

**THE ACTS AND RESOLVES,
PUBLIC AND PRIVATE, OF
THE PROVINCE OF THE
MASSACHUSETTS BAY, VOL. VI**

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The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay, Vol. VI by
Various

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THE
ACTS AND RESOLVES,
PUBLIC AND PRIVATE,
OF THE
PROVINCE OF THE MASSACHUSETTS BAY:

TO WHICH ARE PREFIXED

THE CHARTERS OF THE PROVINCE

WITH

HISTORICAL AND EXPLANATORY NOTES, AND AN APPENDIX.

PUBLISHED UNDER CHAPTER 87 OF THE RESOLVES OF THE GENERAL COURT
OF THE COMMONWEALTH FOR THE YEAR 1867.

VOLUME VI.,
BEING VOLUME I. OF THE APPENDIX.

CONTAINING
PRIVATE ACTS, 1692-1780.

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P R E F A C E .

The following are extracts from a Preface prepared by the Editor of the Province Laws, Mr. ABNER C. GOODELL, Jr., and are here published by the order and authority of the Governor (acting) and Council:—

"By chapter 43 of the resolves of the year 1865 commissioners were appointed 'to prepare for publication a complete copy of the statutes and laws of the Province and State of Massachusetts Bay, from the time of the province charter to the adoption of the Constitution of the Commonwealth, including all the sessions acts, private and public, general and special, temporary and perpetual, passed from time to time by the General Court; all incorporations of towns and parishes, and all other legislative acts of legal or historical importance appearing on the records of the General Court, with suitable marginal references to the statutes and judicial decisions of the Province and Commonwealth, the orders of the king in council, and to such other authorities as, in their opinion, may enhance the value and usefulness of the work; and to append to the same a complete index.' This work was finished before the end of the next year.

"The resolve did not provide for printing the materials thus collected; but two years later, by the resolve of 1867, chap. 87, authority was given for the printing of one volume during that year, and a new commission was thereupon issued, under which the Commissioners began their work in March, 1868, finishing the first volume in March, 1869.

"The work has since continued to the ninth volume, which is partly done.

"Practically, this ninth volume is the tenth, since the entire first edition of volume II. was destroyed in the great fire of November, 1872, and the work had to be done over again and a new index made.

"By the province charter the governor and the great and general court for the time being were granted full power 'to make ordaine and establish all manner of wholesome and reasonable Orders Laws Statutes and Ordinances Directions and Instructions either with penalties or without' not repugnant to the laws of England. Obedience, however, was exacted only to such of these as should be made and published under the seal of the province. This excluded the whole body of legislation except the formally engrossed acts, which, in point of numbers, were a very inconsiderable portion of the whole. Of the resolves and orders thus excluded more will be said further on, but of the one hundred and two private acts passed before the Constitution, all of which, save three, are herein printed (and the substance of those three is known), the following comments are offered as of possible interest and value.

"Notwithstanding the requirement of the charter, that 'the said Orders Laws Statutes and Ordinances' be, by the first opportunity, transmitted to the Privy Council, under the seal of the province, the practice, except in special instances, seems to have been to transmit only the public acts. This appears by the letter of Secretary Willard, in 1718,* to Mr. Popple, secretary of the Board of Trade, as well as by the omission of the titles of private acts in the lists of acts laid before the Privy Council, and by the references, occasionally found in the records of the Lords of Trade and of the Privy Council, to the neglect to send the private acts.

"From December, 1723, to June, 1742, no private acts were passed. This was owing to a royal instruction dated March 29, 1723, directed to Governor Shute, but received by Lieutenant-Governor Dummer before the first session of the assembly of 1724, forbidding 'assent to any private act until proof be made before you in council, and entered in the council books, that public notification was made of the parties' intention to apply for such act, in the several parish churches where the premises in question lie, for three Sundays, at least, successively, before any such act shall be brought into the assembly.' The same instruction forbade the passage of 'any private act without a clause inserted therein suspending the execution' thereof until the royal approbation 'shall be had thereof.' This instruction was renewed to all succeeding governors.

