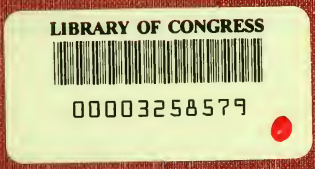

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BY

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THE ROYAL DISALLOWANCE.

BY CHARLES M. ANDREWS

The royal disallowance of colonial laws, when considered in all its phases, becomes a subject of far too wide a scope to be dealt with in the brief space at my disposal. I propose, therefore, to limit my discussion to one phase only, that which concerned the authorities at home. The influence of the disallowance in the colonies themselves is an intricate and difficult question that can be answered satisfactorily only after a thorough study has been made of the history of each individual colony. In what I have to say, I shall treat briefly of the early history of the disallowance, of the procedure accompanying its exercise in England, and of the rules that the British authorities laid down for their own guidance. No adequate attempt has yet been made to define these rules or to study in any systematic way the policy based upon them. One reason for this neglect is, undoubtedly, the belief that British policy was a negligible factor in colonial history and may be ignored by the historian. As I consider this belief to be erroneous, I deem it only a matter of common honesty to find out what this policy was, how far it was applied in dealing with colonial legislation, and to what extent it was justified from the point of view of England's constitutional past and the demands of her imperial and commercial systems. The evidence does not lie on the surface, but must be searched for in parliamentary acts, governor's instructions, and royal disallowances.

The royal disallowance has been commonly interpreted as if it were an act of royal legislation, and the

Privy Council itself defined it as "the negative which the crown has reserved to itself upon acts of legislation in the American colonies." But it was not an act of legislation in the same sense that a royal veto of a parliamentary bill was an act of legislation. The latter was the exercise by the king of his right as a constituent member of the British parliament. In exercising this right the king acted alone, making no use of the Privy Council, for the Council had no place among the law-makers of England. The royal disallowance was an executive rather than a legislative act, performed not by the king but by the Council as his executive agent. It was an exercise of the royal prerogative, an expression of the king's supreme authority in the enacting of laws by inferior law-making bodies, whose right to make laws at all rested on the king's will. The legislatures in the colonies were not parliaments, that is, from the legal point of view they were not in any sense comparable with the supreme law-making body in England. It is true that they frequently made this claim and constantly exercised powers that lay beyond the bounds of their legal right, but properly their powers were only those of a provincial assembly or, in the case of the corporate colonies, of a provincial court with the right to legislate for the good government of the company or fellowship. Except where the king had bound himself by his charters, he had the right at all times to prevent these assemblies from "usurping authorities that were inconsistent with the peace and good government of the province."

The royal disallowance was, therefore, not a veto but an act of regulation and control, in the same sense that a royal letter and instruction was an act of regulation. In fact, disallowance and instruction were synonymous, for both expressed in different forms the royal will. The Privy Council, which was the king's mouthpiece in the matter, frequently issued a new instruction instead of a disallowance; while in all the

governors' instructions clauses were inserted that were dormant disallowances, in that they required the governors to refuse their assent to all measures of a certain class that might be passed by the provincial legislature. Thus the royal disallowance was but one of the means employed by the king, through the Privy Council, to confine the colonial legislatures within the constitutional bounds of their powers. The royal right was never defined and never denied, even by the colonies themselves, for the colonies were the king's colonies, such charters as they had came from him, their officials were his appointees, and all orders and instructions ran in his name. They were never "parcel of the realm," but were possessions of the crown of Great Britain.

