MEMORANDUM

ON

DOMINION POWER OF DISALLOWANCE OF PROVINCIAL LEGISLATION

(WITH APPENDICES)

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1. Historical Source of the Power. Historically, the power of the Dominion Government to disallow Provincial Legislation had its genesis in the resolutions adopted by the Conference of Canadian and other delegates held at Quebec in October, 1864. These resolotions (commonly referred to as the Quebec Resolutions) embody the original framework of the Constitution of Canada. On October 25, 1864, on the motion of the Honourable Mr. Oliver Mowat, one of its Canadian Delegates, the Conference resolved that the proposed constitution should contain the following provision:

"Any Bill passed by the General Legislature shall be subject to disallowance by Her Majesty within two years as in the case of Bills passed by the said Provinces hitherto, and in like manner any Bill passed by a Local Legislature shall be subject to disallowance by the General Government within one year after the passing thereof." Pope's Confed. Docts. pp. 30, 31.

This provision was carried into the final draft of the resolutions as article 51, which read as follows:

"Any Bill passed by the General Parliament shall be subject to disallowance by Her Majesty within two years, as in the case of Bills passed by the Legislatures of the said Provinces hitherto, and in like manner any Bill passed by a Local Legislature shall be subject to disallowance by the Governor General within one year after the passing thereof." Pope's Confed. Docts. p. 49.

This article appears as article 50 in the revised draft of the resolutions adopted at a Conference of the delegates from the British North American Provinces held at the Westminster Palace Hotel in London in December, 1866; Pope's Confed. Docts. pp. 107-108.

In the rough draft of the Bill to provide for the union of the British North American Provinces, prepared by the London Conference, effect was given to said article 50 of the revised resolutions, by sec. 34 (Pope's Confed. Docts. p. 130), which reads, in part, as follows:

"The Governor General may disallow any bill passed by the local legislature within one year after the passing thereof and upon the proclamation thereof by the Governor, it shall become null and void."

In the fourth draft of the Bill, provision for the disallowance by the Governor General of any Act passed by a provincial legislature was made by sec. 119, reading as follows:

"119. Where the Lieutenant Governor assents to a Bill he shall by the first convenient opportunity send an authentic copy of the Act to the Governor General, and if the Governor General in Council within one year after the passing thereof, thinks fit to disallow the Act, such disallowance being signified by the Governor General to the Lieutenant Governor, or by proclamation, shall annul the Act from and after the day of such signification or proclamation.": Pope's Confed. Docts. p. 208.

In the final draft of the said Bill, sec. 119 was omitted, and, instead, it was provided by sec. 93:

"The provision of Part V of this Act shall extend and apply to the legislatures of the several provinces as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof."

The provisions of Part V (secs. 54 to 58 incl.) included in section 57 the provision applicable to the Parliament of Canada in respect of the disallowance of an Act passed by that Parliament by the Sovereign in Council: Pope's Confed. Docts. p. 224. Said section 93 of the final draft of the Bill consequently became the prototype of section 90 of the Bill as finally passed by the Parliament of the United Kingdom.

The resolutions, as well as the rough draft and the fourth draft of the Bill, thus manifest in express terms the intention of the framers of the British North America Act to vest in the Governor General in Council the power of disallowance of provincial legislation.

2. Legal Source of the Power.

In virtue of the conjoint effect of secs. 56 and 90 of the British North America Act, 1867, provision was made in that organic instrument for the power of disallowance contemplated by the article of the Quebec Resolutions quoted above. By sec. 56 the power of disallowance in respect of Dominion Acts is vested in the Queen in Council. By sec. 90 the provisions of sec. 56 are (*inter alia*) made applicable to statutes passed by the Provincial Legislatures, the Governor General in Council being substituted as disallowing authority for the Queen in Council, and the period of one year substituted for the period of two years mentioned in sec. 56. In consequence, there is constitutionally vested in the Governor General in Council the power to disallow

any Act of a Provincial Legislature within one year after receipt of an authentic copy of it from the Lieutenant Governor of the Province.

3. Views of Fathers of Confederation and other Statesmen.

In the debates of the Quebec Resolutions in the Parliament of the Province of Canada in 1865, as might be expected, special attention was called to the proposal to vest in the Federal Government the veto power over Provincial legislation. The discussion evoked some divergency of opinion as to the wisdom of vesting such a power in the Federal Government. The extracts from the "Parliamentary Debates on the subject of Confederation of the British North American Provinces" at the 3rd Session, 8th Provincial Parliament of Canada (1865), set out in Appendix "A" to this memorandum, indicate the different views expressed in this topic. Some members, notably Hon. A. A. Dorion, at that time leader of the Rouge Party in Lower Canada, and Mr. Christopher Dunkin, afterwards Minister of Agriculture (1869-1871) considered the Federal veto power to be an objectionable feature of union, as involving negation of real provincial autonomy. But others including Fathers of Confederation and leading Canadian statesmen, were at one in commending the provision for this power as being one of the best features of the scheme. It was "a wise power" but "not an ordinary power to be commonly resorted to" (Honourable John Sanborn at p. 123), "The best protection and safeguard of the system" (Sir John Rose at p. 404); "necessary in order that the General Government may have control over the proceedings of the local legislatures to a certain extent" (Mr. Alexander Mackenzie at p. 433); and one which "must of necessity exist somewhere in order that the minority may be protected from any injustice which the majority might attempt to do them" (Mr. Paul Denis at p. 876). It was recognized that this veto power might with propriety be invoked, as occasion might require, to prevent "injustice . . . in local legislation" (Honourable George Brown at p. 108; Sir George Etienne Cartier at p. 407); or "unjust or unwise legislation" (Sir George Etienne Cartier at p. 502); or "a conflict of laws and jurisdictions in all matters of importance" (Mr. John Scoble at p. 911).

Macdonald, in moving an address to Her Majesty praying for the submission of a measure to the Imperial

Parliament based on the Quebec Resolutions, made only a veiled reference to the veto power. He said,—

"As this is to be one united Province with the Local Governments and Legislatures subordinate to the General Government and Legislature, it is obvious that the Chief Executive Officer in each of the Provinces must be subordinate as well. The General Government assumes towards the Local Governments precisely the same position as the Imperial Government holds with respect to each of the Colonies now."

Brown said,

"By vesting the appointment of Lieutenant Governors in the General Government and giving a veto over all local measures, we have secured that no injustice shall be done without appeal in local legislation."

Dorion saw in the Federal veto power the negation of any such thing as responsible Provincial Government. Might not the General Government, he said,—

"for party purposes reject laws passed by the local legislatures and demanded by a majority of the people of that locality. . . . We may find parties so hotly opposed to each other in the Local Legislatures that the whole power of the minority may be brought to bear upon their friends who have a majority in the General Legislature for the purpose of preventing the passage of some law objectionable to them but desired by a majority of their own section. What would be the result of such a state of things but bitterness of feeling, strong political acrimony and dangerous agitation?"

Cartier said,—

"The presumption is it (the Federal veto power) will be exercised in case of unjust or unwise legislation."

Rose believed that,—

"This power of negative, this power of veto, this controlling power on the part of the Central Government is the best protection and safeguard of the system."

Dunkin found in the provision for disallowance the impossibility of any real provincial autonomy. On the other hand, Alexander *Mackenzie* thought the veto power was necessary,

"in order that the General Government may have a control of the proceedings of the Local Legislatures to a certain extent . . . . . If each Province were able to enact such laws as it pleased, everybody would be at the mercy of the Local Legislature, and the General Legislature would become of little importance."

So, also, *Denis* thought,—

"This right of veto must of necessity exist somewhere in order that the minority may be protected from any injustice that the majority might attempt to do them."

Scoble thought the veto power which the Federal Executive would possess, and to which all Local Legislatures would be subject,

"will prevent a conflict of laws and jurisdictions in all matters of importance."

Moore foresaw that,—

"The veto power thus placed in the hands of the Federal Government, if exercised frequently, will be almost certain to cause difficulty between the Local and General Governments."

Sanborn concluded that,—

"It was a wise power and commended itself to all; it was, however, not an ordinary power to be commonly resorted to, but an extreme power and one almost revolutionary."

4. View of British Government, 1864. By despatch of December 3, 1864, to Lord Monk, Governor of Canada, acknowledging receipt of the Quebec resolutions, the Right Honourable Edward Cardwell, Secretary of State for the Colonies, said,—

"They (Her Majesty's Government) are glad to observe that, although large powers of legislation are intended to be vested in Local bodies, yet the principle of central control has been steadily kept in view. The importance of this principle cannot be over-rated. Its maintenance is essential to the practical efficiency of the system and to its harmonious operation both in the General Government and in the Governments of the several provinces." Can. Sess. Pap. 1865, Vol. 24 (No. 12) p. 11.

5. Views of Leading Constitutional Authorities. In a letter dated June 20, 1882, published in 18 Can. Law Jour. pp. 265-267, Mr. Alpheus Todd, a leading Canadian writer on constitutional law, said,—

"While the jurisdiction of the Provincial Legislatures in all matters assigned to them in the distribution of powers by the 92nd section of the B.N.A. Act is absolute as well as 'exclusive' and cannot be impaired by any legislation of the Dominion Parliament . . . . . there still remains the supervisory control of the Crown over all acts of legislation whether within or without the competency of any Colonial or Provincial Legislature, to which resort can be had to remedy whatsoever grievances may arise out of Local legislation. . . . *I would express my conviction that the remedial exercise of this control of the Crown—however subordinately it may and ought to be invoked—is unquestionably the keystone of the fabric of Confederation,* and the only power which can be legitimately put forth to uphold unity of action and to secure the adoption of sound principles of legislation in the various Provinces of our widespread Dominion.

A great responsibility rests upon our statesmen in this matter. They are bound, on the one hand, not to yield to sectional outcries against the lawful and appropriate exercise of the prerogative of disallowance; and, on the other hand, to be exceedingly careful that this prerogative is never made use of for party purposes or otherwise than to protect and promote the general interests of Canada."

In an opinion given on June 18, 1909 (45 Can. Law Jour. 457-462), the late Professor A. V. Dicey, foremost English authority on Constitutional Law, said in answer to the Third Question submitted to him:

"Third Question.—Does the B.N.A. Act, ss. 56 and 90, give to the Governor General unlimited power of disallowing the Acts of a provincial legislature?

Answer.—The whole working of the constitution of the Dominion which is created under the B.N.A. Act, 1867, appears to depend upon the possession of, and the use by the Governor General of this unlimited and general power of disallowance (see Lefroy, Legislative Power of Canada, propos. 10, pp. 185-207). On this point I entirely agree with Mr. Goldwin Smith, that the enactment giving the power of disallowance plainly 'refers to a power of political control to be exercised in the interest of the nation, not to a mere power of restraining illegal stretches of jurisdiction, a function which belongs, not to a government, but to a court of law'," (Goldwin Smith, Canada and the Canadian Question, 1891, p. 159).

The power of disallowance is, I am told, exercised by the Governor General in Council, that is, I presume, in practice by the Ministry of one day. But the power is itself unlimited, and is surely intended to be exercised to prevent the enactment of unjust laws, especially where such injustice may, as in the cases submitted to me, work gross injury to the whole people of the Dominion. In any case no variation of the policy adopted by different Ministries can affect the fact that the power of disallowance is under the B.N.A. Act, 1867, quite general and unrestricted."

6. Ministerial Responsibility for Exercise of Power.

Shortly after the close of the first session of the provincial legislatures newly established under the British North America Act, 1867, a question arose whether the Governor General in determining, according to his discretion, what should be the judgment of the Crown in respect of bills passed by the provincial legislatures and whether they should be disallowed or confirmed, fulfilled this function as an Imperial Officer and subject to instructions received from the Secretary of State, or whether he was bound to be guided by the advice of his ministers who were themselves responsible to the Dominion House of Commons.

The Minister of Justice for the Dominion (Hon. John A. Macdonald) was requested to advise the Governor General as to the proper course to pursue with respect to acts passed by the provincial legislatures. In commencing his report on the subject the minister drew attention to the fact "that the same powers of disallowance as have always belonged to the Imperial government with respect to the acts passed by the colonial legislatures had been

conferred by the union act on the Government of Canada." But that "under the present constitution of Canada the general government will be called upon to consider the propriety of allowance or disallowance of provincial acts, much more frequently than Her Majesty's government has been with respect to colonial enactments." The importance of establishing a correct constitutional practice in the exercise of the responsible duties devolving upon him under these circumstances, induced the Governor General of Canada (Sir John Young) to apply to the Secretary of State for the colonies (Earl Granville) for instructions on this matter. In reply to the Governor General's request for instructions, Earl Granville stated that, in the event of a provincial act being passed, which in the opinion of the Governor General "was gravely unconstitutional" or in excess of the power of the local body or in violation of the Royal instructions for the reservation of laws which were objectionable on grounds of Imperial policy, he was not at liberty, even on the advice of his ministers to sanction or assent to any such law. If such advice were given "it would be his duty to withhold his sanction and refer the question to the Secretary of State." On the other hand "if he were advised by his ministry to disallow any provincial act as illegal or unconstitutional, it would, in general, be his duty to follow that advice whether or not he concurred in their opinion." This instruction appeared at the time to be satisfactory to the Dominion government; and more particularly in light of an official letter which on December 13, 1872, the Registrar of His Majesty's Privy Council addressed to the Under-Secretary of State for the Colonies, stating that in the opinion of the Lord President of the Privy Council "the power of confirming or disallowing provincial acts is vested by the statute (i.e. the British North America Act, 1867) in the Governor General of the Dominion of Canada, acting under the advice of his constitutional advisers," and that "there is nothing . . . which gives to Her Majesty in Council any jurisdiction over this question."

Subsequently, however, Earl Kimberley then Secretary of State for the colonies—in a dispatch to the Governor General of Canada dated June 30, 1873, in reference to the proposed disallowance of certain acts of the New Brunswick legislature passed in 1872, in relation to common

schools and which were within the legislative competence of that body,—you declared "that this is a matter on which you must act on your own individual discretion and on which you cannot be guided by the advice of your responsible ministers."

This discrepancy of opinion upon a question of such gravity and importance attracted the attention of the Canadian ministers. A committee of the Dominion Privy Council was appointed to consider it; and they reported on March 8, 1875, their opinion that, in their view of the construction of the British North America Act, the Governor General was required to exercise the power of assent to or disallowance of provincial legislation in the same manner as he fulfilled other functions of government: that is to say, upon the advice of his ministers. This conclusion was communicated to the Secretary of State for the Colonies (Earl Carnarvon) by the Governor General. Earl Carnarvon was not disposed to accept this principle; and the despatch setting forth his views having been referred to the Minister of Justice (Mr. Edward Blake) for his consideration, the latter on December 22, 1875 submitted an elaborate report to council which traversed the whole of the ground taken by the Colonial Secretary. The substance of Mr. Blake's submission, which was approved by the Governor General in Council and forwarded to the Colonial Secretary, appears in the following extracts:

"The power of disallowance of Canadian Statutes is by sec. 56 of the British North America Act, 1867, vested in the Queen in Council. By sec. 90 of the same Act this provision is extended and applied to each Province as if it were re-enacted, and is so made applicable in terms thereto, with the substitution, amongst other things, of the Governor General for the Queen. The result is that by the express words of the Act, the power of disallowance of Provincial Statutes is vested in the Governor General in Council, a phrase which, under the 13th section of the Act, means the Governor General acting by and with the advice of the Queen's Privy Council of Canada. . . . It results from the preceding observations that the only contingencies which can arise are: (1) that the Governor should propose to disallow a Provincial Statute without or against the advice of his Ministers; (2) that Ministers should propose to disallow a Provincial Statute without the assent of the Governor. The position taken by the Council is that neither of these things can be done; that, the power being vested in the Governor General in Council, any action taken must be accomplished by Order in Council, and that a Governor General who thinks it necessary that a Provincial Act should be disallowed must find Ministers who will take the responsibility of advising its disallowance; while Ministers who think it necessary that a Provincial Act should be

disallowed must resign unless they can secure the consent of the Governor General to its disallowance, Ministers being in every case responsible to Parliament for the course taken."