* Province Laws, vol. II., p. 94.

"Another instruction, issued first to Governor Burges, September 8, 1715, required the governor to take care that no private act be passed in which there was not a saving to the king and his successors, 'all Bodys politick and corporate and of all other persons except such as are mentioned in the said Act.' This instruction, likewise, was renewed to succeeding governors, but it was clearly not regarded, nor was the neglect to observe it animadverted upon by the Lords of Trade or the Privy Council until the first private act passed after the above instruction to Governor Shute was laid before the latter board for their consideration. This was act number 80; and upon representation of the Lords of Trade of the failure, in this instance, to comply with the above-mentioned instructions, the act was disallowed by the Privy Council, May 28, 1746. In like manner private acts numbers 87, 88, 90, 94 and 97 were disallowed for want of the suspending clause, although other reasons were given; such as, that numbers 90 and 97 were contrary to law, and that in number 94 the legislature unwarrantably assumed the functions of a court of equity.

"Act number 89 was certified for transmission, June 18, 1761; delivered to the clerk of the Privy Council, in waiting, on the nineteenth of September; referred to the committee of the Privy Council, for plantation affairs, on the twenty-fourth; considered by them and referred to the Lords of Trade, etc., on the twenty-fifth; ordered to be sent to Sir Matthew Lamb, counsel for the Board, for his opinion in point of law, January 13, 1762, who, on the twenty-second of May, reported 'no objection;' and, thereupon, on the ninth of June, the act was 'ordered to lie.' No subsequent action upon it has been discovered, and therefore, presumably, it took effect by lapse of time.

"Acts numbers 91, 92, 93, 95, 96, 98, 99 and 100 were all laid before the Privy Council, but neither appears to have been formally allowed or disallowed. The first three were certified for transmission, March 30, 1763; referred to the Commissioners for Trade and Plantations on the ninth of July; read by the Board on the fifteenth, when they were sent, in regular course, to Sir Matthew Lamb, whose report thereon, dated the twenty-second of September, was read and considered on the fourteenth of October. Both in this report and in the list of acts considered on that occasion these private acts were omitted. Much the same course was undoubtedly taken with the other private acts last enumerated, and they were probably not further acted upon.

Numbers 101 and 102, having been passed during the Revolution, were of course never sent to England.

"The only other private acts which were not disallowed are those relating to the dissolution, or for declaring the nullity, of the marriage contract.

"Acts numbers 81, 82 and 83 were considered together by the Lords of Trade. The first two of them were declared by Sir Matthew Lamb—to whom they were sent, in regular course, for his opinion—to be 'the first of their kind that he ever saw in the colonies or elsewhere.' Sir Matthew's report was dated December 18, 1756, and was read at the Board on the twenty-second of March following, when the acts were first considered. They were again considered, May 12, 1758, by the Board, who, on the thirtieth, drew up their representation to the Privy Council. The Lords concurred in Sir Matthew's opinion that all these acts were 'highly improper;' and, in their representation to the Privy Council, they declared that the governor 'ought not, upon any consideration, to have given his assent to them' without the suspending clause required by his instructions; and they proposed that, 'as it may be a matter of doubt whether the legislature of the province . . . has a power of passing laws of this nature, and, consequently, whether these acts are not of themselves null and void, . . . this point be referred to the consideration of His Majesty's Attorney- and Solicitor-General, to the end that proper instructions may be formed for the governor of this and other . . . colonies, to regulate their conduct in the like cases whenever they shall occur.' This representation or report was signed at Whitehall, June 6, 1758. No report by the law officers of the crown on the point submitted to them has been discovered; but as no signification that these acts were disallowed appears in our public archives, and as other similar acts continued to be passed as late as April, 1780, the conclusion appears inevitable that they were suffered to go into operation, *sub silentio*. This conjecture is rendered more probable by the circumstance that Governor Shirley was present,* by invitation, to consult with the Lords of Trade at their meeting on May 12, 1758, and that before the arrival of his successor, Governor Pownall, two similar acts (numbers 84 and 85) were passed, which do not appear to have been disallowed, although they were duly transmitted to the Privy Council.