The right of disallowance was exercised from earliest times. Laws passed by the first assemblies in America, those of Virginia in 1619 and of Bermuda in 1620, were recognized as subject to the approval of their respective companies in England, and the laws of Bermuda were actually sent over for confirmation. The Massachusetts Bay Company in 1628-1629 instructed its Salem plantation to send over all laws and orders for examination by the company at home. In 1629, five years after the Virginia colony had been taken over by the crown, Governor Harvey in his petition for a charter took for granted the king's right to approve or disapprove of the laws passed in the colony, and in the royal reply he was instructed to see that all laws and orders were transmitted and such as were allowed were to be but temporary and "changeable at his Majesty's pleasure." In 1631 the burgesses of Virginia despatched the first collection of acts of a royal province ever sent to England. By 1638 the practice had become well established. I know of no law actually disallowed at this early period, but one was suspended in 1638 and ordered "to lie by" for further consideration. After 1660 the right was affirmed, and in 1663 the rule was laid down for

Barbadoes that acts should be in force but one year unless confirmed. The rule was extended to two years in 1664 for Jamaica. One clause of a Barbadoes act was disallowed in that year, the first certain instance of a disallowance that I can discover. As far as the continental colonies are concerned, the first recorded disallowance is that of all the laws of Bacon's assembly in 1676, hardly a disallowance properly so-called as the assembly was deemed irregular.

The routine of transmission had got fairly well fixed before the end of the seventeenth century. Maryland, Connecticut, and Rhode Island were not required by their charters to transmit their laws, though all did so to a greater or less extent. The Carolinas and the Jerseys likewise sent over no laws, until after they had become royal provinces. Massachusetts was in the same class until 1684, but after 1691 regularly transmitted her laws, while Pennsylvania, though a proprietary colony, was required to do so from the beginning. Before the end of the colonial period was reached, every colony had had one or more laws disallowed; during the eighty-three years of her second charter, Massachusetts had forty-seven public laws and twelve private laws disallowed; while with other colonies the number was much greater. The machinery of transmission was very far from perfect, even among the royal colonies. Many laws were never sent over; others were never acted upon or were held so long that months and even years elapsed before a decision was reached.

During the early period the English government was uncertain how to proceed. Before 1670 laws were acted upon by the Privy Council with the advice of its committee. In 1670 the special plantation council of that year was ordered to examine the laws of the colonies and if any were "found inconvenient or contrary to the laws" of England or to the "honour and justice" of the government they were to be immediately annulled. But the special councils ap-

parently took no action in the matter, for no reports issued by them relating to colonial acts have been found, and in 1674 the Shaftesbury council was still debating "the best way for his Majesty to confirm the laws made by the plantations." In 1675 colonial business was again taken into the hands of the Privy Council and entrusted to its committee, the Lords of Trade, and then the procedure as finally adopted was introduced. Laws were sent from the colonies to both the Lords of Trade and the secretary of state, and by the former reported on to the Council, with or without the advice of the crown lawyers. The first reports recommending disallowance of acts regularly passed were in 1678, when certain acts of Jamaica, and others of Virginia, passed in February, 1677, to meet the situation raised by Bacon's Rebellion, were declared null and void.

When fully developed the course of a law was somewhat as follows. The Privy Council, to which after 1730 all laws were sent directly, handed over the laws to its committee. This committee was quite competent to act alone, but generally referred the laws to the Board of Trade for report. In making up its report the board called upon a great variety of counsellors for advice: first, its own special solicitor, appointed in 1718, or the regular law officers of the crown, who might and occasionally did reverse the opinion of the solicitor; then in special cases, other departments of government, the bishop of London, agents of the colony, ex-governors, or others familiar with colonial affairs. Generally the board accepted the opinion of those consulted and the Council committee accepted the report of the board. But this was not always the case. Each might reject the advice of its referee and modify or reverse the verdict. But the Privy Council, almost without exception, approved the report of its committee and embodied that report in an order in Council. This order was always supposedly sent to the governor of the colony.