Considerable correspondence upon the subject thereupon ensued. It will be found in Dom.-Prov. Legis. 1867-1895, pp. 65 to 77. Without reviewing it in detail, it may be stated that, at first, a distinct claim was preferred by Her Majesty's Secretary of State for liberty to review, and under certain exceptional circumstances to disallow, provincial legislation, through instructions to the Governor General as an Imperial officer. Afterwards this ground was abandoned and the constitutional propriety, if not the abstract right, of the Imperial Government to interfere with provincial legislation, unless in extraordinary cases and under very exceptional circumstances, was no longer urged. The Secretary of State then claimed that the Governor General personally had an "independent" right (without the consent of his ministers whether actual or prospective) to determine upon the expediency of allowing or disallowing provincial statutes; and in proof of this contention he appealed to the wording of the British North America Act. Mr. Blake's argument was directed to show the inconsistency of this position with an acknowledgment of the principle of self-government in matters of local concern. While the correspondence did not result in entire agreement, Earl Carnarvon conceded that Mr. Blake's construction of the British North America Act had the support of high authorities in England, and that his own view was one upon which, for that reason, he was not prepared to insist strongly. As a matter of fact, ever since the passing of the British North America Act, the Governor General of Canada has invariably decided upon the allowance or disallowance of provincial laws on the advice of his ministers and has never asserted the right to decide otherwise. He has been always content to exercise this prerogative under the same constitutional limitations and restraints which apply to all other acts of executive authority in a constitutional monarchy. It has, moreover, been repeatedly affirmed judicially (as will hereafter appear) that the federal power of veto of provincial statutes is vested in the *Governor General in Council*,—that is to say, in the Governor General, acting by and with the advice of the King's Privy Council for Canada.

7. Judicial opinions as to power of disallowance.

In Appendix "B" to this memorandum are set forth excerpts of judicial *dicta* concerning the federal power of disallowance taken from various judgments pronounced by the Courts of Canada and the Judicial Committee of the Privy Council, since Confederation. These *dicta* appear to afford authority for the following propositions:

(1) The power to disallow Provincial legislation is vested under the British North America Act in the Governor General in Council—that is to say, in the Governor General acting by and with the advice of the King's Privy Council for Canada:

Wilson v. Esquimault and Nanaimo Railway Co. (1922) 1 A.C. 202, 208-210;

Leprohon v. The City of Ottawa (1877) 40 U.C. Q.B.R. 478, 490 per Harrison C.J.;

Severn v. The Queen (1878) 2 S.C.R. 70, 108-109, per Strong J.;

Lenoir v. Ritchie (1879) 3 S.C.R. 575, 624, per Taschereau J.;

City of Fredericton v. The Queen (1880) 3 S.C.R. 505, 564 per Gwynne J.;

Mercer v. Attorney General for Ontario (1881) 5 S.C.R. 538, 711-712 per Gwynne J.;

In *re* Companies Reference (1913) 48 S.C.R. 331, 424, per Duff J.

(2) The power of disallowance so vested in the Governor General in Council is, in point of law, absolute and unrestricted; and hence its exercise is in each case a matter which engages the exercise by the Executive Government of a sound discretion, and for which the Executive Government, for the time being, must assume responsibility:

Wilson v. Esquimault and Nanaimo Railway Co. ibid supra at p. 210;

Leprohon v. The City of Ottawa (1877) 40 U.C. Q.B.R. 478, 490;

Angers v. The Queen Insurance Co. (1878) 22 Low. Can. Jur. 307, 309-310.

(3) The power of disallowance so vested in the Governor General in Council may be exercised even with respect to a law over which the Provincial Legislature had complete jurisdiction; it operates "in the plane of political expediency as well as that of jural capacity."

Severn v. The Queen (1878) 2 S.C.R. 70, 131 per Fournier J.;

Corporation of Three Rivers v. Sulte (1882) 5 Leg. News. 330, 334, 335, per Ramsay J.;

Attorney General of Canada v. Attorney General of Ontario (1891) 20 O.R. 222.

In *re* Companies Reference (1913) 48 S.C.R. 331, 379, 380, per Idington J.

The judicial opinions as to the circumstances under which the federal power of disallowance might (from the viewpoint of conventional practice as distinguished from constitutional right) properly be exercised, are, to some extent, divergent.

On the one hand, there is recognition of the propriety of the power being exercised in relation to,—

"any law contrary to reason or to natural justice and equity"—e.g., a law involving,

"the deprivation of innocent parties of actual or even possible interests by retroactive legislation": *Re Goodhue* (1872) 19 Grant's Chan. Rep. 366, 384.

"cases of great and manifest necessity, or where the act is so clearly beyond the powers of the local legislature that the propriety of interfering would at once be recognized: Severn v. The Queen (1878) S.C.R. 70, 96.

"to prevent injurious conflicts of Provincial legislation with Dominion legislative powers or policy: Severn v. The Queen, ibid supra at pp. 102, 131; Regina v. Taylor (1875) 36 U.C. Q.B.R. 183, 224.

"to prevent any practical inconvenience or mischief arising from the abuse of provincial legislative powers or from hasty or unwise legislation": *Severn* v. *The Queen,* ibid supra, at pp. 108-109; *Angers* v. *The Queen Insurance Company* (1878) 22 Low. Can. Jur. 307, 309-310; *Regina* v. *Taylor,* ibid supra.

"to prevent the Provincial Legislatures from encroaching upon the subjects placed under the control of the National Parliament by assuming to legislate upon those subjects": *Mercer* v. *Attorney-General for Ontario* (1881) 5 S.C.R. 538, 711-712; *Guay* v. *Blanchet* (1879) 5 Q.L.R. 43.

"to nullify provincial legislation detrimental to the original rights of persons or companies outside or beyond the province": in *re* Companies Reference (1913) 48 S.C.R. 331, 380, 381, 382, per Idington J.

On the other hand, the federal veto power has been said to be "the true check for the abuse of powers as distinguished from an unlawful exercise of them": *Corporation of Three Rivers* v. *Sulte* (1882) 5 Leg. News. 330, 334, 335; and one judge went so far as to suggest that the power should be exercised only when a provincial law made "encroachments or trespasses on the rights of the Federal Parliament": *Guay* v. *Blanchet* (1879) 5 Q.L.R. 43, 53, per Casault J.

8. High-lights of Exercise of Power of Disallowance.

In Appendix "C" to this memorandum is set forth a table of all the provincial statutes which have been disallowed by the Governor General in Council since Confederation, with the exception only of the recent statutes of Alberta disallowed by order of the Deputy of the Governor General in Council, dated August 10, 1937 (P.C. 1985). The table includes a brief indication of the reasons for dis-

allowance in each instance. The last previous disallowance of a provincial statute took place in 1924, and brought the total number of provincial statutes disallowed since Confederation to one hundred. Of these, seventy-two were disallowed between 1867 and 1900, and the remaining twenty-eight in the years 1900 to 1924. The reports made to the Governor General in Council by the various Ministers of Justice and the Orders in Council passed from time to time in reference to the allowance or disallowance of provincial legislation, are for the period 1867 to 1920 to be found in two volumes published by the King's Printer: Dominion and Provincial Legislation, 1867-1895; and Provincial Legslation, 1896 to 1920. The corresponding documents in reference to provincial legislation since 1920 have not yet been published, but are contained in the files of the Department of Justice.

The precedents furnish instances of disallowance of provincial legislation on four main grounds, namely, (1) because the provincial Act in question is an abuse of power and contrary to sound principles of legislation, as e.g. amounting to spoliation or a violation of property and vested rights, under contract or otherwise; (2) because it is *ultra vires,* and therefore invalid; (3) because it conflicts with Imperial treaties or Imperial policy, and (4) because it conflicts with Dominion policy or interest.

From a survey of the precedents, there does not, however, emerge any statement of principles of general and uniform acceptance by successive Ministers of Justice, concerning the occasions upon which the exercise of the federal power of disallowance of provincial legislation is justified. From the viewpoint of the principles applied, the history of the exercise of this power may be divided, broadly, into three periods, namely, (1) 1867 to 1898, (2) 1898 to 1911, and (3) 1912 to 1924. These periods do not represent definite cleavages, so much as different trends or orientations, of opinion by Ministers of Justice as to the principles upon which the power of disallowance should be exercised. They are not, as it were, distinct "water-tight compartments"; and this, a review of the precedents readily indicates.

First Period: 1867 to 1900.—First, there is the general report of Sir J. A. Macdonald dated 8th June, 1868. He recommends that the Minister of Justice should report on

provincial Acts basing his reports on one or all of four heads (1) as being altogether illegal or unconstitutional, (2) as being illegal or unconstitutional in part, (3) as clashing in cases of concurrent jurisdiction, with Dominion legislation, and (4) as affecting the interests of the Dominion generally. A perusal of Sir John A. Macdonald's later reports shows that he used the word "unconstitutional" to cover Acts *ultra vires* of the legislatures enacting them and the word "illegal" to cover legislation which might be deemed inequitable and unjust. For instance, in 1871 Sir J. A. Macdonald recommended that a railway Act of the Province of Manitoba, which had been reserved for the signification of the Governor General's pleasure, should not be assented to because "no sufficient provision was made for compensation for any infringement of the rights of property or other vested rights": Dom.-Prov. Legis. 1867-1895, p. 769.

In 1874 the Lieutenant-Governor of Prince Edward Island reserved "The Land Purchase Act, 1874" for the signification of the Governor General's pleasure on the grounds that it was subversive of the rights of property, ruinous to the proprietors and a dangerous precedent. The assent was withheld for the above reasons and because the arbitration was arbitrary and made no provision for impartiality and for speedy settlement": Dom-Prov. Legis. 1867-1895, p. 1154.

In 1874 Sir A. A. Dorion recommended that the Governor General's assent should not be given to a Manitoba Act because its provisions appeared "likely to seriously interfere with the survey of public lands": Dom.-Prov. Legis. 1867-1895, p. 777.

In 1876 an Act of the legislature of Prince Edward Island was disallowed on the report of the Hon. R. Scott, acting Minister of Justice, because it dealt with the rights of parties then under or subject to litigation under the Act which it proposed to amend, and because there was no provision saving the rights or proceedings of such persons: Dom.-Prov. Legis. 1867-1895, p. 1176.

In 1881 the Ontario legislature passed an Act granting all persons rights to use improvements on rivers and streams for purposes of floating down logs on payment of a reasonable toll. An appeal was made to the Governor General for disallowance on the grounds of its being uncon-

stitutional, of depriving the petitioner of private rights, and of being *ex post facto*. The Act was disallowed on the recommendation of Sir John A. Macdonald, acting for the Minister of Justice, because it seemed "to take away the use of his property from one person and give it to another," and because, assuming that the local legislature had such a power, "it devolves upon this government to see that such power is not exercised in flagrant violation of private rights and natural justice, especially when, as in this case, in addition to interfering with private rights in the way alluded to, the Act overrides a decision of a court of competent jurisdiction by declaring retrospectively that the law always was, and is, different from that laid down by the court." Ontario objected in strong terms against any review of a provincial Act *intra vires* of the province, and re-enacted the Act of 1881, only to have it again disallowed by the Dominion: Dom.-Prov. Legis. 1867-1895, pp. 177-178.

In 1887, Manitoba passed an Act providing that every person engaged in the construction of any public work should be deemed a servant of the Crown, and that the sanction of the Minister of Public Works should be deemed in the courts of justice full and competent authority and justification for any work or acts done with the approval and on behalf of such minister. Sir John A. Macdonald, for the Minister of Justice, recommended disallowance, because the immunity from responsibility and liability for their acts, which by this act was given to contractors and other persons employed in the construction of any public work in the province, was of such an unusual and extraordinary character and such a manifest interference with private rights that the Act should be disallowed without further delay: Dom.-Prov. Legis. 1867-1895, pp. 856-857.

In 1888, New Brunswick passed an Act which appeared to give a new company rights inconsistent with rights granted to a Dominion company. Petitioners claimed that their charter had been ratified by the province, that no cause was shown for forfeiture of their charter, and that propriety and contractual rights were violated.. Sir John Thompson recommended disallowance, because the Act interfered with and restricted a Dominion Act, and because it diminished the value of franchises already granted: Dom.-Prov. Legis. 1867-1895, p. 749.

In 1888, Quebec passed an Act to enable the Province to issue debentures for the purpose of redeeming outstanding liabilities and to save the amount of interest paid yearly by the province. Sir John Thompson observed that the Act authorized the province to violate contracts without compensation, that it would affect the credit of the province and might indicate the possibility that faith might not be kept inviolate between the province and its creditors, and that it might hurt the other provinces. Quebec undertook to repeal the objectionable sections: Dom.-Prov. Legis. 1867-1895, pp. 376-377.

In 1889, the legislature of New Brunswick passed an Act forfeiting mining leases under conditions set out in the Act. Sir John Thompson characterized the Act as

> "Seeming to be at variance with the principles of justice and to invade the rights of property which it is so important to preserve for the credit of the whole country and for the safety of private persons. If it is desirable that a province should resume any part of its patrimony, the methods adopted should be those which recognize and provide for the rights which have accrued under the sanction of the Crown."

He recommended amendment to remove such objectionable features as he enumerated: Dom.-Prov. Legis. 1867-1895, p. 750. Shortly afterwards the same Minister of Justice recommended the province of Quebec so to amend a mining law of 1890 as to remove "any objection to the Act on the ground of its being a confiscation of existing private rights as claimed by the petitioners:" Dom.-Prov. Legis. 1867-1895, pp. 453-454. He also brought about the amendment of a Nova Scotia Act of 1892 because it prejudiced rights under litigation: Dom.-Prov. Legis. 1867-1895, pp. 625-626.

In 1893 an Ontario Act occasioned the federal criticism that a statute which interfered with vested rights of property or with the obligations of contracts without compensation ought to come within the Dominion sphere of disallowance: Dom.-Prov. Legis. 1867-1895, pp. 238-239.

Sir John Thompson, however, in 1886 and 1888 seems to have deviated from his general principles. In 1886 he refused to consider the question whether an Ontario Act "is a just measure or not," because he was of opinion that "it is within the undoubted authority of the legislature of that province," and should, therefore, be left to its operation: Dom.-Prov. Legis. 1867-1895, p. 198; and in 1888 while pronouncing a Nova Scotia Act, altering the status and rights of litigants in pending actions as, generally

speaking of, " a pernicious tendency," he refused to recommend disallowance because he did not think there could be any doubt that the statute was within the jurisdiction of the provincial legislature, and it did not affect the interests of the Dominion generally: Dom.-Prov. Legis. 1867-1895, pp. 571-572. Similarly, in another case as far back as 1875, the Hon. Edward Blake, then Minister of Justice, in reporting on a petition for the disallowance of an Ontario Act respecting the union of certain Presbyterian churches (38 Vict. ch. 75) said: " The undersigned does not conceive that he is called upon to express an opinion upon the allegations of the petition as to the injustice alleged to be effected by the Act. This was a matter for the local legislature:" Dom.-Prov. Legis. 1876-1895, pp. 132-133.

These three opinions are, however, more or less isolated within the years 1867 to 1898. Towards the end of this first period—that is towards the end of the nineties—there begins to emerge a tendency, if no special Dominion interest is affected, to leave matters involving a determination as to whether Provincial legislation is *ultra vires* or *intra vires* to the courts. This is well illustrated by a report in 1897 of Sir Oliver Mowat, Minister of Justice, in relation to legislation of the province of New Brunswick dealing with succession duties. The provincial government had made certain amendments at the instance of the Dominion authorities which were designed to bring the Act in question within the provincial sphere of power. These amendments, however, were not of a satisfactory nature, but as further amendments were promised, disallowance was not recommended. In commenting on the Act certain of the minister's remarks were significant of the change in attitude toward provincial legislation. As he observed: "It is a question for the legislature as to whether as a matter of justice it should not be provided that property situate outside of the province which had already paid succession duties in the place where it was situate should not under this Act be held liable to taxation, except where the tax levied in the outside jurisdiction was less than that imposed under this statute, and then only to the extent of the difference." And later he remarked: "The undersigned is further induced to refrain from recommending the disallowance of the Act, because the objections to which he has referred, in so far as they relate to the question of the authority of the legislature, are objections which could be considered judicially, and

because the courts would be bound in the construction of the Act to reject any interpretation which would have the effect of taxing property beyond the jurisdiction of the legislature:" Prov. Legis. 1896-1920, Vol. 2, 399.

It is not uninteresting to note that the emergence of this tendency is more or less coincident with pronouncements of the Judicial Committee of the Privy Council, emphasizing the independence and autonomy of the provinces. It is true that, as early as *Hodge* v. *The Queen* (1883) 9 A.C., 117, 132, the Privy Council had said:

"When the British North America Act enacted that there should be a Legislature for Ontario and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area, the local Legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion."