* See Province Laws, vol. III., p. 855.

"The province law of 1754-55, chapter 15, for enforcing the decrees and orders of the Governor and Council in matrimonial cases, had been passed January 8, 1755, but that board continued to decline to decree a dissolution of the bonds of matrimony in cases of cruelty or of adultery. Accordingly, in the second session of the legislature which enacted private act, number 86, for dissolving the marriage of Daniel and Mary McCarthy, a bill was passed in the House empowering the Governor and Council to grant a license to marry again to the 'innocent or aggrieved party,' who had been separated by a divorce *a mensa et thoro*. This bill was read in the Council, August 24, 1757, but there was no vote of concurrence. This, of course, was while the provincial divorce-acts of the preceding two years were lying before the Lords of Trade for their consideration.

"The subject of legislative divorces was largely debated about that time, and William Bolla, son-in-law of Governor Shirley, and then agent of the province, in England, a person of various learning, as well as an accomplished lawyer, has left some account of the difficulties he encountered in his diligent and arduous pursuit of this subject, in the libraries and in the records of the ecclesiastical courts in London.

"The Editor has reserved his comments upon the subject of legislative resolves for this conclusion of the preface. However slight the distinction between a bill and a resolve may be according to present practice,—a distinction hardly definable if we follow the received authorities,*—it appears from what has been already shown in this preface that by the province charter, the impress of the province seal, which was affixed to acts exclusively, was a necessary badge of authority, and hence the propriety of limiting the office of resolves, generally, to administrative matters, in which they served to express the consent of the legislature, rather than to prescribe or command action. A large number of resolves are merely subsidiary to other formal legislation, or ancillary to the proceedings of the judicial courts. Of the former, are resolves for the imprinting and issuing of bills of public credit; for abating taxes and imposts; for granting salaries; votes for supplying the treasury; and appropriations for a variety of objects sanctioned by law. Of the latter, are resolves for altering the terms of the courts; aiding in the settlement and distribution of estates; and ordering sales of the estates of deceased persons or persons under disability; granting

* See Cushing's "Law and Practice of Legislative Assemblies," paragraphs 752 and 2403, and citations.

relief in cases of failure to enter appeals and reviews, or for correcting irregularities in the service of writs, and in the levy of executions, where the powers of the judiciary were inadequate.

"Of a higher class of resolves are those declaratory of the law; for forming treaties; issuing proclamations for fasts and thanksgivings; sending envoys and preparing letters to other governments; adopting addresses to the crown; defining the functions of the respective branches of the legislature, and settling questions of parliamentary law and practice.

"The administrative resolves comprise a great variety; such as those authorizing the building of highways, bridges, and ferries, meeting-houses and schoolhouses, forts and blockhouses; establishing the boundaries of the province, and of towns and counties; electing public officers; providing arms and munitions of war, and furnishing snow-shoes for the militia.

"The resolves most difficult to trace in their operation are those which were passed in aid of military forces in actual service. The governor, as commander-in-chief, having the disposal of all grants for this purpose, and not being accountable except through the commissaries and boards of war appointed by him, it is sometimes impossible to determine whether a given resolve of this class was actually operative, — the mere vote, by the House, of approval of a military enterprise being often taken as sufficient warrant for the application of money therefor by the Governor and Council, without the record of the concurrence of the upper branch. A similar difficulty arises in determining whether a resolve actually became operative in cases where its operation depended upon the election of the beneficiary.*

"Besides these classes there was a series of resolves having all the force of acts, not from their form or intrinsic power, but because of a provision of the charter, authorizing the governor and general assembly 'to make or passe any Grant of Lands . . . in such manner as heretofore they might have done.' These grants were expressly ordained 'to be and continue for ever of full force and effect without our further Approbation or Consent.' This provision, therefore, dispensed with the necessity of the formalities required in the passage of acts, including the transmitting them to the Privy Council for the royal allowance or disallowance.

* See *Little v. Frost*, 3 Mass. 106, 116.