LEGISLATIVE DIVORCE IN COLONIAL PENNSYLVANIA

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It is a somewhat curious circumstance, and one, I think, not noticed by writers on the history of English Colonial evolution, that certain legislation in Colonial Pennsylvania occasioned a change in the Royal Instructions given by the Administration at Westminster in the name of the King, to Colonial Governors.

In 1769, the Legislature of Pennsylvania passed an Act, dissolving the marriage of Curtis Grubb from Anne, his wife, and permitting him to marry again. While some of the Colonies, Proprietary or otherwise, in America were not compelled to submit their legislation for the Royal approval—of course, in fact, the approval of the Administration at Westminster—Pennsylvania was not one of the Colonies so favored, and its legislation was duly transmitted to the Board of Trade and Plantations, charged with the oversight of the dominions over seas of the Empire.

When the Act came on for consideration by the Board, it appeared to be of a new and extraordinary nature, and the Board thinking it of "very great Importance that care should be taken that the Assemblies in Your Majesty’s Colonies do not assume the exercise of powers beyond what the nature and principles of the Constitution admit”, they referred it for an examination and Report to a Barrister of standing in London, Richard Jackson, K.C.

On such references, the examination was usually of a very minute and careful character: obviously, there were always present a fear of the Colony acting im-
prudently and a distrust of the Colonists’ judgment. Sometimes, the Colonial legislation was “imprudent”, “unjust”, “inconsistent with the interests of the Kingdom”; but, as a rule the real objection was either an encroachment upon the rights of the King or Mother Country or a deviation from the English law, with or without other reasons. It is true that Pennsylvania was not so much at fault as “the Colony of Rhode Island, which Colony as well as that of Connecticut, under pretence of the Powers granted to them by their Charters assume to themselves an absolute Government, independant not only of the Sovereign Government of the Crown, but of the Legislature of the Mother Country”.¹ Nor did it quite equal Jamaica, whose Legislature “departed from the known and Established Principles of Justice Equity and Reason and the Laws of the Mother Country”, that it had to be declared “null and void, as being Repugnant to Justice, Reason and the Laws of England”.² But even Pennsylvania had passed legislation which was “a direct breach of the Privileges of the People”; also “An Act of the most extraordinary and unprecedented nature”; some “inconsistent with reason and Natural Justice”, and “Laws by which the Trade and Shipping of this Kingdom may be affected”, even if it did not go as far as Virginia which passed an Act “so highly unjust and improper” as that thereby “Liberty is given to any Person, to kill Swine that should be running at large within the Limits of the . . . Town” of Walkerton.³

Jackson reported that he was inclined to think that this Act divorcing Caleb Grubb was “not repugnant to the Laws of England, but as near as might be agreeable to the same, the situation and Circumstances of

² Ibid., pp. 519, 520.
³ Ibid., pp. 339, 341, 764, 766, 175, et passim.
that province as well as of the other Colonies, because the Laws of the Kingdom gave validity to Marriages celebrated according to the Rites and Ceremonies . . . not only of the Colonies parcel of the Dominions of Great Britain, but by the Laws of Foreign States; and it seems as reasonable and as little inconvenient to give Faith to the Dissolution of that Contract under an Equivalent Sanction . . ."; he observed "it was evident that the Marriage of persons residing in the Colonies can hardly be dissolved unless by their . . . Assemblies . . . power"; he was inclined to think, "they ought to be entrusted with, but inasmuch as the exercise of this Power might frequently affect other parts of Your Majesty's Dominions . . . and very important Conclusions might therefore be drawn from the allowance of such an Act", he advised that it should be "referred to the Consideration of the Attorney-General and Solicitor-General."

The act was so referred—the Attorney-General being then Sir William De Grey (afterwards Lord Walisingham), and the Solicitor-General, Sir Edward Willes: they did not make a Report; and the Act was allowed to go into force, sub silentio.

When the thirty Pennsylvania Acts of March and September, 1772, came before the Board of Trade and Plantations, December 22, 1772, one of them was found to be a Divorce Act, dissolving the marriage of George Keehmle of Philadelphia, Barber, with Elizabeth, his wife, and enabling him to marry again. The Board carefully examined the history of such legislation and found "the dissolving Marriages by Acts of Legislature, tho' not altogether without Example, is a power which has been rarely and recently Assumed in Your Majesty's Colonies in America": in the reference, January 15, 1773, by the Board of the Council, an extended statement was made by the Board of the facts of the former Act of Divorce; and it was added that they
felt it a duty "no longer to withhold the Submitting this matter to consideration, to the end that if it shall be thought that the Acts of Divorce in the Plantations, more especially in Cases where there does not appear to have been any Suit instituted in any Ecclesiastical Court, nor any Verdict, previously obtained in a Court of Common Law, are either Improper or Unconstitutional, Your Majesty may be advised to give such Directions as shall have the effect to prevent the Laws passed by the Legislature of Pensilvania becoming a Precedent and Example for the Exercise of the like powers in other Colonies".