Later pronouncements of the Privy Council placed further emphasis on the nature of provincial autonomy. In *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), A.C. 437, 441-442, Lord Watson said:

"The object of the Act (i.e. British North America Act, 1867) was neither to weld the provinces into one nor to subordinate the provincial government to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest; *each province retaining its independence and autonomy*..... As regards those matters which by sec. 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act..... It (the province) possesses powers not of administration merely, but of legislation in the strictest sense of that word; and, within the limits assigned by sec. 92 of the Act of 1867, these powers are exclusive and supreme."

Again, in *Brophy* v. *Attorney General of Manitoba* (1895), A.C. 202, 222, Lord Herschell said:

"In relation to the subjects specified in sec. 92 of the British North America Act, and not falling within those set forth in sec. 91, the exclusive power of the provincial legislature may be said to be absolute."

Three years later, in the Fisheries Reference (*Attorney General of Canada* v. *Attorney General of the Provinces of Ontario,* etc. (1898), A.C. 700, 713) the same law lord said:

"The suggestion that the power might be abused so as to warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected."

Then, again, in *Union Colliery* v. *Bryden* (1899) A.C. 580, 584-585, Lord Watson said:

"In assigning legislative power to the one or other of these parliaments (i.e. Dominion or provincial) it is not made a statutory condition that the exercise of such power shall be in the opinion of the Court of law, discreet. In so far as they possess legislative jurisdiction the discretion committed to the parliaments, whether Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but when that point has been settled courts of law have no right whatever to enquire whether their jurisdiction has been exercised wisely or not."

These expressions of judicial opinion ushered in a new era in the exercise of the Dominion power of disallowance of provincial legislation.

Second Period: 1898-1911. This period is characterized by a definite tendency to refuse to disallow provincial legislation, if no special Dominion interests were affected, because of its unjust or confiscatory nature. In 1898, the Honourable David Mills, then Minister of Justice, in dealing with a petition for disallowance of a Manitoba Statute, said:

"The matter is unquestionably one within the exclusive legislative authority of the province, and the undersigned does not consider that a case has been made out which would justify Your Excellency disallowing a statute passed in the exercise of such authority";

and, citing the passage from the judgment of the Privy Council in the Fisheries Case quoted above, he concluded:

"It would seem, therefore, that the objections urged by the petitioners are for the consideration of the Provincial Legislature, which has power to grant a remedy for any grievance which may be established": Prov. Leg. 1896-1920, Vol. II. p. 461.

Again in 1901, in reference to an Ontario Act, the same Minister of Justice said in a report of December 31, 1901:

"The undersigned conceives that Your Excellency's government is not concerned with the policy of this measure. It is no doubt *intra vires* of the Provincial Legislature, and if it be unfair or unjust or contrary to the principles which ought to govern in dealing with private rights, the constitutional recourse is to the Legislature, and the acts of the Legislature may be ultimately judged by the people. The undersigned does not consider, therefore, that Your Excellency ought to exercise the power of disallowance in such cases": Prov. Leg. 1896-1920, Vol. II, p. 52.

In the same year, in connection with a British Columbia Act, the same Minister of Justice based his refusal to recommend disallowance,—

"upon the fact that the application proceeds upon grounds affecting the substance of the Act with regard to matters undoubtedly within the legislative authority of the province and not affecting any matter of Dominion policy. It is alleged that the statute affects pending litigation, and rights existing under previous legislation and grants from the province. The undersigned considers that such legislation is objectionable in principle and not justified, unless in very exceptional circumstances, but Your Excellency's government is not in anywise responsible for the principle of the legislation and . . . . . the proper remedy in such cases lies with the legislature or its constitutional judges;" Prov. Leg. 1896-1920, Vol. II, pp. 605-606.

The said Act of British Columbia was further considered a few months later by Sir Charles Fitzpatrick, then Minister of Justice, and in reporting with a recommendation similar to that of his predecessor, he said:

"The undersigned cannot help expressing his disapprobation of measures of this character, but there is a difficulty about Your Excellency in Council giving relief in such cases without affirming a policy which requires Your Excellency's government to put itself to a large extent in the place of the legislature and judge of the propriety of its acts relating to matters committed by the constitution to the exclusive legislative authority of the province": Prov. Leg. 1896-1920, Vol. II, p. 617.

Again in 1904 an unsuccessful attempt was made to procure the disallowance of a Manitoba Statute respecting the Town of Emerson which had become insolvent, the Minister of Justice, Sir Charles Fitzpatrick declaring:

"The undersigned entertains no doubt that the Act is within the authority of the legislature, and whatever views Your Excellency's government may entertain as to the propriety of legislation intended to reduce or affect the obligation of a municipality to its debenture holders, such view cannot in the opinion of the undersigned either consistently with the constitution or practice which has hitherto prevailed be invoked as justifying the disallowance of this Act. The legislation is within the scope of the subjects assigned exclusively to the provinces. The Legislative Assembly is the constitutional judge of the objections which are urged by the petitioners, and it is to the Assembly which they must look for redress if any": Prov. Legis. 1896-1920, Vol. II, p. 488.

The tendency or practice indicated by the foregoing reports of Ministers of Justice attained the "high-water mark" of its development during the regime of Sir Allen Aylesworth, Minister of Justice from June 4, 1906, to October 6, 1911.

In 1908 in the Cobalt Mining Case the Florence Mining Company claimed that it had performed all conditions precedent to entitle it to the ownership of a valuable

mining claim, but the Ontario government sold it to the Cobalt Mining Company and the Ontario legislature passed an Act confirming this sale. In refusing to recommend disallowance of this Act, Sir Allen Aylesworth said:

"Although such legislation must be admitted to be harsh and unjustified in principle, yet relating as it does to a matter within the exclusive legislative authority of the province its effect cannot reasonably be questioned."

and while conceding that,

"There seems much ground for the belief that the framers of the British North America Act contemplated and probably intended that the power of disallowance should afford to vested interests and the rights of property a safeguard and protection against destructive legislation",

he, nevertheless, concluded:

"In his opinion it is not intended by the British North America Act that the power of disallowance shall be exercised for the purpose of annulling provincial legislation, even though Your Excellency's Ministers consider the legislation unjust or oppressive or in conflict with recognized legal principles so long as such legislation is within the power of the provincial legislature to enact.

"The undersigned is of the opinion that where an Act is of a merely domestic or local character and does not affect any matter of Dominion interest Your Excellency's government ought not to review the policy or propriety of the measure which is exclusively a matter of provincial concern, and he accepts the general view that it is not the office or right of the Dominion Government to sit in judgment considering the justice or honesty of any Act of a provincial legislature which deals 'solely with property or civil rights within the province'." Prov. Legis. 1896-1920, Vol. II, pp. 80-83.

On March 1, 1909, the matter was discussed in the House of Commons, and Sir Allen, in defending his action, said:

"The large question of principle which was presented for consideration was simply whether or not the provincial legislature has the power, without control, to take one man's property and give it to another and to take away from the person injured any right of redress in the courts..... Now I think I may safely say..... that if this identical question had arisen before 1896 this legislation would have been disallowed..... And I will say at once that I believe that was the intention with which the framers of the British North America Act provided the right of disallowance in the statute..... I entertain in all honesty and sincerity the view that it is of vital consequence to the well-being of this Dominion that the rights of the provinces to legislate within the scope of their authority should not be interfered with, and that every provincial legislature, within the limits prescribed for it by the terms of the British North America Act, is and ought to be supreme. I believe that this is a principle of greater importance to the welfare of this Dominion as a whole than even the sacredness of private rights or of property ownership. I am willing to go thus far in the enunciation of the views I am stating to this House, that a provincial legislature, having as is given to it by the terms of the British North America Act, full and absolute control over property and civil rights within the province, might if it saw

fit to do so, repeal Magna Charta itself..... I take the ground that rights of property are subject only to the control of provincial legislatures within Canada. Having that view it seemed to me in considering this legislation that I was not, as advising His Excellency in Council, called upon to think at all of the injustice, of the outrageous character it might be of the legislation, but that my one inquiry ought to be whether or not there was anything in the legislation itself which went beyond the power of the provincial legislature to pass a law referring alone to property and civil rights within the province..... My view was, and is, that any measure of this sort is one in regard to which the only appeal from the provincial legislature ought to be to the people who elect that legislature, and who, if they please, may dethrone the government of the day and deprive it of power": H. of C. Debates, Sess. 1909, Vol. I. Cols. 1752-1757.

In 1909 strenuous efforts were made to obtain disallowance of the Ontario Power Commission Amendment Act, 1909, on the ground that it and the entire legislative scheme of which it formed a part amounted to a breach of faith on the part of the Ontario Government, was an unjust interference with vested rights and calculated greatly to injure the credit, not only of Ontario but of Canada as a whole as a field for investment in the money markets of Europe, inasmuch as the Provincial Government thus entered the field in competition with a number of companies supported mainly by English capital which had been allowed to expend enormous sums in the construction of works for the development of electric power. In refusing to recommend disallowance, Sir Allen Aylesworth said:

"In the opinion of the undersigned, a suggestion of the abuse of power, even so as to amount to practical confiscation of property, or that the exercise of a power has been unwise or indiscreet, should appeal to Your Excellency's Government with no more effect than it does to the ordinary tribunals, and the remedy in such cases is, in the one case as in the other, in the words of Lord Herschell, an appeal to those by whom the legislature is elected." Prov. Leg. 1896-1920, Vol. II, p. 96.

The doctrine so enunciated was not, however, uniformly applied during this period. In 1905-1906 the Minister of Justice threatened disallowance of certain Acts of Manitoba incorporating insurance and investment companies with power to do business beyond the limits of the province unless appropriate amendments of these Acts were enacted: Prov. Leg. 1896-1920, Vol. II, pp. 490-505.

In 1905 an Act of British Columbia was disallowed on the ground that it was *ultra vires* as being an attempt to impose a limitation upon the Governor General's power of selection of judges under s. 97 of the British North America Act: Prov. Leg. 1896-1920, Vol. II, p. 679; and

in January, 1911, three Statutes of the Province of Saskatchewan of 1909, incorporating certain loan and investment and trust companies, and purporting to vest them with power to do business beyond the limits of the province were disallowed. In his report of the 9th January, 1911, in regard to these Acts, Sir Wilfrid Laurier, for the Minister of Justice, said:

"The power of disallowance is conferred upon the Government of Canada to be administered constitutionally, and while great care should be taken to see that the execution of this power does not unduly interfere with the operation of provincial laws, competent to the legislatures and consistent with the general interest, it is equally the duty of Your Excellency's Government when persuaded by authority or upon due consideration that a provincial enactment is *ultra vires* of the legislature to see that the public interest does not suffer by an attempt to sanction locally laws which can derive their authority only from the Parliament.

Ministers may of course err in the interpretation of constitutional powers, but they should not on that ground decline to give effect to what they deem to be a just conclusion. . . .

If the powers which these Acts profess to confer as to extra-provincial business be *ultra vires,* it requires no argument to prove the inexpediency of executing them. Great confusion and hardship may result from a statutory corporation carrying on a trust or investment business in excess of its corporate powers." Prov. Leg. 1896-1920, Vol. II, p. 786.

Then again an Act of the Legislature of the Province of Quebec of 1910 amending the charter of a company called the "General Trust," was disallowed because, in the opinion of the Minister of Justice (Sir Allen Aylesworth), it "infringed upon the subject of banking under any fair interpretation of the words," and also because it authorized the company "to carry on a general business throughout Canada"; Prov. Leg. 1896-1920, Vol. II, pp. 256-261.

Against disallowance on the ground merely of a provincial statute being *ultra vires,* there is the noteworthy protest of the Government of British Columbia in a communication to the Department of Justice of August 22, 1905, namely, that:

"Unless the Bill should be a clear and palpable attempt on the part of the province to invade the legislative field of the Dominion Parliament, a provincial Act should not be disallowed by the Governor in Council on constitutional grounds only. The effect of disallowance, except on the principle mentioned, is to make the Minister of Justice the highest judicial dignitary of the land for the determination of constitutional questions, and in reality, above the Supreme Court of Canada. The decisions of the Supreme Court of Canada are open to question in the Judicial Committee of the Privy Council. From the decision of the Minister of Justice there is no appeal. He stands alone": Prov. Leg. 1896-1920, Vol. II, p. 675.

Third Period—1911-1924. This period is characterized by a tendency on the part of Ministers of Justice of the time to revert to, and to apply, the principles upon which the power of disallowance was exercised during the period 1867-1898.

In 1912, on two occasions, the Honourable C. J. Doherty, then Minister of Justice, while refusing to recommend disallowance of the provincial legislation under consideration, indicated that he entertained no doubt that the Federal veto power might constitutionally be exercised in relation to legislation within the competence of the Provincial Legislature on the ground of hardship and injustice to the rights affected.

In one case, on a petition for disallowance of Acts of Alberta relating to bonds of the Alberta and Great Waterways Railway Company, Mr. Doherty said in his report:

"There was considerable discussion at the hearing as to the practice and precedents in respect of disallowance of legislation by reason of unjust provisions or because of its interference with vested rights or the obligations of contract, and a recent report of the predecessor in office of the undersigned was quoted as showing that the Governor General should in no case be advised to disallow for such reasons. It is true, as has been frequently pointed out, that it is very difficult for the government of the Dominion, acting through the Governor General, to review local legislation or consider its qualities upon questions of hardship or injustice to the rights affected, and this is manifest not only by expressions in reports of the Ministers, but also by the fact that but a single instance is cited in which the Governor General has exercised the power upon these grounds alone.

The undersigned entertains no doubt, however, that the power is constitutionally capable of exercise and may on occasion be properly invoked for the purpose of preventing, not inconsistently with the public interest, irreparable injustice or undue interference with private rights or property through the operation of local statutes intra vires *of the legislatures.* Doubtless however the burden of establishing a case for the execution of the power lies upon those who allege it; and, although the undersigned is not prepared to express any approval of the statute in question, which he feels must be regarded as a most remarkable exercise of legislative authority, he is nevertheless not satisfied that a sufficient case for disallowance has been established either on behalf of the bondholder, the bank or the companies, especially when it is considered that the legislation sanctioned by the Assembly evidences as it does a very deliberate and important feature in the policy of the local government.....

The undersigned apprehends that it is sufficient for present purposes to say that he is not convinced after the very thorough discussion to which the matter was subjected, that it was prejudicial to the credit of the Dominion, or not advisable in the interests of the province, to take legislative measures to prevent improvident application of these funds, which had been raised virtually upon the credit of the province, and which the province had bound itself to repay with interest.": Prov. Leg. 1896-1920, Vol. II, pp. 801-802.

In the other case in 1912, relating to an application for disallowance of an Act of New Brunswick on the ground, *inter alia,* that it operated to cancel the stock of certain stockholders in a New Brunswick Railway without their knowledge or consent, Mr. Doherty said:

"While the Act appears to be within the constitutional powers of the legislature, the undersigned does not consider that the transfer or cancellation of private rights without notice or compensation is an appropriate sphere of legislative activity, and he reported in another case that circumstances might arise which would justify the exercise of the powers appertaining to Your Royal Highness to prevent irremediable wrong or injustice legislatively sanctioned by a province." Prov. Leg. 1896-1920, Vol. II, pp. 433-434.

In 1917, in refusing to recommend disallowance of an Ontario Act respecting Separate Schools, the same Minister observed:

"Furthermore, upon the question of the merits or justice of the legislation, assuming it to be *intra vires,* the undersigned observes that the subject of education is committed to the legislature by the special and exceptional provisions of Section 93 of the British North America Act 1867, and while *notwithstanding these provisions the power of disallowance undoubtedly exists with regard to statutes affecting education as well as other matters committed to the provinces,* the undersigned is not satisfied that the petitioners have made out a case for interference with the important particulars of provincial policy which are evidenced by these statutes." Prov. Leg. 1896-1920, Vol. II, p. 165.

In 1918, on Mr. Doherty's recommendation, an Act of the British Columbia Legislature (7-8 Geo. V. cap. 71) was disallowed because it diminished substantially the consideration of a contract, and was also an undue interference with the policy of the Dominion.