The procedure was neither perfunctory nor mechanical. In the passage of a law from referee to board and board to committee there was ample opportunity given to those concerned to check or accelerate its advance. Protests, petitions, and caveats might be entered against it, sometimes verbal and sometimes in writing, by agents or solicitors of the colony or of neighboring colonies, by merchants, by the bishop of London, and even by the governor who had signed the bill. Caveats were always recorded on the books of the board. Occasionally the law would be returned to the colony with instructions to the governor to obtain its modification or repeal, or it might be held until the colony met the objection that had been raised against it. Some lively tilts took place in the Plantation Office between those who favored a law and those who opposed it. In some instances the difficulty of reaching a decision was so great that the board refused to take the responsibility, leaving the matter entirely in the hands of the committee of the Council. Sometimes the board, not wishing to recommend disallowance, drafted an amendment or even a whole bill, and sent it over to be substituted for the measure passed. Should the colony refuse to pass the substituted clause or bill, the original measure was disallowed. Sometimes an act would be recommended for approval with the proviso that henceforth governors be forbidden to sign such acts, and sometimes in recommending a disallowance the opinion was expressed that governors ought not to consent to such acts in the future. Frequently the act would be ordered "to lie by probationary" or "to be postponed," either until its effect could be better understood, until someone had been consulted, or until some complaint had been registered against it, after which it would be sent to the legal adviser. At least one act was read and ordered to be confirmed, then read again and ordered to lie by. Once or twice the board on its own initiative waited to hear from the

governor of the colony and on a number of occasions it promised the bishop of London or some interested individual to let him know when the law was to be considered. There is one instance where an act already confirmed was, on complaint of the merchants, afterwards disallowed, and one where the board instructed the governor of a colony to obtain an amendment to an act that the Privy Council had already agreed to.

Of course, all these attempts to be fair caused inevitable delays. The board itself was often very dilatory; the legal adviser was slow in making his reports and sometimes failed to report altogether; and the time taken in communicating with agents or with the colony was at best exasperatingly long. For the royal colonies, a period of three years between the passage of a law and the issue of a disallowance was not uncommon. There are instances of five years elapsing, and in the case of a New Jersey law regarding lawsuits passed in 1714, the act was read June 27, 1720, reported to be disallowed January 10, 1722 and disallowed ten days later. The same act, passed again in 1728, was twice sent to the legal adviser and not finally disallowed until 1731. A Massachusetts act of 1695 for the settlement and support of ministers was "complained of by the parsons and sent to Mr. Attorney General" in 1727. One freakish case, and not the only one of its kind, was that of a New Hampshire law of 1718, which was not disallowed until 1769, when an additional act was passed in the colony and sent to England. When Fane retired in 1746, he left without report a large number of laws, which had been sent to him three or four years before, and his successor, Matthew Lamb, to whom these laws were immediately despatched, left his own quota of unexamined laws at the time of his death in 1768. There was no regularly commissioned legal adviser from 1768 to 1770, though laws were sometimes sent to a "Mr. West," a solicitor whose identity has so far

eluded me. Jackson, who was appointed in 1770, was on the whole prompt in his replies. In 1766 so great a number of laws had accumulated that the Privy Council peremptorily ordered the board to examine them and make report, which the board did so zealously as to overwhelm the Council committee with a mass of laws and recommendations that held up regular business for many days. It was inevitable that under such circumstances comments on colonial legislation should be hasty and inconsistent. All things considered, the wonder is that the criticisms were as good as we find them to be.

The policy which governed the board and its advisers had four leading aspects. First, to defend the law and custom of the British constitution; secondly, to guard the interest and welfare of British subjects; thirdly, to protect the colonies or any of their inhabitants from ill-advised legislation; and lastly, to prevent the passing of laws that were extraordinary, oppressive, improper, or technically defective.

I. The first group of disallowances is the largest, though not necessarily the one that ranked as most important in the eyes of the English authorities. Departures from the law and custom of England were not infrequently permitted, if good reason could be adduced therefor, but laws that affected the welfare and prosperity of the subjects of Great Britain, and so of the state itself, were rarely allowed to go into force if the Board of Trade and the Council committee could prevent it. The welfare of the colonists themselves was held in high consideration, provided it was not furthered at the expense of British subjects, and laws that were deemed in any sense injurious, either because of their content or because of their form, were always disallowed.