The Privy Council, April 7, 1773, referred an Act of Naturalisation to the Law Officers of the Crown: and, the next day, a letter was sent to Sir Edward Thurlow, Attorney-General, and Sir Alexander Wedderburn, Solicitor-General; but this Act of Divorce was declared void without further proceedings. Thereafter, the Royal Instructions to the Governors of the Colonies contained a clause directing the withholding of the Royal Consent by the Governor to any Divorce Act, a prohibition which continued in Canada till well past the middle of the last Century. For example, the first Divorce Act in Upper Canada to come into force received the Royal Assent in 1841 at Westminster not at Toronto.

I find three other Divorce Acts disallowed from the North American Colonies. An Act passed by the Legislature of New Jersey, August–September, 1772, "to dissolve the Marriage of David Baxter with Margaret his Wife, late Margaret McMastry", was disallowed September 1, 1775, on a Report of a Committee, August 26, 1775, on a Board of Trade representation of May 27, referred to the Committee, June 9.4 "A New Hampshire Act of January, 1773 for the divorce of Eliphalet

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Pattee of Chester from his wife, formerly Abigail Elliott, is disallowed, on the Committee Report of May 28, 1774, agreeing with a Board of Trade representation of March 31st, referred to them April 11th, which showed that the Act was inconsistent with a general Instruction given since its passing to all Colonial Governors not to assent to Divorce Acts.'

The story in full of the proceedings in Pennsylvania which brought about these Instructions will be found in the same volume, a volume, I may add, which contains much else of great interest to all who are students of British Colonial policy, and which discloses the actual cause—I had almost said, the inevitability—of the American Revolution.

Another Act of the Province of New Hampshire, passed in April, 1771, to dissolve the marriage of Greenwood Carpenter of Swanzey with Sarah Leathers, formerly of Charlestown, Middlesex County, Massachusetts, was disallowed, September 1, 1773, having been brought before the Board of Trade and Plantations, May 6, 1773, reported to the Privy Council, May 19th, presumably with adverse representations; referred by the Council to the Committee, August 26th; Committee reported recommending disallowance, and acted on by the Council, September 1st.

Ibid., pp. 365, 366.
Ibid., pp. 580, 581.

General Note.—Perhaps divorce legislation has furnished an excellent illustration of the progress of "Colonial" development in the British world as can be obtained. As we have seen in the text, Imperial interference with Colonial legislation was minute and constant when the "American Colonies" were in existence—the power of disallowance by the King, i.e., the Administration at Westminster, continued to exist and be exercised throughout the Colonial period. Even in 1876, when the Dominion of Canada was given political entity, this power was retained, in form, though it has been exercised only once and that at the request of the Canadian Administration—it is one of the many camouflages in the Constitution of British nations, and is as dead as
the dodo, or the Royal power of refusing consent to legislation passed by the two Houses of Parliament, which has not been exercised for centuries, and never can be again. Divorce legislation took a somewhat different course; e.g., when in 1792, Canada became two political entities, Upper and Lower Canada, the Governor and Lieutenant-Governor received specific Royal Instructions, inter alia. "Whereas We have thought fit by Our Orders in Our Privy Council to disallow certain Laws passed in some of our Colonies and Plantations in America for . . . divorcing Persons who have been legally joined together in Holy Matrimony . . . It is Our Will and Pleasure, that you do not upon any pretence whatsoever give your Assent to any Bill or Bills . . . for the Divorce of Persons joined together in Holy Matrimony." Documents relating to the Constitutional History of Canada, 1791-1818, Ottawa, The King's Printer, 1914, p. 38. The first Divorce in Upper Canada (Now Ontario), was effected by an Act, passed February 7, 1840, for the divorce of J—— S—— from his wife, Elizabeth V—— R——; this was not assented to by the Governor but reserved for "the Royal pleasure". This was given in the name of the young Queen Victoria, and came into effect, June 24, 1841. These Instructions continued after the formation of the Dominion of Canada in 1867; "in 1875-6, an interesting situation arose; the Canadian Ministry through Mr. Blake, the able Minister of Justice, objected to Canada being considered a 'Colony', when she had become a 'Dominion'; and he called for a radical change in the Royal Instructions. The result was that all Instructions as to Bills for Divorce were abandoned, and since that time, the Bills for Divorce have been treated as other Bills passed by the Parliament of the Dominion, and from the first, that of 1884, 47 Vict. cap. 107, there has been no reservation of such Bills". See my article, "The First Divorce in Upper Canada", Bench and Bar, Toronto, for March 1, 1932.