The Minister's report was made after hearing of argument before the Dominion Prime Minister, the Minister of Public Works and himself, and after notifying the Attorney General for British Columbia and hearing counsel for the petitioners. There are two passages in his report which deserve attention:

First, Mr. Doherty laid it down that he did not consider the Dominion power of veto obsolete in cases where reasons of inequality or hardship were alleged; and while he was of opinion that the Governor in Council should not disallow merely because an Act is in his judgment ill-advised, untimely or defective, or because its project lacks either in principle or detail that degree of equity and consideration of the existing situation which in the opinion of the Governor in Council should have commended itself to the

legislature, yet he maintained that "there are principles governing the exercise of legislative power other than the mere respect and deference due to the expression of the will of the local constituent assembly, which must be considered in the exercise of the prerogative of disallowance." It was not necessary to define these principles for purposes of general application, but he added "certainly although legislative interference with vested rights or the obligation of contracts, except for public purposes, and upon due indemnity, are processes of legislation which do not appear just or desirable, nevertheless, it would, in the opinion of the undersigned be formulating too broad a rule to affirm that local legislation affected by these qualities should in all cases be displaced by means of the prerogative." Prov. Leg. 1896-1920, Vol. II. p. 708.

Secondly, upon the submission of the Attorney General for British Columbia that disallowance would involve a serious interference with provincial rights, Mr. Doherty said:

"Upon the submission of the Attorney General that disallowance would involve a serious interference with provincial rights, the undersigned observes that provincial rights are conferred and limited by the British North America Acts, and while the Provinces have the right to legislate upon the subjects committed to their legislative authority, the power to disallow any such legislation is conferred by the same constitutional instrument upon the Governor General in Council, and incident to the power is the duty to execute it in proper cases. This power and the corresponding duty, are conferred for the benefit of the Provinces as well as for that of the Dominion at large. The system sanctioned by the Act of 1867, as interpreted by the highest judicial authority, 'provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself, except under the control of the whole acting through the Governor General.' The mere execution of the power of disallowance does not therefore conflict with provincial rights, although doubtless the responsibility for the exercise of the power which rests with Your Excellency in Council ought to be so regulated as not to be made effective except in those cases in which, as in the present case, the propriety of exercising the power is demonstrated." Prov. Leg. 1896-1920, Vol. II, pp. 709-710.

In 1922 an Act of Nova Scotia of 1921, which purported to vest in one J. E. MacNeil certain property and rights which had been held by the judgment of the Supreme Court of Canada, affirming that of the Supreme Court of Nova Scotia *en banc* to be vested in other persons and not in J. E. MacNeil, was disallowed. The disallowance of this Act was based on the report of Sir Lomer Gouin, then Minister of Justice. There is no suggestion either in his re-

port, or in his speech in the subsequent Parliamentary Debate (H. of C. Deb. May 1, 1923) that he considered the provincial legislation unconstitutional or *ultra vires.* He justified his recommendation rather upon these grounds:

(1) The Act in question is so extraordinary, so opposed to principles of right and justice, that it clearly falls within the category of legislation with respect to which it has been customary to invoke the power of disallowance.

(2) That he was not aware of "any circumstance whatever, moral, equitable or legal," which can be pointed to in justification of the legislation now under review; and

(3) That the Legislature in passing the Act in question constituted itself a Court of Appeal upon the Supreme Court of Canada thereby removing the case from the judicial tribunals expressly established for the administration of justice in the province.

In the course of his report, Sir Lomer said:

"It has been the subject of judicial declaration by the Courts that while the provinces have the right to legislate upon the subjects committed to their legislative authority, power to disallow any such legislation is conferred by the same constitutional instrument on the Governor in Council, and that incident to the power, is the duty to execute it in proper cases": Compar. Leg. Third Series (1924) pp. 86-89.

In 1924 the Mineral Taxation Act of Alberta (cap. 32, 1923) was disallowed mainly on the ground that it interfered with Dominion interests and policies. In his report to Council recommending disallowance, the Right Honourable Ernest Lapointe, Minister of Justice, said:

"It is maintained on behalf of the province that the legislation, if *intra vires,* ought not to be reviewed on its merits by Your Excellency because it is enacted by the Provincial Legislature which is sovereign and independent within the scope of its powers; and if *ultra vires,* that the statute ought not to be disallowed upon that ground because it is then inoperative and may be so declared by the Courts in appropriate judicial proceedings. If, however, effect be given to these submissions of the province, no place is left for the operation of the power of disallowance which is, in express language, conferred by sections 56 and 90 of the British North America Act, 1867. That the power exists is not questioned and it may operate with regard to any provincial statute 'if', in the words of the two sections last mentioned, 'the Governor General in Council within one year after the receipt thereof by the Governor General thinks fit to disallow the Act.' While the discretion thus belonging to Your Excellency in Council ought to be wisely exercised upon sound principles of public policy, and having due regard to local powers of self-government, there are cases in which disallowance affords a constitutional remedy, and it is implicit that the exercise of the power ought not to be withheld when the public interest requires that it should become effective..... It is not necessary.....to review the legislation upon its merits with

relation to the position or interests of mineral owners in the province who are subject to the provincial taxing powers, and whose property and civil rights in the province are affected by the operation of the provincial laws. There are reasons which have influenced the undersigned to submit his recommendation upon this report which are not affected by the mere grounds of injustice or hardship which are urged by the petitioners.

There are paramount considerations affecting the Government of Canada and the general public interest which demand attention, and, whatever may have been said as to the propriety of recommendations for the disallowance of legislation which is thought to be unfair, unreasonable or unjust, it has, whenever the occasion presented itself, been maintained by the Ministers of Justice, and has never been successfully controverted by any province, that disallowance is the appropriate remedy for the maintenance of that harmony which it is essential should exist between provincial legislation and the administration of Dominion affairs within their proper domain."

9. Request for Abolition of Power of Disallowance in 1887.

In October, 1887, an Inter-Provincial Conference—that is, a conference composed of the local premiers and one or more of their leading colleagues—was convened at Quebec, on the invitation of the Honourable Mr. Mercier, Premier of Quebec, for the purpose of considering questions "which have arisen or may arise as to the autonomy of the provinces, their financial arrangements, and other matters of common provincial interest." The Provinces of Ontario, Quebec, Nova Scotia, New Brunswick and Manitoba were each represented by several ministers. Sir John Macdonald, then Prime Minister of Canada, was invited to attend with one or more of his ministers, but declined to do so. The proceedings of the conference are reported in a publication entitled "Minutes of Proceedings of the Inter-Provincial Conference" held at the City of Quebec from the 20th to the 28th October, 1887. In opening the Conference, the Honourable Mr. Mercier enumerated various topics proposed for consideration. These topics included among others,—

"(8) Removal from the Federal Government of the Power of disallowing Provincial Laws."

In reference to this topic, the Honourable Mr. Mercier said (at pp. 19 and 20 of the report):

"The exercise of the power of disallowing Provincial laws presents the gravest objections which it is necessary to remove.

As regards the constitutionality of the laws, that falls naturally within the jurisdiction of the courts.

On the other hand, it should no more be permitted to the Federal Government to disallow a Provincial Act, on the pretext that it affects Federal rights, than it is permitted to Provincial Government to disallow Federal Acts because they affect provincial interests."

On the 28th October, the following Resolutions, amongst others, were unanimously adopted by the Conference:

"RESOLUTIONS

RESPECTING AMENDMENTS OF THE BRITISH NORTH AMERICA ACT, 1867

Whereas, in framing the British North America Act, 1867, and defining therein the limits of the Legislative and Executive powers and functions of the Federal and Provincial Legislatures and Governments, the authors of the Constitution performed a work, new, complex and difficult, and it was to be anticipated that experience in the working of the new system would suggest many needed changes; that twenty years' practical working of the Act has developed much friction between the Federal and Provincial Governments and Legislatures, has disclosed grave omissions in the provisions of the Act, and has shewn (when the language of the Act came to be judicially interpreted) that in many respects what was the common understanding and intention had not been expressed, and that important provisions in the Act are obscure as to their true intent and meaning; and whereas the preservation of Provincial autonomy is essential to the future well-being of Canada; and if such autonomy is to be maintained, it has become apparent that the Constitutional Act must be revised and amended; therefore the representatives and delegates of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, and Manitoba, duly accredited by their respective Governments, and in Conference assembled, believing that they express the views and wishes of the people of Canada, agree upon the following Resolutions as the basis upon which the Act should be amended; subject to the approval of the several Provincial Legislatures:

1. That by the British North America Act exclusive authority is expressly given to the Provincial Legislatures in relation to subjects enumerated in the 92nd section of the Act; that a previous section of the Act reserves to the Federal Government the legal power of disallowing at will all Acts passed by a Provincial Legislature; that this power of disallowance may be exercised so as to give to the Federal Government arbitrary control over legislation of the Provinces within their own sphere; and that the Act should be amended by taking away this power of disallowing Provincial Statutes, leaving to the people of each Province, through their representatives in the Provincial Legislature, the free exercise of their exclusive right of legislation on the subjects assigned to them subject only to disallowance by Her Majesty in Council as before Confederation; the power of disallowance to be exercised in regard to the Provinces upon the same principles as the same is exercised in the case of Federal Acts;

2. That it is important to the just operation of our Federal system, as well that the Federal Parliament should not assume to exercise powers belonging exclusively to the Provincial Legislatures, as that a Provincial Legislature should not assume to exercise powers belonging exclusively to the Federal Parliament; that to prevent any such assumption, there should be equal facilities to the Federal and Provincial Governments for promptly obtaining a judicial determination respecting the validity of Statutes of both the Federal Parliament and Provincial Legislatures; that Constitutional provision should be made for obtaining such determination before, as well as after a Statute has been acted upon; and that any decision should be subject to appeal as in other cases, in order that the adjudication may be final.

The request for the abolition of the power of disallowance, embodied in the foregoing resolutions, was made in vain. No action was taken upon it. The attitude of Sir John Macdonald towards this Conference is indicated in the following passage in Sir Joseph Pope's "Correspondence of Sir John Macdonald, 1845-1891," at pp. 398, 399:

"Almost immediately after the General Elections of 1887, the Provincial leaders of the Liberal party, which at that time was in power in all the provinces, except Manitoba, British Columbia and Prince Edward Island, organized what was styled an Inter-Provincial conference—that is, a conference composed of the local Premiers and one or more of their leading colleagues, who met together in Quebec at the call of Mr. Mercier, to consider the question of the readjustment of the financial and other relations between the Dominion and the provinces with an eye to embarrass the Dominion Government, which they had signally failed to defeat at the polls, and now sought to entangle in controversy, thus presenting the spectacle of the larger provinces arrayed in hostility to the Central Government as the common enemy of all. Sir John Macdonald was not to be caught in any such trap. Apart from the question of the *bona fides* of the managers of this conference which he gravely doubted, Sir John uniformly held to the view (since widely departed from) that the functions of the Provincial Governments are strictly limited to matters of local concern, and that the only constitutional representatives of a province in its relations with the Dominion, are the members of the Parliament of Canada from that province. He therefore declined to take part in this conference or to recognize it, on behalf of the Dominion Government, in any form."

However, the suggestion contained in the second paragraph of the resolution above quoted did have a practical result. In the House of Commons on April 29, 1890, on a motion to resolve the House into Committee of Supply, the Honourable Edward Blake moved the following amendment:

"To leave out all the words after 'that' and insert the following:—

'It is expedient to provide means whereby on solemn occasions touching the exercise of the power of disallowance, or of the appellate power as to educational legislation, important questions of law or fact may be referred by the Executive to a high judicial tribunal for hearing and consideration, in such mode that the authorities and parties interested may be represented and that a reasoned opinion may be obtained for the information of the Executive'": H. of C. Debates, Session 1890, Vol. 2, Column 4084.

This motion was supported by Mr. Blake in an able speech and met with the approval of Sir John Macdonald, the Prime Minister of the day. As a result, at the following session of Parliament the Supreme and Exchequer Courts Act was, by sec. 4 of chap. 25 of the Statutes of 1891, amended by the substitution of a new section for section 37. This new section was the prototype of sec. 55

of the present Supreme Court Act. Pertinent extracts from the speeches delivered by Mr. Blake and by Sir John Macdonald are set out in Appendix "D" to this memorandum.

10. Does the Power of Disallowance still subsist or has it become obsolete?

Following upon the disallowance by order of His Excellency the Governor General in Council dated August 17, 1937 (P.C. 1985), of three Acts passed by the Legislative Assembly of the Province of Alberta at the 1937 (second) session, and assented to on August 6, 1937, the Hon. William Aberhart, Premier of the Government of that Province, challenged the constitutional right and competency of the Governor General in Council to disallow the legislation referred to on the ground that the power of disallowance which the Governor General in Council had professed to exercise no longer existed, and contended that such legislation was, in consequence, still law and would remain law until declared *ultra vires* of the provincial legislature by the courts. In support of the position so taken by the Government of the Province of Alberta, the Legislative Assembly of the said province on September 30, 1937, adopted by a majority of votes declaring, in part, "that the Legislative Assembly of Alberta accepts the declaration of the provincial government that the right of disallowance of provincial legislation no longer exists and approves the determination of the provincial government that the disallowed legislation shall be implemented."

In the issue of the Ottawa *Citizen* of October 14, 1937, there was republished from the *Edmonton Journal* an extensive excerpt from the speech delivered on the floor of the Alberta legislature by the Hon. Lucien Maynard, Minister of Municipal Affairs in the Alberta Government, in support of the contention of his government that the Dominion power of disallowance of provincial legislation no longer exists. His argument, in summary, is,—

1. That under the decisions of the judicial Committee of the Privy Council the provinces are just as sovereign within their legislative sphere as the Dominion Parliament is within its legislative sphere;

2. That the Lieutenant-Governor of a province, although appointed by the Dominion Government, is just as much

the representative of His Majesty the King for all purposes of provincial government, as the Governor General himself is for all purposes of Dominion government;

3. That, under the provisions of the B.N.A. Act, the power of disallowance was not only given to the Governor General in relation to provincial legislation, but was also given to His Majesty in Council in relation to Dominion legislation;

4. That, long before the Imperial Conference of 1926, it had become a recognized constitutional convention that His Majesty in Council could not exercise the power of disallowance of Dominion legislation, and all that the Imperial Conference Reports of 1926 and 1930 and the Statute of Westminster, 1931, did, was to declare extinct a right which had, in fact, been dead a long time; and

5. That the Governor General can have no greater power than his master, the King, and, since the King can no longer disallow Dominion legislation, neither can the Governor General, who is only the agent or representative of the King in Ottawa, disallow any provincial legislation, no matter what the character of this provincial legislation may be.

Propositions 1 to 4 inclusive merely express indisputable principles of constitutional law; but the conclusion drawn in proposition 5 that, because His Majesty in Council can no longer constitutionally disallow Dominion legislation, it logically follows that the Governor General, who is merely the King's representative in Canada, can no longer constitutionally disallow provincial legislation, will not stand the test of examination. The reasoning is demonstrably unsound.

First, Canada's attainment to "equality of status" with the United Kingdom and the other self-governing Dominions of the British Commonwealth of Nations, as described in the definition of their position and mutual relations set out in the Report of the Imperial Conference of 1926, was the culmination of a long evolutionary process by which the legal powers of the British Government in relation to the Dominions fell into disuse through the emergence and operation of constitutional conventions. These conventions, being merely in the nature of precepts

or maxims of political usage, are, in themselves, without legal force; and the Statute of Westminster, 1931 (Imperial Statutes 22 Geo. V. cap. 4), by removing certain legal restrictions on Dominion Sovereignty, merely brought the legal position into accord with the existing conventional position of the Dominions. The Dominion's status still depends, in part, upon constitutional conventions, now for the most part formally expressed in resolutions embodied in the Reports of the Imperial Conferences of 1923, 1926, 1930 and 1937, and, in part, upon the provisions of the Statute of Westminster, 1931.

In so far as Canada's status depends upon constitutional conventions, they are conventions affecting only the Dominion as a unity: they have no reference to the internal adjustments of legislative power under the British North America Act, 1867. For instance, the Statute of Westminster, 1931 left untouched the power of disallowance reserved by sec. 56, or the power of reservation reserved by secs. 55 and 57 of the British North America Act to the King in Council. Legally these powers are still intact; constitutionally, however, they have passed, save as hereinafter indicated, into desuetude. These matters are covered by the resolutions of the Imperial Conference, 1930, under which it is recognized that the power of disallowance can no longer be exercised in relation to Dominion legislation, with one exception. Under Treasury regulations issued under the Colonial Stock Act, 1900 (Imperial Statutes, 63-64 Vict., cap. 62), Dominion securities had been admitted as trustee securities on condition that the Dominion Government placed on record a formal expression of its opinion that any legislation which appears to the British Government to alter any of the provisions affecting the stock to the injury of the stockholders, or to involve a departure from the original contract, would properly be disallowed. It is agreed by the Dominions that when a Dominion Government has complied with this condition and there is outstanding any stock which is thus a trustee security, the right of disallowance in respect of such legislation must remain and can properly be exercised.