As I have said, the first group is by far the largest. It includes, first, all laws that affected or trespassed on the royal prerogative, a power wide and uncertain and nowhere defined; secondly, all laws that were

contrary to the governors' instructions or in excess of powers granted by the charters, each of which was but an expression of the royal will; and thirdly, all laws that were contrary to or in derogation of any act of parliament specifically relating to the colonies, that went counter to English legal or administrative usage, or that were in opposition to the organization and practice of the Anglican church. Let us take these up in turn.

1. No royal colony had a legal right to concern itself with such questions as the duration of the assembly, the qualification of electors or elected, or the number of those making up the legislative body. The assemblies could not legally decide questions of controverted elections or define their own powers. They could not legally grant representation to new townships or declare any part of the population debarred for any reason whatever from sitting in the assembly. These were regal powers, exercisable only through the colonial governor, the king's deputy in the colony, though at times other reasons had weight, such as the fear of the English authorities lest the popular branch of the colonial legislature should be increased and so destroy the balance between the assembly and the council. No royal colony had the right to appoint executive officers, either by law or ordinance. It could not restrict the functions of any patent office, the appointment to which always lay in the hands of the crown. It could not compel holders of such offices to reside in the colony. It could not render these offices less lucrative by attempts to regulate fees and perquisites to the disadvantage of the incumbents, or in any way to take away the rights and privileges belonging to such offices. The assembly of a royal colony could not appoint judges or chancellors who, though not necessarily patent officers, were nominees of the king only. It could not erect courts or decide where actions should be tried, nor could it interfere with the established

legal jurisdiction by grants of powers to new officials, such as sheriffs and justices of the peace. It could not alter the tenure of judges by declaring that they held office during good behavior and not at the king's pleasure, and it could not in any way restrict the king's freedom of appointment by defining qualifications or narrowing the range of selection. It could not take from the crown the right of hearing appeals from colonial courts.

In the same class of unconstitutional acts, but making a greater stir in colonial history, were all legislative measures looking to the control of the public purse. The Board of Trade recommended the disallowance of many acts whereby the colonial assemblies sought to direct appropriations and the appointment of colonial treasurers. It declared such acts contrary to the instructions of the governors, who alone could issue warrants for money. The board objected very strongly to the South Carolina Act regulating the Indian trade (1731) because it placed the power of making presents to the Indians in the hands of the assembly instead of the governor, who by his instructions had authority "to issue all public money by his warrant with the advice of council." So vigorous was the quarrel over the question in New York, Massachusetts, and elsewhere, that it is not clear why the many acts passed by the assembly of North Carolina, between 1738 and 1773, practically taking the collecting and expenditure of public taxes out of the hands of the governor, were allowed to stand. But I cannot find that they were ever disallowed. The governor signed them, and one of them at least was returned by the legal adviser of the board endorsed "no objection." On the other hand, Jackson in 1778 recommended the disallowance of a Tobago act on the ground that it *required* the governor to sign the warrants and so placed a restriction on the royal freedom of action. Voting the speaker a salary, appropriating any crown revenue, or dimin-

ishing in any way the revenue of the crown were all deemed repugnant to the royal prerogative. Even the establishment of fairs and markets was a royal privilege and could not be usurped. The Board of Trade watched over all revenue bills, and if it found a tack or rider in the form of an appropriation clause, it recommended the disallowance of the whole. Other acts in derogation of the royal authority were those altering a city charter granted by the king, as in the case of Norfolk, Virginia; conferring a monopoly, which could be created only by royal patent; authorizing naturalized subjects to hold property, affecting, as the disallowance said, "the king's rights derived from the laws and constitution of the kingdom"; or repealing an act that had once received the royal confirmation.

