or set at liberty, he said he had then lain there for sixteen months. That petition was endorsed " Not to be released," and the rest is silence.

The purpose of this paper is, however, complete with the tracing of John Doughty's proceedings against Drake a little further than, as far as I know, they have hitherto been followed, and in pointing out that nowhere in the course of them does any reference appear to have been made to the investment of Drake with power of life and death over Thomas Doughty or any other mutineer amongst his company. For the reason already mentioned it is difficult to account for that omission in the writings of lawyers, had such a power been expressly granted to the " General " by letters-patent before he sailed. We have, of course, always been entitled to draw the same inference from the general absence of any contemporary English reference to Drake's commission, which, had it ever existed, might have been set up in excuse for an act that, according to Camden, was being

publicly blamed at the time[8]; but that it was not set up in answer to specific proceedings at law seems to render the inference still stronger.

I am far from saying that where so much is mysterious these considerations are conclusive: but in any unbiassed examination of the Doughty affair they would probably have weight. At the same time it is well to point out that they are merely concerned with the legal backing Drake may or may not have had *in re* Thomas Doughty, and not with his justice. In my humble judgment the question of commission or no commission has not all the importance sometimes ascribed to it from the latter point of view, especially by writers bent above everything else upon making out a case on behalf of a national hero. Supposing it to be established that Drake held a commission to administer martial law, even in the large terms of the draft in part set out above, it would not follow that Thomas Doughty had a fair trial,[9] or that he was not done to death from ulterior motives. On the other hand, some measure of disciplinary authority over his people, and that of a lawful kind, Drake must necessarily have had. Even in these democratic days there has to be conceded to every uncommissioned master-mariner upon the high seas a modicum of such authority: it is inherent in his office, and is, moreover, derived from that of the State whose flag he flies. There is no other source from which, in course of law, it can, or ever could be, derived.[10] The sixteenth century was not democratic or overmuch concerned about the liberty of the subject, nor was the distinction between a public and a private ship as well defined as it is now. That Sir Francis Drake was high-handed and prone to exaggerate the powers he rightly had we know from what happened afterwards in the case of Vice-Admiral Borough, wherein again the Doughty affair was remembered as an exercise of authority without warrant. But let us not forget the atmosphere of what has been called the 'enlightened absolutism' of his age.

8 Annales, 1625 Ed., pp. 426-8.

9 That is to say, according to Tudor standards. An acquaintance with contemporary criminal trials in the ordinary course of law at home, especially in cases of treason, would be a desirable preliminary to any useful discussion of the Doughty affair, *e.g.*, the jury that acquitted Sir N. Throckmorton of treason in 1554 were severely fined: thus assuring the conviction of Sir J. Throckmorton upon the same evidence on which his brother had been acquitted.

10 See "The Master-Mariner's Authority," Law Quarterly Review, 1918, p. 347: It is not improbable that this was what Thomas Doughty had in mind when he made his vaunting speech about Drake's authority, delegated, he said, to himself in the *Pelican*. The words are put forward by the author of "New Light on Drake" as evidence of Drake's commission: but, saving all other exceptions to them, they hardly go so far. I am aware, of course, of the other two witnesses.