Similarly, with regard to the power of reservation, it is recognized that the advice of the Dominion Government is to govern in every case. All that the resolutions of the Imperial Conference of 1930, in substance, really involved

was recognition of the fact that the Governor General's power of discretionary reservation can be exercised, if at all, only upon the advice of His Majesty's Canadian Ministry, and that, as regards the signification of the King's pleasure concerning a reserved Bill, the right to advise His Majesty had been transferred from His Majesty's Ministers at Westminster to His Majesty's Ministers at Ottawa: that is all.

These principles depend only upon constitutional conventions; but they are conventions which affect the position of the Dominion only as a unity *vis-à-vis* the United Kingdom. This is so for the simple reason that the Imperial Conferences have in fact no authority, and have never professed to exercise any authority, to alter the internal relations existing under the British North America Act, 1867 between the Dominion Government, on the one hand, and the Provinces on the other. If evidence of the truth of this statement be required, it is furnished by the following passage in the Report of the Imperial Conference of 1930, dealing with the Report of the Conference of 1929 on the operation of Dominion legislation, at pp. 17-18:

"The Imperial Conference examined the various questions arising with regard to the Report of the Conference on the Operation of Dominion Legislation and in particular took into consideration the difficulties which were explained by the Prime Minister of Canada regarding the representations which had been received by him from the Canadian Provinces in relation to that Report.

A special question arose in respect to the application to Canada of the sections of the Statute proposed to be passed by the Parliament at Westminster (which it was thought might conveniently be called the Statute of Westminster), relating to the Colonial Laws Validity Act and other matters. On the one hand it appeared that approval had been given to the Report of the Conference on the Operation of Dominion Legislation by resolution of the House of Commons of Canada, and accordingly, that the Canadian representatives felt themselves bound not to take any action which might properly be construed as a departure from the spirit of that resolution. On the other hand, it appeared that representations had been received from certain of the Provinces of Canada subsequent to the passing of the resolution, protesting against action on the Report until an opportunity had been given to the Provinces to determine whether their rights would be adversely affected by such action.

Accordingly, it appeared necessary to provide for two things. In the first place it was necessary to provide an opportunity for His Majesty's Government in Canada to take such action as might be appropriate to enable the Provinces to present their views. In the second place it was necessary to provide for the extension of the sections of the proposed Statute to Canada or for the exclusion of Canada from their operation after the Provinces had been consulted. To this end it seemed desirable to place on record the view that the sections of the Statute relating to the

Colonial Laws Validity Act should be so drafted as not to extend to Canada unless the Statute was enacted in response to such requests as are appropriate to an amendment of the British North America Act. It also seemed desirable to place on record the view that the sections should not subsequently be extended to Canada except by an Act of the Parliament of the United Kingdom enacted in response to such requests as are appropriate to an amendment of the British North America Act."

Accordingly, a Dominion-Provincial Conference was held in Ottawa in April, 1931, for the purpose of affording the Provinces an opportunity of presenting any views they might desire to express with reference to the changes involved in the proposed Statute of Westminster, and the Dominion and Provincial representatives unanimously agreed upon the terms of a section to be inserted in that Statute.

On June 30, 1931, the Right Honourable R. B. Bennett, then Prime Minister of Canada, introduced in the House of Commons a resolution for an Address to His Majesty requesting the enactment of the Statute of Westminster: H. of C. Deb. 1931, Vol. III, p. 3191; and in the course of his speech fully explained to the House the proposed provision affecting the Provinces and the British North America Act, 1867.

The present Minister of Justice, the Right Honourable Mr. Lapointe, in expressing approval of this provision so far as it affected the legislative powers of the Provinces, said:

"This is an extension which I commend. Of course the Special Conference of 1929 could not make any such recommendation because we had no mandate from the Provinces to ask for such a change. And it was then recognized that that extension could be made if the Provinces saw fit to ask for it in order that this Statute might affect their legislation as well as the legislation of the Dominion": H. of C. Deb. 1931, Vol. III, p. 3201.

There is thus explicit recognition of the incapacity of the Imperial Conferences to affect the constitutional position or powers of the Provinces, *vis-à-vis* the Dominion, without their consent.

It is submitted, therefore, that the fact that the power of the King in Council to disallow Dominion legislation, though legally still intact, has become obsolete through the operation of constitutional conventions affecting only the inter-imperial relations of the Dominion, affords no foundation whatever, historically or in fact for the pretension that the power of the Governor General in Council to

disallow provincial legislation has, in consequence, also become obsolete. It is not pretended that the exercise of this power has been restrained or limited by a constitutional convention originating from any other source. If any such constitutional convention could be relied upon or invoked, one would expect to find a statement of it formulated in a Report of a Dominion-Provincial Conference rather than the Report of an Imperial Conference which is concerned only with inter-imperial relations; but no such report has been cited or exists. Unanimity of opinion by successive Ministers of Justice approved by the Governor General in Council as to the principles upon which the Dominion power of disallowance of provincial legislation ought to be exercised might well also afford a basis for such a constitutional convention; but the survey of precedents of disallowance of provincial legislation, set out in a preceding section of this memorandum, discloses divergency rather than unanimity of opinion by Ministers of Justice. The principles enunciated by Sir Allen Aylesworth, as Minister of Justice between 1906 and 1911, if they had been consistently acted upon by succeeding Ministers, might have afforded a basis for a constitutional convention recognizing the impropriety of disallowing legislation within the competence of a province merely on the ground of its unjust or confiscatory nature; but the reports of succeeding Ministers of Justice definitely affirm the principle "that the power is constitutionally capable of exercise, and may on occasion be properly invoked for the purpose of preventing, not inconsistently with the public interest, irreparable injustice or undue interference with private rights or property through the operation of local statutes *intra vires* of the legislatures." Hence practice in respect of the exercise of the power of disallowance affords no basis for any alleged constitutional convention restraining the exercise of the power; and still less for the pretension that the power of disallowance no longer exists. Neither can it be validly argued that the power has become obsolete through disuse. It was exercised as recently as 1924, and the administrative practice of annually reporting on provincial legislation has proceeded upon the theory that the power is still in full vigour.

But even if it were the case (and it is not the case) that this power had never been exercised, or had been

infrequently exercised, in respect of provincial legislation, the continued legal existence of the powers and the legal right of the responsible authorities, in the exercise of a sound discretion, to exercise the power would be wholly unaffected by that fact. "It is," as Lord Hatherley, L.C., said in *Hebbert* v. *Purchas* (1871) L.R. 3 P.C. 605, 650, "quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute," or, as was said in the Court of King's Bench in *White* v. *Boot* (1788) 2 T.R. 274, 275, "An Act of Parliament cannot be repealed by non-user, notwithstanding any practice that may have obtained to the contrary."

Secondly, in so far as the provisions of the Statute of Westminster, 1931, are concerned, it is manifest on an examination of those provisions that they legally have effect to leave unaltered and unimpaired the constitutional position and powers of the Provinces, *vis-à-vis* the Dominion, under the provisions of the British North America Act, 1867.

The Statute of Westminster, 1931, 22 Geo. 5, Imp. ch. 4, is applicable to Canada as well as other Dominions. By this statute certain legal restrictions on Dominion sovereignty were removed. Notable amongst its provisions is section 2, which provides as follows:

> "2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
>
> (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion."

This provision, if it had stood absolutely and unqualified, would have had the effect of vesting in the Parliament of Canada alone the power to repeal or amend the British North America Acts, 1867 to 1930. However, the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, by which the draft sections of the proposed Statute of Westminster were prepared, recognized the desirability of making it clear that the proposed Act of the Parliament of the United Kingdom would effect no change in the existing position in this

respect, and recommended the inclusion in the said Act of the following draft section:

"Nothing in this Act shall be deemed to confer any power to repeal or alter the constitution Acts of the Dominion of Canada.....otherwise than in accordance with the law and constitutional usage and practice heretofore existing"; See report of the said Conference at p. 23.

The Provinces of Canada were not content with this provision, and at a Dominion-Provincial conference held in Ottawa in April, 1931, the representatives of the Dominion and Provincial Governments agreed upon the terms of a draft section which was later embodied as section 7 in the Statute of Westminster, 1931. That section reads as follows:

"7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively."

The plain effect of subsection 1 of this section is to preclude the exercise of any of the powers conferred by the statute (in particular the power conferred by sec. 2) for the repeal, amendment or alteration of the British North America Acts, 1867 to 1930; and by subsection 3 (in order as it were to make assurance doubly sure) it is made clear that neither the Dominion Parliament nor the Provincial Legislatures are enabled by the statute to legislate on matters not under the constitution within their power already. The Dominion power of disallowance of provincial legislation under sec. 56 of the British North America Act is thus not only legally unaffected, but legally conserved, by the provisions of the Statute of Westminster, 1931.

This view of the effect of said section 7 is confirmed by what was said by the Judicial Committee (speaking by Lord Sankey, L.C.) in British Coal Corp. v. The King (1935) A.C. 500, 520:

"It is true that before the Statute (Statute of Westminster), the Dominion Legislature was subject to the limitations imposed by the Colonial Laws Validity Act and by s. 129 of the Act (British North America Act, 1867), and also by the principle or rule that its powers

were limited by the doctrine forbidding extra-territorial legislation, though that is a doctrine of somewhat obscure extent. But these limitations have now been abrogated by the Statute (Statute of Westminster). There now remain only such limitations as flow from the Act (British North America Act, 1867) itself, the operation of which as affecting the competence of Dominion legislation was saved by s. 7 of the Statute (Statute of Westminster), a section which excludes from the competence of the Dominion and Provincial Parliaments any power of 'repeal, amendment or alteration' of the Act (British North America Act, 1867). But it is well known that s. 7 was inserted at the request of Canada and for reasons which are familiar."

If the Dominion's power of disallowance of provincial legislation was considered an essential feature of the Constitution prior to the enactment of the Statute of Westminster, 1931, still more so must it be so considered since that act was passed. For before that statute was passed, the Imperial Parliament might, in default of the exercise of the Dominion's power of disallowance, have provided a remedy by enacting legislation which, in virtue of the Colonial Laws Validity Act, 1865, would have been effective to override repugnant provincial legislation. That power of legislation has, however, been renounced by the Imperial Parliament under the provisions of the Statute of Westminster, 1931. Section 2 relieves future Dominion legislation from the rule of the Colonial Laws Validity Act, 1865, that any Act is repugnant or any order, rule or regulation made thereunder, affirms the principle that no Act is invalid on the score of repugnancy to the law of England, and gives power to the Dominion Parliament to repeal any United Kingdom Act, order, rule or regulation, in so far as the same is part of the law of the Dominion; and sec. 7 (2) renders this provision applicable to laws made in the future by any of the Provinces of Canada. Moreover, by sec. 4, no Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

The retention of the Dominion's power of disallowing provincial legislation appears to be essential not merely for the purpose of protecting the interests of Canada as a whole; as, for instance, in relation to its international obligations; but also for the purpose of protecting inter-Imperial interests. How important the exercise of this

power may on occasion be in relation to provincial legislation conflicting with treaty obligations of the Dominion, is illustrated by the decision in the Japanese Treaty case (*Attorney General for British Columbia* v. *Attorney General for Canada* (1924) A.C. 203). The provincial legislation in question in that case was held to be invalid, because it violated the principle laid down in the Japanese Treaty Act, 1913, although, apart from the Treaty, the legislation had been held to be within the powers of the Provincial Legislature: *Brooks-Bidlake and Whittall* v. *Attorney General for British Columbia* (1923) A.C. 450. The legislation in question was disallowed by the Governor General in Council on March 31, 1922, and, although this fact is observed upon in several places in the judgment of the Judicial Committee of the Privy Council in the Japanese Treaty Case (1924) A.C. 203, no doubt is suggested that the power had been effectively exercised. The judgment proceeds rather upon the theory that it had been effectively exercised. Lord Haldane, in delivering the judgment of the Board said at pp. 210 and 212:

"As the result of the opinion delivered in the Supreme Court of Canada, the Governor General in Council on March 31, 1922, being within the year from the passing of the statute of 1921, during which his power of disallowance remained operative, disallowed it.

Leave to appeal to the Sovereign in Council against the judgment of the Supreme Court was subsequently given. On the decision in the present appeal depends, therefore, the ascertainment of the limits within which the Legislature of the Province can attempt further legislation on the subject."

"*The statute has been disallowed,* and if re-enacted in any form will have, in their Lordship's opinion, to be re-enacted in terms which do not strike at the principle in the Treaty that the subjects of the Emperor of Japan are to be in all that relates to their industries and callings in all respects on the same footing as the subjects or citizens of the most favoured nation . . . . . The second question does not arise for the reason they have indicated. *The statute has been disallowed.* It may not be necessary to enact it in a fresh form, but if this is to be done it may be possible so to redraft it as to exclude from the operation of its principle all subjects of the Japanese Emperor and also to avoid the risk of conflict with s. 91, sub-s. 25, of the British North America Act. The question whether there has been success in the latter respect can only be answered when the terms of any fresh statute are known.

Without this power of disallowance, the Dominion would be reduced to a condition of impotence akin to that in which the Central Government of the United States of America found itself under the Articles of Confederation from 1782 until the Government was reorganized under its present Constitution in 1789. Under these Articles, the

Central Government, although vested with the sole and exclusive right of entering into treaties and alliances, had no means of carrying its powers into execution. In many of the States laws were passed which rendered nugatory the stipulations of treaties with other Governments. This evil became so great that in April, 1787, Congress was compelled to address to the several States a letter beseeching them to repeal such of their laws as interfered with the treaties made with foreign nations: see Devlin on the Treaty Power, pp. 8, 12 and 17; Story on the Constitution, 5th ed., Vol. 2, pp. 603, 607.

Thirdly leading writers on Constitutional Law apparently entertain no doubt that, notwithstanding the constitutional changes which have been brought about by the Reports of the Imperial Conferences of 1926 and 1930, and the Statute of Westminster, 1931, the Dominion's power of disallowance of provincial legislation is still a subsisting power and may constitutionally be exercised.

Professor A. Berriedale Keith, an acute and prolific commentator on British Constitutional Law was the contributor of the title "Dominions, Colonies, Possessions, Protectorates, and Mandated Territories" contained in 11 Halsbury's Laws of England, 2nd ed. This title which professed to state the law as at October 1, 1933, states at p. 71:

"It must be remembered that the Dominion Government may disallow any provincial Act, including a Constitution Act, and that this power is not obsolete." (g)

and at p. 91:

"Nor is it now usual to disallow provincial Acts on constitutional grounds alone, it being held proper to allow the Courts to decide as to the validity of legislation rather than assert a federal control, in contrast to the earlier policy of Sir John Macdonald's regime (m). The tendency to disallow has also been largely curtailed by the decisions of the Courts in favour of the existence of provincial powers denied to exist by the federation, as in the case of statutes dealing with the pardoning power (n) or the creation of King's Counsel (o), or the taking of privileges by the legislatures (p). *Disallowance on grounds of moral disapprobation of legislation deemed confiscatory in character is not obsolete, but decidedly rare* (q), and disallowance to meet the convenience of the provincial government is open to constitutional objection (r). In any case disallowance is a very minor factor in the scheme of federation. It has, of course, no retroactive operation (s)."

(g) See p. 91, post.

(m) Keith, Responsible Government in the Dominions (1928), i, 560-569.

(n) A.G. of Canada v. A.G. of Ontario (1890), 20 A.R. 222, at p. 247; on appeal (1894), 23 S.C.R. 458.

(o) A.G. for Dominion of Canada v. A.G. for Province of Ontario (1898) A.C. 247 P.C.

(p) See Landers v. Woodworth (1878), 2 S.C.R. 158; Fielding v. Thomas (1896) A.C. 600, P.C.

(q) An Act may be very gravely open to objection but yet not be disallowed: see Florence Mining Co. v. Cobalt Lake Mining Co. (1909), 18 O.L.R. 275, per Riddell, J. at p. 279; per Moss, C.J. at p. 293; on appeal (1910) 102 L.T. 375, P.C.