2. In the same general class are all disallowances of acts passed contrary to the governor's instructions. That such were constantly passed we know, and that the governors were thereby often placed in very embarrassing positions our colonial records show. Governor Johnston of North Carolina complained to the board of a great many acts that he had been compelled to sign, and there is one instance where in 1734 the governor of Barbadoes signed a bill and then apparently sent home depositions and other testimony for the purpose of having it disallowed. The colonial assemblies were masters of the art of persuading their governors that instructions did not mean what they seemed to mean, and the Board of Trade, three thousand miles away, was powerless to meet the difficult situation. Once when Dobbs of North Carolina, a highly conscientious man, attempted to justify his action, the board deemed the course adopted an aggravation of the offence, and declared that if the governor "could be dissolved by the opinions of others from the obligation of obedience," then "the interests of the crown and the mother-country must depend solely for security on the uncertain wills, inter-

ests, and instructions of any person whose advice and opinion the governor might think proper to ask." Despite brave words frequently uttered, the board was not able even by the threat of a severe reprimand or the loss of his position to keep the colonial governor to his statutory obedience.

Whenever a colonial assembly passed an act that exceeded its powers or was not properly cognizable by it as a law-making body, that act was disallowed as an infringement of the prerogative. Such happened when one of the proprietary or corporate colonies legislated contrary to its charter, as when Rhode Island set up a court of vice-admiralty, Connecticut dealt with heretics, and Massachusetts attempted to regulate the taking of fish within its harbors and the coves of its townships. Such happened in a royal colony when New Jersey inserted in a paper money act a clause concerning counterfeiting that was construed in England as a subject lying outside the province of the legislature. Matters not cognizable by a legislature were usually such as came within the jurisdiction of the courts and should have been dealt with in the ordinary course of law. Massachusetts passed acts fining certain persons who had aided the enemy and enabling a married woman to prosecute an action. New Hampshire passed acts relating to private property and enabling private persons to revive a suit at law. New York passed acts partitioning lands held in common; and New Jersey in 1771 passed an act regarding debtors, on which occasion the board laid down the general rule that "the frequent and occasional interposition of the legislature in cases of individuals for the purpose of stopping or diverting usual courses of legal action is unjust." In the same class are all legislative acts of divorce, the first of which was passed in Jamaica in 1739, and others in Nova Scotia (1763), Pennsylvania (1769, 1773), New Jersey (1773), and New Hampshire (1774). In 1773, the governors were directed by a

general instruction to allow no divorces by act of assembly.

3. Many acts were disallowed because contrary to acts of parliament or because they conflicted with the prevailing English practice in like cases. Laws were disallowed that were contrary to the terms of the First Fruits Act of Henry VIII, the Navigation Acts, the Toleration Act, the Proclamation of 1704 or the Coinage Act of 1707, the Mutiny Act, the Barrack Act, the Patent Act, and the acts to prevent paper bills of credit, naturalizing foreign Protestants in America, and dealing with insolvency cases. Laws were disallowed that were construed as contrary to English usages touching outlawry, affirmation, security of the creditor, the ballot, the service of writs, the various conventions under the common law allowing a wife or divorcée to sell property, the legal jurisdiction of local justices or city officials, and the methods of obtaining divorce. The rule of the board was extended to things ecclesiastical as well as temporal, and laws that introduced variations from Anglican practices at home, such as the vestry acts of Maryland and North Carolina and the East Chester parish act of New York, were disallowed on the recommendations of the bishop of London, who had a standing order with the board that he be informed whenever acts of an ecclesiastical character were under consideration. Laws that seemed intolerant and contrary to the liberty of conscience enjoyed in England, such as the Massachusetts acts taxing Quakers and Anti-pædobaptists, the Connecticut act against heretics, and the Maryland act against Roman Catholics, suffered a like fate.

II. Probably the most important of all the reasons for disallowance was that an act affected the trade and shipping of the kingdom or the privileges and prerogatives of British subjects. In one sense such acts fall within the class of those that trenched upon the king's authority, for the royal prerogative had

"an ancient and special force in the government of trade," as seen in the grants of trading charters and of monopolies of trading privileges. Hence any law that placed the inhabitants, trade, and shipping of the colonies on a more advantageous footing than those of Great Britain was certain to be disallowed. Such were the South Carolina Port Act and the New Hampshire act for preventing frauds in the customs. Trading companies, industrial and mercantile corporations, individual merchants, and others were alert to protest against all acts of this character, and their influence was very great, though not always decisive even at this time. The commissioners of customs and the treasury likewise registered their refusal to agree to many acts of this nature. All measures contrary to the Navigation Acts and laws liable to promote smuggling or to hamper trade, whether by sea or land, as in the case of the Massachusetts act for establishing sea-ports, the Maryland act altering the size of tobacco casks, the New York act regarding peddlers, and the Virginia act dealing with the Indian trade, were regularly disallowed. In the case of the New York acts prohibiting trade with the French in Canada, the board very unwillingly recommended their disallowance on other grounds. The board regularly disallowed all Jamaica acts levying duties on negroes landed for refreshment only, and the Jamaicans as regularly ignored such disallowances. The governors were specially instructed to veto any acts laying a duty on English or European goods imported in English vessels, and the board recommended the disallowance of all acts that came before it levying import dues on wines, liquors, English merchandise, and shipping. Such acts were passed at one time or another by Massachusetts (Shipping and Excise Acts), New York, Pennsylvania (import duties on liquors and hops), Virginia (Tonnage Act), Bermuda (Deficiency Act), and Antigua. The board also recommended the disallowance of certain export acts,

such as those of New Jersey imposing duties on timber and copper ore and that of Georgia on hides. The Privy Council having issued an order in 1740 prohibiting the export of sugar from the British sugar islands to any foreign island, all acts contrary to this order were always disallowed.

As trade was extremely sensitive to all legislation touching money and credit, acts passed in the colonies that affected in any way the creditor class, to which as a rule the British merchants belonged, were viewed with the utmost disfavor. The governors had very positive directions upon this point and themselves vetoed a number of acts, which had they reached England would certainly have been disallowed. In the statute of 1707, the king reserved full right to refuse the royal assent to any measure passed in the colonies for settling and ascertaining the current rates of coins within the plantations. Acts of this character that came under the ban were those of Nevis regulating the use of French "black dogs" (copper sous), of Jamaica raising the value of pieces of eight and regulating the value of Spanish milled money, and the Virginia act affecting rates of exchange. Though the land bank scheme of Massachusetts was brought to naught by act of parliament, that of Barbadoes was suppressed by order in Council, as "imposing an intolerable hardship on creditors, damnifying his Majesty's revenue, and obstructing trade," while the Massachusetts excise law was disallowed because lessening the value of the goods imported and so affecting the trade of Great Britain. Almost all the debtor and bankruptcy laws of the colonies—Massachusetts, Virginia, North Carolina, and others—were considered injurious to the British merchants, and when in 1771 Jackson reported adversely on the Montserrat law attaching the goods, money, and chattels of persons absent, he said that laws of this description were almost universal in America and "were contrary to the principles requisite to the very foundations of commerce."

Laws reducing the rate of interest were commonly disallowed, and the Bahamas law preventing vexatious lawsuits, and those of Pennsylvania establishing courts of judicature and of Virginia erecting a court of hustings at Williamsburg were annulled as prejudicial to the interests of the merchants. In this class fall the many acts providing for the issue of bills of credit, some of which were confirmed and some disallowed, but this subject is too intricate and important for consideration here. In the same class also fall the acts, comparatively few in number, that were deemed likely to encourage manufacturing in the colonies, such as the Pennsylvania act preventing the sale of badly tanned leather for the making of shoes. All acts of this nature were construed as contrary to what England considered her best interest in the colonies.