(r) Statutes of Nova Scotia (1922) 12 & 13 Geo. V, cc. 14, 40, respecting the rule of the road, were conflicting and on that score disallowed at the request of the province.

(s) Wilson v. Esquimault and Nanaimo Rail Co. (1922) 1 A.C 202, P.C.

Again, Professor Keith, in his more recent treatise, "The Governments of the British Empire" (1936), states at p. 417:

"But the Dominion has also the power of requiring the Lieutenant Governors to reserve provincial Bills, though this is practically never done, and the originally much more important power of disallowing provincial Acts within a year after receipt by the Governor General. The use of this power is mainly confined to Acts which infringe the principles of the distribution of legislative power in Canada, or contravene Imperial interests applicable to Canada, as, for example, British Columbian legislation directed against Japanese immigration or employment, and, more rarely cases of Acts confiscating property without compensation on an adequate basis. The power is one to be discreetly exercised."

Anson's "Law and Custom of the Constitution," Vol. II, Part II "The Crown," 4th ed. (1935), edited by Professor Keith, states at p. 102:

"The legislation of the Canadian Provinces is subject to disallowance by the Governor General in Council. But this power is now very rarely used in respect of Acts to whose substance exception is taken; and it is the rule to allow Acts whose legal validity is doubtful, to stand, leaving the matter to come before the Courts and so, ultimately, before the Judicial Committee of the Privy Council."

A Report on "The British Empire," its structure and problems, by a Study Group of the Members of the Royal Institute of International Affairs, published in 1937, after submission in draft form for criticism to a number of leading authorities in Great Britain, the Dominions and other countries, states at p. 31 in discussing the Canadian Constitution:

"Each Province has a Lieutenant-Governor who is nowadays always a local citizen, appointed by the Governor General in Council and paid by the Dominion. The Dominion Government may remove a Lieutenant-Governor from office, require him to reserve Bills for the Governor General's consideration, or disallow provincial Acts within a year; but it seldom exercises these powers."

And again Professor Robert MacGregor Dawson, Professor of Political Science, University of Saskatchewan, in his treatise on "Constitutional Issues in Canada, 1900-1931," states at pp. 431-2:

"Few federations give to the central authority the extensive powers enjoyed by the Dominion Government in Canada. This peculiarity finds expression in the generous grant to the Dominion of the enumerated powers in section 91, in the further grant to the Dominion of the residuary powers (though these have been greatly reduced by decisions of the Judicial Committee), and, most unusual of all, in the control allowed the Dominion over certain activities of the provincial governments. *Under this last heading appear the power of the central Government to appoint and remove the lieutenant-governors in each province, and the right to disallow (subject to no statutory restriction) any enactment of the provincial legislatures.* It is obvious that the possession of the powers last mentioned increases materially the authority of the central Government, and any extensive exercise of them would in a short time transform the provinces into large municipalities. The Dominion control of the lieutenant-governors, however, has been of the highest kind, although interference has occasionally been charged, and two lieutenant-governors have been removed from office by the Governor General in Council. The power of disallowance was freely used during the first thirty years of the federation, and it constituted at that time a serious menace to provincial legislative autonomy. Since then, however, the number of Acts disallowed has rapidly declined; *but it is well to remember that this Dominion power is legally unimpaired, and the extent of its exercise rests on no more stable basis than the particular theory held at a given moment by the Minister of Justice or by the Cabinet.*"

Fourthly, as the late E. L. Newcombe, K.C., Deputy Minister of Justice, is reported to have said on the argument before the Privy Council of Canada in connection with the application for disallowance of the Alberta Act, 1910, cap. 9, relating to the bonds of the Alberta and Great Waterways Railway Company,—

"There is a little difference between Imperial action in the disallowance of a colonial Act, and Federal action here, in that the Imperial Government disallows by virtue of the Royal prerogative without any advice based on the representations of the colony, whereas here I think the interpretation of the Judicial Committee that we have a carefully balanced constitution, under which no one of the provinces can pass laws for itself, except under control of the whole exercised by the Governor General, means that His Excellency is advised here locally under our system by the representatives of all the provinces, and, therefore, there is a reason for interfering locally which could not be urged in the case of colonial legislation dealt with at the Court in London.": Canada's Federal System by A. H. F. LeFroy, pp. 47-48.

Fifthly, explicit recognition by the governments of the Dominion and of the Province of Alberta, respectively, of the continued existence of the power of the Governor

General in Council to disallow provincial legislation is afforded by the following instruments:

I. The Instructions issued under the authority of the Governor General in Council to the Lieutenant Governors of the Provinces (the authentic text of which Instructions will be found in Appendix E to this memorandum) and annexed to their Commissions, contain the following Instruction:

"VI. The Lieutenant Governor, on receipt of a copy of an Order in Council disallowing an Act with my certificate of the date on which the Act was received by me, shall forthwith make proclamation in the said Province of such certificate, and of the disallowance of the said Act."

This Instruction is included in the Instructions issued to all Lieutenant-Governors of the Province of Alberta since its establishment in 1905, including (since the advent to office of the present Government of that Province in September, 1935), the Lieutenant-Governors appointed since that date, namely, His Honour Lt.-Col. P. C. H. Primrose, appointed October 1, 1936, and succeeded on his death by His Honour John C. Bowen, appointed March 20, 1937, and still holding office.

II. The Statutes Act, chap. 2 of the Revised Statutes of Alberta, 1922, provides, by sections 4, 6, 7 and 8, as follows:

"4. (1) The Clerk of the Legislative Assembly shall indorse on every Act immediately after the title of such Act, the day, month and year when the same was by the Lieutenant Governor assented to or reserved by him for the assent of the Governor General; and in the latter case the Clerk shall indorse thereon the day, month and year when the Lieutenant Governor has signified either by speech or message to the Legislative Assembly or by proclamation, that the same was laid before the Governor General and that the Governor General was pleased to assent to the same; and such indorsement will be taken to be a part of such Act.

(2) Every Act of the Province whenever its commencement is not otherwise provided for shall, if it is not reserved, come into and be in force on and from the first day of July following the day on which it was assented to, and if it has been reserved and afterwards assented to then on and from the tenth day after the publication in *The Alberta Gazette* of the proclamation announcing such assent, or on and from the said first day of July, whichever date last occurs.

* * * * *

6. The Clerk of the Legislative Assembly shall affix the seal of the Province to certified copies of all Acts intended for transmission to the Secretary of State or required to be produced before courts of justice and in any other case in which the Lieutenant Governor in Council may so direct; and such copies so certified shall be held to be duplicate originals and also to be evidence, as if printed by lawful authority of such Acts and of their contents.

7. The Clerk of the Legislative Assembly shall furnish a certified copy of any Act to any person applying for the same upon receiving from such person such fee (not exceeding ten cents for every hundred words) as the Lieutenant Governor in Council may from time to time direct.

8. The Clerk of the Legislative Assembly shall insert at the foot of every such copy so required to be certified a written certificate duly signed and authenticated by him to the effect that it is a true copy; and in the case of any Act disallowed after it came into force, he shall add the words 'but disallowed by the Governor General in Council which disallowance took effect on the .....day of ....., 19....'"

C. P. P.

APPENDIX "A"

EXTRACTS FROM PARLIAMENTARY DEBATES ON THE SUBJECT OF CONFEDERATION OF THE BRITISH NORTH AMERICAN PROVINCES

3rd SESSION, 8th PROVINCIAL PARLIAMENT OF CANADA, QUEBEC, 1865

Honourable John A. Macdonald, Attorney General of Upper Canada, in moving an address to Her Majesty praying for the submission of a measure to the Imperial Parliament based on the Quebec resolutions said:

* * * * *

"With respect to the Local Governments it is provided that each shall be governed by the Chief Executive Officer who shall be nominated by the General Government. As this is to be one united Province with the Local Governments and Legislatures subordinate to the General Government and Legislature, it is obvious that the Chief Executive Officer in each of the Provinces must be subordinate as well. The General Government assumes towards the Local Governments precisely the same position as the Imperial Government holds with respect to each of the Colonies now: so that as the Lieutenant Governor of each of the different provinces is now appointed directly by the Queen, and is directly responsible and reports directly to Her, so will the executives of the local government hereafter be subordinate to the representative of the Queen, and be responsible and report to him." P. 42.

Honourable George Brown:

* * * * *

"There was but one choice open to us — federal union or nothing. But in truth the scheme now before us has all the advantages of a legislative union and a federal one as well. We have thrown over on the localities all the questions which experience has shown lead directly to local jealousy and discord, and we have retained in the hands of the General Government all the powers necessary to secure a strong and efficient administration of public affairs. (Hear, hear.) By placing the appointment of the judges in the hands of the General Government, and the establishment of a central court of appeal, we have secured uniformity of justice over the whole land. (Hear, hear.) *By vesting the appointment of the lieutenant-governors in the General Government and giving a veto for all local measures, we have secured that no injustice shall be done without appeal in local legislation.* (Hear, hear.)" P. 102.

Honourable Mr. Sanborn:

* * * * *

"But to what power were the rights of property committed in these resolutions. When the Minister of Finance appealed to moneyed men abroad for a loan, could he say the Constitution had provided guarantees P. 123.

against injurious changes, when it was known that the laws relating to property were left to the caprice of the local governments? Where was the security of the great religious societies of Montreal, if a sentiment hostile to monopolies were carried to extremes in the Local Parliament?

Hon. Sir E. P. Taché — The General Legislature had power to disallow such acts.

Hon. Mr. Currie — This would be an interference with local rights.

Hon. Mr. Ross — It would preserve local rights.

Hon. Mr. Sanborn — It was a wise power and commended itself to all; it was, however, not an ordinary power to be commonly resorted to, but an extreme power, and one almost revolutionary. It was a power somewhat similar to that which existed in the second branch of the Legislature to stop the supplies, but in its very nature not one often to be exercised; and it could not be frequently exercised without destroying the very foundation of society, and occasioning evils of the greatest
P. 183. magnitude."

Hon. Sir N. F. Belleau:

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"But even granting that the Protestants were wronged by the Local Legislature of Lower Canada, could they not avail themselves of the protection of the Federal Legislature? And would not the Federal Government exercise strict surveillance over the action of the local legislatures in these matters? Why should it be sought to give existence to imaginary fears in Lower Canada.

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P. 184. The same honourable member also stated that the minorities in Upper and Lower Canada wished to know the fate reserved for them before voting for Confederation. If he had reflected a little, he would have learned that the fate of the minorities will be defined by the law, that their religion is guaranteed by treaties, and that they will be protected by the vigilance of the Federal Government which will not permit the minority of one portion of the Confederation to be oppressed by the majority."

Hon. Mr. Moore:

* * * * *

P. 228. "If we were going to have an independent sovereignty in this country, then I could understand it. I believe honorable gentlemen will agree with me, that after this scheme is fully carried into operation, we shall still be colonies.

Hon. Sir E. P. Taché — Of course.

Hon. Mr. Moore — Now, that being the case, I think our Local Government will be placed in a lower position than in the Government we have now. Every measure resolved upon in the Local Government will be subject to the veto of the Federal Government—that is, any measure or bill passing the Local Legislature may be disallowed within one year by the Federal Government.

Hon. Sir E. P. Taché — That is the case at present as between Canada and the Imperial Government.

Hon. Mr. Moore.—I beg to differ slightly with the honourable gentleman. Any measure passed by this province may be disallowed within two years thereafter by the Imperial Government. But the local governments, under Confederation, are to be subjected to having their measures vetoed within one year by the Federal Government, and then the Imperial Government has the privilege of vetoing anything the Federal Govern-

ment may do, within two years. The veto power thus placed in the hands of the Federal Government if exercised frequently, would be almost certain to cause difficulty between the local and general governments. I observe that my honorable friend, Sir Etienne P. Taché, does not approbate that remark.

Hon. Sir E. P. Taché — You understand me correctly.

Hon. Mr. Moore — It will be conceded that the question of the veto power was very ably discussed, at one time, in the United States congress, and that discussion led to a qualification of the veto power in the Constitution of the United States, so that now any bill passed by both Houses may be vetoed by the President within ten days thereafter, by assigning reasons for doing so. Both Houses may then, however, again take up the measure, and if they pass it by a two-third vote, it becomes the law of the land, independent of the President's will. Now, I would have the veto power applied in a similar way in our new constitution. Exercising it in an arbitrary manner, as the Federal power is privileged to do, it must, from the very nature of things, create dissatisfaction and difficulty between the two governments." P. 229.

Hon. Mr. Dorion:

* * * * *

"Now, Sir, when I look into the provisions of this scheme, I find another most objectionable one. It is that which gives the General Government control over all the acts of the local legislatures. What difficulties may not arise under this system? Now, knowing that the General Government will be party in its character, may it not for party purposes reject laws passed by the local legislatures and demanded by a majority of the people of that locality. This power conferred upon the General Government has been compared to the veto power that exists in England in respect to our legislation; but we know that the statesmen of England are not actuated by the local feelings and prejudices, and do not partake of the local jealousies, that prevail in the colonies. The local governments have therefore confidence in them, and respect for their decisions; and generally, when a law adopted by a colonial legislature is sent to them, if it does not clash with the policy of the Empire at large, it is not disallowed, and more especially of late has it been the policy of the Imperial Government to do whatever the colonies desire in this respect, when their wishes are constitutionally expressed. The axiom on which they seem to act is that the less they hear of the colonies the better. (Hear, hear.) But how different will be the result in this case when the General Government exercises the veto power over the acts of local legislatures. Do you not see that it is quite possible for a majority in a local government to be opposed to the General Government; and in such case the minority would call upon the General Government to disallow the laws enacted by the majority. The men who shall compose the General Government will be dependent for their support upon their political friends in the local legislatures, and it may so happen that, in order to secure this support, or in order to serve their own purposes or that of their supporters, they will veto laws which the majority of a local legislature find necessary and good. (Hear, hear.) We know how high party feeling runs sometimes upon local matters even of trivial importance, and we may find parties so hotly opposed to each other in the local legislatures, that the whole power of the minority may be brought to bear upon their friends who have a majority in the General Legislature for the purpose of preventing the passage of some law objectionable to them but P. 258.

desired by the majority of their own section. What will be the result of such a state of things but bitterness of feeling, strong political acrimony and dangerous agitation? (Hear, hear.)

Hon. Mr. Ross:

* * * * *

P. 404. "Then the other point which commends itself so strongly to my mind is this, that there is a veto power on the part of the General Government over all the legislation of the Local Parliament. That was a fundamental element which the wisest statesmen engaged in the framing of the American Constitution saw, that if it was not engrafted in it, must necessarily lead to the destruction of the Constitution. These men engaged in the framing of that Constitution at Philadelphia saw clearly, that unless the power of veto over the acts of the state legislatures was given to the Central Government, sooner or later a clashing of authority between the central authority and the various states states must take place. What said Mr. Madison in reference to this point? I quote from *The Secret Debates upon the Federal Constitution,* which took place in 1787, and during which this important question was considered. On the motion of Mr. Pinkney 'that the National Legislature shall have the power of negativing all laws to be passed by the state legislature, which they may judge improper,' he stated that he considered this as the corner stone of the system, and hence the necessity of retrenching the state authorities in order to preserve the good government of the National Council'. And Mr. Madison said, 'The power of negativing is absolutely necessary—that is the only attractive principle which will retain its centrifugal force, and without this the planets will fly from their orbits'. Now, Sir, I believe this power of negative, this power of veto, this controlling power on the part of the Central Government is the best protection and safeguard of the system; and if it had not been provided, I would have felt it very difficult to reconcile it to my sense of duty to vote for the resolutions. But this power having been given to the Central Government, it is to my mind, in conjuction with the power of naming the local governors, the appointment and payment of the judiciary, one of the best features of the
P. 405. scheme, without which it would certainly, in my opinion, have been open to very serious objection. (Hear, hear.)

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P. 407. As I read the resolutions, if the Local Legislature exercised its powers in any such unjust manner (i.e. by apportioning the electoral districts so that no English-speaking member can be returned to the Legislature) it would be competent for the General Government to veto its action and thus prevent the intention of the Local Legislature being carried into effect—even though the power be one which is declared to be absolutely vested in the Local Government and delegated to it as one of the articles of its constitution.

Hon. Atty. Gen. Cartier: There is not the least doubt that if the Local Legislature of Lower Canada should apportion the electoral districts in such a way as to do injustice to the English-speaking population, the General Government will have the right to veto any law it might pass to this effect and set it at nought.