III. The Board of Trade was always anxious to do all that it could to prevent the passing of laws that might be injurious to the colonies, and to modify its rules so far as to confirm measures that might strengthen or otherwise benefit them. The Barbadoes land title act designed to quiet possession was thought more likely to create disturbances and to lead to controversies at law, and the same was said of the New Jersey county court act. The various New York acts passed under Bellomont in favor of Leislerian claimants were disallowed for the good of the province, and a Massachusetts act of 1743 was deemed unjust because "it had a retrospect to contracts made upon the faith of an act of 1741." Acts imposing duties on slaves were thought to place a burden on the poorer planters, and the Jamaica law regarding slaves and free negroes was disallowed because working a hardship on free negroes and their descendants. The Antigua law keeping out Roman Catholics and the Jamaica law taxing Jews were considered injurious to their respective colonies, while all the acts of West Indian legislatures imposing a double tax on absentees

were interpreted as an unfair discrimination and a hardship to planters in England. Similarly, acts for checking the importation of slaves and keeping out criminals and poor and impotent people were disallowed, not only because in part contrary to the act of parliament for the transportation of felons, but also because likely to decrease the supply of labor and to hinder the populating of the territory. For the same reason all laws authorizing excessive grants of land to individuals were discouraged as hindering settlement. The New York act regulating the magistrates of Kingston was disallowed as tending to the ruin of that town; the military law of Pennsylvania, passed in 1756, was similarly treated as likely to cramp the public service; while the North Carolina act to encourage the importation of British halfpence was thought to open the way to great frauds and abuses by the introduction of base and counterfeit coin to the detriment of the colony.

Not only did the British authorities keep in mind the dangers likely to accrue to individual colonies by the passing of ill-advised legislation, but they extended their interest to other and neighboring colonies and to the colonies as a whole. The North Carolina acts encouraging settlement and taxing Indian traders from Virginia were disallowed because they were thought to hamper trade and injure Virginia; the Georgia shipping act was held up until the agents of neighboring colonies could be consulted; the Pennsylvania act advancing the rates at which foreign coin could pass was considered injurious to Maryland because drawing away her hard money; the Massachusetts act excluding New Hampshire notes was deemed a prejudicial measure; and when Virginia wanted to impose a tonnage duty for a lighthouse at Cape Henry, the act was disallowed as affecting Maryland trade and shipping. Any measure that was distinctly contrary to practices in other colonies was always held in suspicion, such as the Antigua act reducing

interest, those of Georgia and Nova Scotia for regulating courts, and that of Massachusetts for preventing the spread of infectious diseases.

At the same time the board and its advisers were always ready to stretch a point if an act was a real advantage, or what they thought was a real advantage to the colony, even though the law might be objectionable on other grounds. Laws that concerned only the private affairs or "domestic economy" of the province, if proper, were allowed to stand, even though they were unlike anything known in England. Such, for example, were the Pennsylvania poor law and the Virginia act dealing with the method of trying criminals and the practice of pleading in court. The Pennsylvania act barring entailed estates was allowed in 1751, even though the legal adviser reported against it, because the people wanted it. Other acts were allowed, even though they differed more or less from the law of England, either because they were founded on local custom and usage and were not inconsistent with reason and natural justice, or because they were wise and proper and of importance to the happiness and prosperity of the people. In the case of St. Vincent in 1711, the board was not willing "to press the customary laws of settled colonies or of England upon a newly settled island struggling with difficulties, danger, and insecurity."

IV. In the last group were laws that the board considered improper, illegal, extraordinary, or dangerous, or technically open to criticism. Both Barbadoes and Maryland passed laws in an improper manner in the absence of the governor. Virginia passed an act appropriating money for the payment of members of a convention that had not been authorized to meet by the crown, and this was considered illegal. Numbers of acts were declared incongruous and unreasonable, others extraordinary, irregular, vexatious, or dangerous, while still others were considered too summary in the powers conferred, oppressive, liable

to arbitrary abuse, or inquisitorial. That many laws drawn up in the colonies should have been technically imperfect is not surprising. As early as 1631, the burgesses of Virginia begged the king to excuse "the forms of their acts," as men were wanting who were competent to draft them; and the same want of men versed in the technique of the law and the phraseology of legal instruments was characteristic of the entire colonial period. The situation improved after 1750, and almost no laws were disallowed after that date on technical grounds. But in the earlier years laws were sent over that the board thought likely to have the opposite effect intended, that contained words and phrases of loose and uncertain meaning, that were so carelessly penned as likely to be attended with great inconvenience in execution, or that were defective in omitting some necessary definition, qualification, or pertinent clause. Many acts had bad titles, or titles that were not in accord with the text of the acts, or titles that covered only a part of the act. Two Leeward Island acts, regarding the governor's house-rent, were so badly worded that, as the board said, the colony bound itself to pay the rent to the governor should he cease to be governor but continue to reside, or should he continue to be governor but reside elsewhere.

That the policy of the crown might not be applied too rigidly and that opportunity might be given for a careful consideration of the legitimate needs of the colonies, the Privy Council adopted the principle of the suspending clause, whereby provision was made that nothing in the act should have force, power, or efficacy until the king's will had been made known. An act of this nature stood suspended until the receipt by the governor of the order from England confirming or disallowing it, and it is worthy of note that in 1768 the governor of New York wished to know what he should do in cases where neither confirmation nor disallowance had been received. In general, such clause

was to be added to all laws that departed from the rules already laid down. All private acts had to have not only a suspending clause but also a clause saving the rights of the crown. Instead of adding a suspending clause, the assembly might send a draft of the bill to England or obtain the royal consent in some other way. The Board of Trade expressed itself very strongly on this subject, and once when in 1752 Virginia petitioned against the obligation, it refused to listen to any abrogation of the rule whatever. Nevertheless, it is a fact that the suspending clause was generally ignored by the colonies and its insertion when required was rather the exception than the rule. Massachusetts, I believe, never employed it, and the requirement that it be added to bills of credit acts, enjoined in Belcher's instructions, was omitted from those issued to Shirley in 1741. The colonies thoroughly disliked the suspending clause, and in later times as loyal a governor as Edward Long of Jamaica was emphatic in his denunciation of it. At times so manifest was the injustice of such a clause that the board, despite its rules, did recommend the confirmation of acts containing no suspending clause, where one should have been inserted.

I have now considered in summary fashion but as fully as my space will allow, the disallowances of colonial laws that were ordered by the king acting through the Privy Council and the Board of Trade. The policy that underlay these disallowances was in accord with the terms of the British constitution of the seventeenth and eighteenth centuries and with the views held by British statesmen and merchants regarding the proper place of colonies in the British commercial and imperial scheme. The policy worked badly in operation, because of time and distance, and because the colonies in order to evade the requirement made a practice as often as possible of passing temporary laws to continue in force but a year, thus thwarting the royal will. Furthermore, the time

allowance, notably in the case of Pennsylvania, frequently led to the transmission of so many laws at once that the board was not able to examine them as thoroughly as it ought to have done, a situation the more objectionable because the board was not the best judge of colonial needs, upholding a constitutional control that too often, even under the most favorable circumstances, hampered colonial action and development. The position taken by the board and its advisers was constitutionally and legally correct, and their rules were not without ample justification in their own eyes. But these rules were not favorable to colonial independence and self-government, and they were not designed to be. As the colonists were rapidly growing in independence and in a determination to govern themselves, it was inevitable that the disallowance should be frequently violated and brought to naught. Colonial self-government was incompatible with the maintenance of the royal prerogative, yet the authorities at home, with colonial subordination and dependence as the leading objects of their policy, could hardly have acted otherwise than they did. The disallowance was neither unconstitutional nor designedly oppressive, but the British authorities and the colonists in America did not always see the colonial situation eye to eye in the same light. The colonists were fashioning their own constitutional order, but in so doing they were performing acts of legislation and government that were undoubtedly illegal and revolutionary, when construed not in terms of the democracy that was to be, but from the standpoint of English law and custom by which they were legally bound and of the English commercial system of which they were legally a part.