Hon. Mr. Holton: Would you advise it?

Hon. Atty. Gen. Cartier: Yes, I would recommend it myself in case of injustice. (Hear, hear.)

Hon. Mr. Rose—I am quite sure my hon. friend would do it rather than have an injustice perpetrated."

Mr. A. Mackenzie — P. 433.

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"The veto power is necessary in order that the General Government may have control over the proceedings of the local legislatures to a certain extent. The want of this power was the great source of weakness in the United States, and it is a want that will be remedied by an amendment in their constitution very soon. So long as each state considered itself sovereign whose acts and laws could not be called in question, it was quite clear that the central authority was destitute of power to compel obedience to general laws. If each province were able to enact such laws as it pleased everyone would be at the mercy of local legislatures, and the General Legislature would become of little importance."

Mr. Christopher Dunkin in contending that the proposed constitutional system aimed at nothing like uniformity between the general and local constitutions themselves; and in this respect was essentially at variance with the much wiser system adopted in the United States, said:

"To be sure there is the grand power of disallowance by the Federal Government which we are told, in one and the same breath, is to be possessed by it, but never exercised. P. 502.

Hon. Atty. Gen. Cartier — The presumption is, it will be exercised in case of unjust or unwise legislation.

Mr. Dunkin — The hon. gentleman's presumption reminds me of one, perhaps as conclusive, but which Dickens tells us failed to satisfy his Mr. Bumble. That henpecked beadle is said to have said, on hearing of the legal presumption that a man's wife acts under his control: — 'If the law presumes anything of the sort, the law's a fool—a natural fool.' (Laughter). If this permission of disallowance rests on a presumption that the legislation of our provinces is going to be unjust or unwise, it may be needed; but under that idea, one might have done better either not to allow, or else to restrict within narrower limits, such legislation. If the promised non-exercise of the power to disallow rests on a presumption that all will be done justly and wisely in the provincial legislatures, the legislative power is well given; but then there is no need, on the other hand, for the permission to disallow. (Hear, hear.)"

Mr. J. B. E. Dorion:

"I am opposed to the scheme of Confederation, because by means of the right of *veto* rested in the Governor by the 51st resolution, local legislation will be nothing but a farce. They may try to make us believe that this power would be but rarely exercised, and that it differs in nowise from that exercised by the present Governor when he reserves bills for the Royal assent; but all the country knows that it would not be so From the moment that you bring the exercise of the right of *veto* more nearly within the reach of interested parties, you increase the number of opportunities for the exercise of the right — you open the door to intrigues. As, for instance, a party will oppose the passing of a law, and not succeeding in his opposition in Parliament he will approach the Ministers and the Governor General, intriguing to obtain as a favor that the law may be disallowed. Take an example. I suppose your Confederation to be established; that a Bill is passed for the protection of settlers, such as we have seen pass the house six times in ten years without becoming law, on account of the opposition to it in the Legislative Council by the P. 860.

Councillors from Upper Canada; what would happen? The few interested parties who were opposed to the measure would rush to the Governor General to induce him to disallow the law. By an appeal to the right of property, to the respect due to acquired rights, and to other sophistries, they would override the will of the people of a measure which is just in itself, and which is sought for and approved of by all legal men of Lower Canada in the present House. The people of Lower Canada will be prevented from obtaining a law similar to those now existing in thirteen different states of the American union, and which would in no way affect the principles of the existing law in Lower Canada. (Hear, hear.) This is one instance out of a thousand, and will serve to illustrate the effect of thi sright of *veto*."

Mr. Paul Denis:

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P. 876. "For several days past, Mr. Speaker, we have listened to pompous speeches made by honorable members of the Opposition, appealing incessantly to the religious and national prejudices of the population of Lower Canada, with the view of defeating the Government scheme. These honorable gentlemen draw pictures which are really heartrending. They tell the Protestants that under Confederation they will lose all their rights in Lower Canada in respect of the education of their children; and, on the other hand, they tell the Catholics that their religion is in danger, because the Federal Government will have the right to *veto* in respect of all the measures of the Local Government. But this right of *veto* must of necessity exist somewhere, in order that the minority may be protected from any injustice which the majority might attempt to do them. We cannot hope to have the majority in the Federal Parliament, when we French Lower Canadians and Catholics have never had it under the existing union. And yet we cannot but congratulate ourselves upon the relations which have always existed between us and our fellow-countrymen of other origins and religions."

Mr. John Scoble:

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P. 911. "A careful analysis of the scheme convinces me that the powers conferred on the General or Central Government secures it all the attributes of sovereignty, and the *veto* power which its executive will possess, and to which all local legislation will be subject, will prevent a conflict of laws and jurisdictions in all matters of importance, so that I believe in its working it will be found, if not in form yet in fact and practically, a legislative union. (Hear, hear.)

APPENDIX "B"

Judicial Dicta Concerning Dominion's Power of Disallowance of Provincial Legislation

Re Goodhue (1872) 19 Grant's Chan. Rep. 366.

Draper, C. J. at p. 385:

"Though our Legislature is limited by the constitutional Act to certain defined subjects, the Act imposes no limit to the exercise of the power on those subjects. It does provide checks, for the Lieutenant Governor may withhold the necessary assent or the Governor General may disallow Acts to which his subordinate has assented";

and also at p. 384:

"And further, if from oversight or any other cause, provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or even possible interests, by retroactive legislation, such bills are still subject to the consideration of the Governor General who, as the representative of the Sovereign, is entrusted with authority,—to which a corresponding duty attaches,—to disallow any law contrary to reason or to natural justice and equity. So that, while our legislation must unavoidably originate in the single chamber, and can only be openly discussed there, and once adopted there cannot be revised or amended by any other authority, it does not become law until the Lieutenant Governor announces his assent, after which it is subject to disallowance by the Governor General."

Regina v. Taylor (1875) 36 U.C. Q.B.R. 183:

Draper, C.J. (Strong, Burton and Patterson JJ. concurring) said at p. 224:

"I cannot forbear adding that I see no inevitable inconvenience to arise from each Government possessing the power of granting a license in this matter. It might certainly be said that the Legislature of Ontario might make an injurious use of it, as by imposing a tax for the license unreasonable in amount, which would prevent the exercise of the trade; but I cannot believe that the most zealous advocate of prohibition, as to spirituous or fermented liquors, would prevail on the Assembly to pass such a law, and *if it happened otherwise, the power of disallowance is ample to prevent such an interference with the policy of the Dominion Government. This power would prevent any mischief from hasty or unwise legislation,* which would not well be justified as actuated by a desire to 'raise a revenue for either provincial, local, or municipal purposes'."

Leprohon v. *The City of Ottawa (1877) 40 U.C. Q.B.R. 478:*

Harrison, C.J. at p. 490:

"The power of the Governor General in Council to disallow a Provincial Act is as absolute as the power of the Queen to disallow a Dominion Act, and is in each case to be the result of the exercise of a

sound discretion, for which exercise of discretion the Executive Council for the time being is in either case to be responsible as for other Acts of executive administration."

Severn v. *The Queen (1878) 2 S.C.R. 70.*

Richards, C.J. at p. 96:

"Under our system of Government, the disallowing of Statutes passed by a Local Legislature after due deliberation, asserting a right to exercise powers which they claim to possess under the British North America Act, will always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the act is so clearly beyond the powers of the Local Legislature that the propriety of interfering would at once be recognized."

Ritchie, J. at p. 102:

"Should at any time the burthen imposed by the Local Legislature, under this power, in fact, conflict injuriously with the Dominion power to regulate trade and commerce, or with the Dominion power to raise money by any mode or system of taxation the power vested in the Governor General of disallowing any such legislation, practically affords the means by which serious difficulty may be prevented."

Strong, J. at pp. 108-109:

"The imposition of licenses authorized by this subsection 9, is, it will be observed, confined to licenses for the purposes of revenue, and it is not to be assumed that the Provincial Legislatures will abuse the power, or exercise it in such a way as to destroy any trade or occupation. Should it appear explicitly on the face of any Legislative Act that a license tax was imposed with such an object, it would not be a tax authorized by this section, and it might be liable to be judicially pronounced *extra vires*. And however carefully the purpose or object of such an enactment might be veiled, *the foresight of those who framed our constitutional Act led them to provide a remedy in the 90th section of the Act, by vesting the power of disallowance of Provincial Acts in the Executive Power of the Dominion, the Governor General in Council.*"

Fournier, J. referring to a possible conflict of Dominion and Provincial Taxing Legislation said at p. 131:

"The constitution, by giving the right of vetoing Provincial Legislation, has prudently given the means, if not to prevent, at least to put a stop to such conflicts of authorities. Such a law would be directly opposed to the interests of the Federal Government, and they would be justified in disallowing it by exercising their right of veto.

No doubt this extraordinary prerogative exists, and could even be applied to a law over which the Provincial Legislature had complete jurisdiction. But it is precisely on account of its extraordinary and exceptional character that the exercise of this prerogative will always be a delicate matter. It will always be very difficult for the Federal Government to substitute its opinion instead of that of the Legislative Assemblies in regard to matters within their province, without exposing themselves to be reproached with threatening the independence of the Provinces.

What would be the result if the Province chose to re-enact a law which had been disallowed? The cure might be worse than the disease, and probably grave complications would follow."

Angers v. *The Queen Insurance Company (1878) 22 Low. Can. Jur. 307.*

Ramsay, J. at pp. 309-310:

"It should be observed that there is a fundamental difference between our constitution and that of the United States. Here the powers of the Legislatures and Governments are partitioned by a *Supreme authority* which *has given to the Dominion organization* not only all unassigned powers, not purely of a private or local nature, but also *specially the power to control absolutely, by disallowance, the legislation of the Provinces.* In the United States the central government holds its authority from the States, and has no power over the States' legislation other than that it may acquire through the Supreme Court. Here, then, we have by the constitution a complete check on any practical inconvenience arising from the abuse of the powers confided to the Provincial Legislatures, which is entirely wanting in the constitution of the United States, a defect which may justify to some extent the decisions there on this matter."

Lenoir v. *Ritchie (1879) 3 S.C.R. 575.*

Taschereau, J. at p. 624:

"The power of veto is given to the Governor General in Council, not to the Governor General himself. . . . It is well known that Provincial statutes cannot be disallowed in England, and that they are not transmitted to the Imperial authority, under the British North America Act, as the Federal statutes are.

In the second place, a Provincial statute, passed on a matter over which the Legislature has no authority or control, under the British North America Act, is a complete nullity, a nullity of *non esse. Defectus potestatis, nullitas, nullitatum.* No power can give it vitality. Still less can it get vitality from the mere non-vetoing of the superior authority. In fact, the veto, in such a case, does not add to its nullity. It records it; it gives notice of it, but it cannot avoid what does not exist. *Quod nullum est ipso jure, rescindi non potest.* The Legislatures have the power conceded to them by the British North America Act, and no others. And no one, no authority (except the Imperial Parliament, of course) either impliedly or expressly can add to these powers, and give to these Legislatures a right or rights which they do not have by the Imperial Act. If they pass an Act *ultra vires,* this Act is null, whether it is vetoed at Ottawa or not."

Quay v. *Blanchet (1879) 5 Q.L.R. 43.*

Casault, J. at p. 53:

"The veto can be pronounced by the Queen only when a law assented to by the Governor General encroaches upon the prerogatives of the Sovereign or of the Imperial Parliament; and that allowed to the Governor General can equally only be exercised when a provincial law makes the same encroachments, or trespasses upon the rights of the federal parliament. . . . So long as the legislatures abide within the limits of what this section of the Act attributes to them" (i.e. sec. 92 of the B.N.A. Act), "their powers and their authority are absolute, and admit of neither superiors, not intervention, nor censure."

City of Fredericton v. *The Queen (1880) 3 S.C.R. 505.*

Gwynne, J. speaking of the B.N.A. Act, said at p. 564:

"We have constituted one supreme power, having executive and legislative jurisdiction over all matters, excepting only certain specified matters, being of a local, municipal, domestic, or private character, jurisdiction over which is vested in certain subordinate bodies, termed Provinces, carved out of the territory constituting the Dominion, and *which jurisdiction is subject to the control of the Dominion Executive.*"

Dobie v. *Temporalities Board (1880) 3 Leg. News. 250.*

Ramsay, J. said at p. 251:

"But without meaning to imply any sort of criticism as to the exercise of the discretion of the Federal Government in the disallowance of bills, I may say that we all know that the Federal Government is most unwilling to interfere in a too trenchant manner with local legislation, and where there is room for doubt as to the limits of the powers exercised, and where great popular interests are involved, they readily leave the question to the decision of the Courts."

Mercer v. *Attorney General for Ontario (1881) 5 S.C.R. 538.*

Gwynne, J. said at pp. 711-712:

"The power of disallowing Acts of the provincial legislatures is no longer, as it was under the old constitution of the provinces, vested in Her Majesty, but in the Governor General of the Dominion in Council, and this is for the purpose of enabling the authorities of the Dominion to exercise that branch of sovereign power formerly exercised by her Majesty in right of her prerogative royal, but to be exercised no longer as a branch of the prerogative, but as a power by statute vested in the Dominion authorities (the royal prerogative being for that purpose extinguished) and to enable the Dominion authorities *to prevent the legislatures of the provinces,* carved out of and subordinated to the Dominion, *from encroaching upon the subjects placed under the control of the National Parliament* by assuming to legislate upon those subjects which are not within the jurisdiction of the provincial legislatures."

The Corporation of Three Rivers v. *Sulte (1882) 5 Leg. News. 330.*

Ramsay, J. at pp. 334-335:

"The true check for the abuse of powers, as distinguished from an unlawful exercise of them is the power of the central government to disallow laws open to the former reproach. Probably to a certain class of mind this interference appears 'harsh' and provocative of 'grave complications,' as has been said; but this is hardly an argument in favour of the Courts extending their jurisdiction to relieve the Central Government of its responsibility. It seems to be fairer to leave the rule of expediency to be applied by a body responsible to the people at large, rather than to a comparatively irresponsible body like a Court."

Bank of Toronto v. *Lambe (1887) 12 A.C. 575.*

Lord Hobhouse, delivering the judgment of the Judicial Committee, said at p. 587:

"Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for *itself except under the control of the whole acting through the Governor General.*"

Attorney General of Canada v. *Attorney General of Ontario (1891) 20 O.R. 222:* (affirmed on appeal, 19 O.A.R. 31).

Boyd, C. said at p. 245:

"The right of supervision touching Provincial legislation entrusted to the Dominion Government . . . . . works in the plane of political expediency as well as in that of jural capacity."

In re Companies Reference (1913) 48 S.C.R. 331.

Idington, J. at pp. 379, 380, 381 and 382:

"The Dominion Government was, by section 90 of the Act, given the express power to veto or disallow any Acts whether *intra vires* the powers assigned the provinces or not.

That power alone was all that ever was needed or designed to be exercised by the Dominion in the way of interference with the legislative P. 380. action of the / provinces acting within the powers specifically assigned them, and not in conflict with any of the enumerated powers of section 91 given the Dominion, or specific powers given in other sections.

. . . . . .

This veto power was given for the express purpose of preserving as matter of expediency or public policy the rights of every one in the Dominion, corporate or individual, to enjoy such rights in as full measure as they existed at Confederation, or might exist thereafter by later legislative development.

The narrow contracted views of a local patriotism, it was felt, might be used by the exercise of the wide powers given the legislatures to the detriment of the Dominion as a whole and of the people thereof outside a province so moved.

It became from the time of Confederation thenceforward the duty of the Government of the Dominion to watch local legislation and see that nothing was enacted, even if *intra vires* the powers of a legislature, that would interfere with the prosperity of the Dominion as a whole.

The rich heritage thus to be guarded was that in which every Canadian had a right to share and not that alone of any class of people either as mere provincials or otherwise.

The right to dwell where one saw fit, and there or elsewhere follow his or her avocation was the common heritage of every Canadian and, for many years, of every Canadian company. If the right has not been well and sufficiently guarded, it must be because the veto power, the only power given by the 'British North America Act' to guard it, has not been properly exercised and such rights duly preserved.

It is not that the Acts passed by the provinces are *ultra vires*. It may be that they are *intra vires*. And if a provincial legislature, acting *intra vires*, has duly enacted legislation detrimental to the original rights of persons or companies outside or beyond a province and that has not been duly vetoed there is no help for it in law.

. . . . . .

I am not writing to glorify the veto power, for it also may be capable of great abuse. It seems to have fallen into disuse; perhaps because abused.

Yet, I repeat, it was intended as a beneficent power and is capable of great good service in the class of questions such as raised herein.

To seek to apply it when the proposed legislation can only affect the rights of the people of the province concerned, may be offensive, and in the domain of practical politics be an impossibility. Yet when the legislation proposed would manifestly improperly affect people elsewhere, or corporations created out/side the province, such as the Dominion corporations resting upon the residual power of Parliament, or those of other provinces, and thus affect the people of the whole Dominion, surely, the exercise of the power in that regard ought to be, and to be held, practicable.

P. 382.

Those who would interpret aright our 'British North Aberica Act,' and especially the features of it that hinge upon this veto power, must never forget that our Confederation was framed whilst the United States was passing through a civil war for which the want of greater power in the federal government was thought by some to be indirectly responsible.

The nullification ordinances of South Carolina, a generation previously, had formed a prominent feature of much argument.

Our statesmen, profiting by the experience of others, tried to find by anticipation the means of averting such like possible dangers as the result of their work. They found these in the assignment of the residual power to Parliament instead of to the provinces, as it had been left with each of the states in the United States and in the veto power which was in harmony with British legislation and practices in relation to the colonies, which latter in its turn was but part of an early condition of things in the growth of the English Constitution. The residual power given Parliament was as it were a complement of the veto power, but not to be used in substitution therefor. It might operate over that field which the veto power kept open."

Duff J. at p. 424:

"Those who were responsible for the scheme of Confederation deliberately rejected the American system of constitutional limitations. So far as provincial legislation is concerned they adopted the safeguard of investing the Governor in Council with a power of disallowance."

In Re The Initiative and Referendum Act, (1919) A.C. 935.

In this case the Judicial Committee of the Privy Council (speaking by Viscount Haldane) decided that the British North America Act, 1867, s. 92, head I, which empowers a provincial legislature to amend the constitution of the province, "excepting as regards the office of Lieutenant-Governor," excludes the making of a law which abrogates any power which the Crown possesses through

the Lieutenant-Governor who directly represents the Crown. Viscount Haldane at p. 941.

"The Executive Government of Canada was declared by the Act of 1867 to remain vested in the Queen, and, by s. 12, all powers, authorities and functions vested in or exercisable by the Governors or Lieutenant-Governors of the Provinces brought into confederation were, so far as the same continued in existence and were capable of being exercised after the Union in relation to the Government of Canada, to be vested in and exercisable by the Governor-General. A Parliament was then set up for Canada. Part V of the Act established analogous Constitutions for the provinces. For each of these there was to be a Lieutenant-Governor. Although he is under s. 58 appointed by the Governor-General, it has been settled by decisions of the Judicial Committee, such as that in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick (1892) A.C. 457, Vol. II, p. 414,* that, as the appointment of a Provincial Governor is made under the Great Seal of Canada, and therefore really by the Executive Government of the Dominion which is in the Sovereign, the Lieutenant-Governor is as much the representative of His Majesty for all purposes of Provincial Government as is the Governor-General for all purposes of Dominion Government. Sect. 65 and the other sections dealing with the subject define the powers of the Lieutenant-Governor as being such of those powers having been exercisable by the Governors or Lieutenant-Governors of the Provinces brought into Confederation, as are exercisable in relation to the Government of a Province . . . . . After thus defining the executive power the statute goes on to provide for a Legislature for each Province, and concludes Part V by declaring in s. 90 that what has been laid down as to the Dominion Parliament in regard to Appropriation and Money Bills, the recommendation of money votes, the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, is to extend and apply to the Legislatures of the several Provinces as if these provisions were re-enacted and made applicable in terms to the respective Provinces and their Legislatures, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Sovereign and for a Secretary of State and of one year for two years and of the Province for Canada.

The Act then, by two well-known sections, 91 and 92, distributes the powers of legislation which it confers between the Dominion Parliament and the Provincial Legislatures. Nothing in s. 91, which relates to Dominion powers, affects the question under consideration, excepting in one important respect . . . . . The language of s. 92 is important. That section commences by enacting that 'in such Province the Legislature may exclusively make laws in relation to matters' coming within certain classes of subjects. The only one of these classes which is relevant for the present purpose is the first enumerated, 'the amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, excepting as regards the office of Lieutenant-Governor'.

The references their Lordships have already made to the character of the office of Lieutenant-Governor, and to his position as directly representing the Sovereign in the province, renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the constitution of the Province. The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of

construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it. For when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the Sovereign that so gives or withholds assent. Moreover, in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature. This is in terms so enacted in such sections as s. 69, the
P. 944. principle of which has been applied to Manitoba by s. 2 of the Dominion Statute of 1870, which formed the new Province out of Rupert's Land and the North-Western Territory and established it with the Constitution provided by the Act of 1867. It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, this Act was in so far *ultra vires.*

Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the Legislature, and to detract from rights which are important in the legal theory of that position. For if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in s. 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and *the powers of veto and disallowance referred to can only be those of the Governor-General under s. 90 of the Act of 1867,* and not the powers of the Lieutenant-Governor, which are at an end when a Bill has become an Act. Sect. 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the *Manitoba Gazette* a statement of the result of the vote. Thus the Lieutenant Governor appears to be wholly excluded from the new legislative authority.

These considerations are sufficient to establish the *ultra vires* character of the Act. The offending provisions are in their Lordship's view so interwoven into the scheme that they are not severable."

Wilson v. *Esquimault and Nanaimo Railway Co. (1922) 1 A.C. 202:*

In this case, the Judicial Committee of the Privy Council decided in effect that the disallowance under secs. 56 and 90 of the B.N.A. Act by the Governor General in Council of a Provincial statute does not affect such private rights acquired under the Provincial Statute as were before the disallowance completely constituted and founded upon transactions entirely past and closed.

Duff J. delivering the judgment of the Board said at pp. 208-210:

"In relation to this question the pertinent sections of the British North America Act are ss. 56 and 90. By the first of these a power of disallowance in respect of Dominion Acts is vested in the Queen in Council; by s. 90 the provisions of s. 56 are (*inter alia*) made applicable to statutes passed by the Provincial legislatures, the Governor General in Council being substituted as disallowing authority for the Queen in Council, and the period of two years named in s. 56 being reduced to one year. P. 209.

Textually, s. 56 is as follows: 'Where the Governor General assents to a Bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within two years after receipt thereof by a Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate by the Secretary of State of the day on which the Act was received by him) being signified by the Governor General, by speech or message to each of the Houses of Parliament or by Proclamation, shall annul the Act from and after the day of such signification.' For the purposes of the present appeal the point under examination turns, as their Lordships think, upon the effect to be ascribed to the words 'shall annul the Act from and after the day of such signification'.

Cases may no doubt arise giving place for controversy touching the application of this phrase, but their Lordships think that the language itself discloses with sufficient clearness an intention that, at all events as to private rights completely constituted, and founded upon transactions entirely past and closed, the disallowance of a Provincial statute shall be inoperative.

It is important in construing such a provision to consider the probable tendency of any proposed construction in relation to its effect upon the working of the constitutional system set up by the British North America Act, and from this point of view the construction advocated by the appellants is open to two objections of not a little weight. If private rights that have been finally constituted under Provincial legislation are swept away by disallowance—which may take place at any time up to the expiration of a year after the enactment of the legislation—then Provincial legislation may obviously become the subject of a considerable degree of doubt as to its ultimate operation and effect. This uncertainty would, of course, be much limited in its practical incidence by recognized constitutional conventions restricting the classes of cases in which disallowance is permissible; but *it is indisputable that in point of law the authority is unrestricted,* and under conceivable conditions the uncertainty touching the fate of Provincial enactments might be productive of some degree of general inconvenience. Another objection of some practical importance lies in the probability that under the proposed construction the Dominion Government when considering the advisability of disallowing a Provincial enactment in circumstances making the exercise of the power proper and desirable on general grounds would encounter embarrassments (otherwise not likely to arise) by reason of apprehensions as to the consequences of its action upon the rights and interests of private individuals." P. 210.

APPENDIX "C"

Table of Disallowed Provincial Acts 1867-1924

1867-1895

ONTARIO

Act	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Page
32-33 Vict., 1868-69, chap. 3.	An Act to define the privileges, immunities and powers of the legislative assembly, and to give summary protection to persons employed in the publication of Sessional Papers.	Not within competence of the legislature to pass, and being inconsistent with the provisions of secs. 92 and 96 of the British North America Act.	24 Nov., 1869...	93
Chap. 1.....	The Supply Bill, 1869.....	6th section objectionable. Act not within competence of legislature to pass, as infringing on jurisdiction of parliament of Canada to fix and provide for Judge's salaries.	14 July, 1869.... 19 Jan., 1870.	83 93
37 Vict., 1874, chap. 8.	An Act to amend the Law respecting escheats and forfeitures.	Not within competence of legislature to pass, escheat being a matter of prerogative, with which provincial legislatures have no power to deal.	18 Nov., 1874... 16 Mar., 1875.	110 119
42 Vict., 1879, chap. 19.	An Act respecting the administration of justice in the northerly and westerly parts of Ontario.	Assumes to provide for administration of justice over territory, the right of province to which is not admitted, as boundaries are not settled. Act encroaches on powers of Dominion government to appoint judges.	20 Jan., 1880.... 17 Mar., 1880.	161 168
44 Vict., 1881, c. 11. 45 Vict., 1882, c. 4. 46 Vict., 1882-83, chap. 10.	An Act for protecting the public interests in Rivers, Streams and Creeks	Power of legislature to take away rights of one, and vest them in another doubtful. Devolves upon government to see that such power is not exercised in flagrant violation of private rights and natural justice. Act is retroactive and overrides a decision of court of competent jurisdiction.	17 May, 1881.... 20 Sept., 1882. 13 Mar., 1883.	177 182 192
47 Vict., 1884, chap. 13.	An Act respecting license duties.	Doubt as to competence of Dominion parliament to enact the Liquor License Act, 1883, or with respect to validity of Ontario License Acts, in view of the general laws enacted by parliament. Object arrived at by Act is to render Liquor License Act, 1883, inoperative, by imposing heavy and cumulative tax on persons taking out licenses. Duty of government to protect those obeying laws of parliament.	29 April, 1884...	194

QUEBEC

Act	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Page
32 Vict., 1869, chap. 4.	An Act to define the Privileges, immunities and Powers of the Legislative Council and Legislative Assembly of Quebec, and to give summary protection to persons employed in the publication of Parliamentary Papers.	Act not within competence of legislature to pass, and being inconsistent with the provisions of sections 92 and 96 of the British North America Act.	3 Nov., 1869... 24 Nov., 1869...	254 255

Table of Disallowed Provincial Acts 1867-1924

1867-1895—*Continued*

QUEBEC—*Concluded*

Act	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Page
38 Vict., 1874-75, chap. 47.	An Act to incorporate the St. Lawrence Bridge Company.	Importance of preserving navigation of River St. Lawrence.	16 Oct., 1876....	262
49-50 Vict., 1886, chap. 98.	An Act respecting the Executive Power.	Not within competence of legislature to pass, as provisions of Act withdrawn from provincial legislative authority by 92nd section of British North America Act.	22 Mar., 1887... 16 July, 1887....	313 338
51-52 Vict., 1888, c. 20. 52 Vict., 1889, chap. 30.	An Act to amend the Law respecting District Magistrates.	Act not within competence of provincial legislature to pass, being in excess of powers. Power to appoint judges being conferred on Governor General by section 96 of British North America Act.	3 Sept., 1888... 18 Jan., 1889.... 21 June, 1889....	345 354 430

NOVA SCOTIA

31 Vict., 1868, chap. 21.	An Act to empower the Police Court in the City of Halifax to sentence Juvenile Offenders to the Halifax Industrial School.	Act deals with criminal law, which appertains to Dominion parliament.	12 Aug., 1869....	472
34 Vict., 1871, chap. 32.	An Act to regulate Pilotage in the Bras d'Or Lakes in the Island of Cape Breton.	Provincial legislature has no power to regulate fees of pilots, as that can only be done by Dominion parliament.	6 Dec., 1871...	476
37 Vict., 1874, chap. 74.	An Act to incorporate the Halifax Co. (Ltd.).	Incorporation of the company is for objects beyond the power and control of provincial legislature.	4 Dec., 1874...	479
Chap. 82.....	An Act to incorporate the Eastern Steamship Co.	Act not within competence of provincial legislature, as coming within subjects mentioned in British North America Act, section 92, sub-section 10, clause A.	25 Mar., 1875...	488
Chap. 83.....	An Act to incorporate the Anglo-French Steamship Co. (Ltd.).	Act not within competence of provincial legislature, as coming within subjects mentioned in British North America Act, section 92, sub-section 10, clause A.	4 Dec., 1874...	480
49 Vict., 1886, chap. 56.	An Act concerning the collection of Freight, Wharfage and Warehouse Charges.	Act in excess of powers of provincial legislature, as by British North America Act, section 91, parliament of Canada has jurisdiction respecting trade and commerce, navigation, shipping.	30 Mar., 1887...	558

NEW BRUNSWICK

45 Vict., 1882, chap. 69.	An Act to incorporate the Fredericton and St. Mary's Bridge Company	Bridge must be constructed without any interference of the river, and provincial legislature has no power to authorize this interference; parliament of Canada can alone authorize.	13 Feb., 1883.... 20 July, 1883....	731 732

Table of Disallowed Provincial Acts 1867-1924

1867-1895—*Continued*

MANITOBA

Act	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Page
36 Vict., 1873, chap. 2.	An Act to define the privileges, immunities and powers of the Legislative Council and Legislative Assembly of the Province of Manitoba and to give a summary protection to persons employed in the publication of Sessional Papers.	Act not within competence of provincial legislature to pass, as it was inconsistent with sections 92 and 96 of the British North America Act.	21 Aug., 1874...	780
Chap. 32.....	An Act to incorporate the Winnipeg Board of Trade	Incorporation of boards of trade not being for provincial objects only, but treating of trade and commerce, is alone within competence of parliament of Canada.	1 Sept., 1874...	781
38 Vict., 1875, chap. 12.	An Act to regulate proceedings against and by the Crown.	Act is so general in terms that it might be held to apply to claims against Dominion government. In Manitoba serious consequence might issue, as bulk of lands belong to Canada and are still ungranted.	25 May, 1876....	796
Chap. 18.....	An Act respecting Escheats, Fines, Penalties, and Forfeitures.	Act deals with matters beyond competence of provincial legislature. Subject of Act is on whole a matter of criminal procedure, and act deals with many matters within exclusive competence of the parliament of Canada.	5 Aug., 1876....	799
Chap. 33.....	An Act to afford facilities for the construction of a Bridge over the Assiniboine River between the City of Winnipeg and St. Boniface West.	River being navigable, any authority required for bridging the Assiniboine River, at any point east of Portage la Prairie, should be obtained from the Dominion government.	7 Oct., 187 6.....	804
Chap. 37.....	An Act to amend 37 Vict., chap. 46, intituled: "The Half Breed Land Grant Protection Act".	No notice of passage of Act was given in Manitoba Gazette for 3 months as required, and same was not considered in force in province.	7 Oct., 1876....	804
Chap. 00..... (Reserved Bill)	An Act respecting Land Surveyors and the Survey of Land in Manitoba.*	Act premature and unnecessary. Provisions unnecessary and unjust, and would create a monopoly. If assented to, conflict of authority would be created, as Dominion Lands Act provides who shall act as surveyors of Dominion lands.	29 Jan., 1876....	795
44 Vict., 1881, chap. 37.	An Act to incorporate the Winnipeg Southeastern Railway Company.	Doubt existing as to power of a provincial legislature to authorize construction of railway extending beyond limits of the province, as trenching on British North America Act, section 92, sub-section 10, clause (a). Act conflicts with settled policy of Dominion as evidenced by the clause in contract with Canadian Pacific Railway No. 15, ratified and confirmed by Parliament.	4 Jan., 1882....	827
Chap. 38.....	An Act to incorporate the Manitoba Tramway Co.	Act conflicts with policy of the government, ratified by parliament, to prevent diversion of traffic of Northwest Territories, to railway system of United States, and to endeavour by all means possible to secure it to Canadian railways.	31 Oct., 1882....	829

*This Bill was reserved for the assent of His Excellency the Governor General.

Table of Disallowed Provincial Acts 1867-1924

1867-1895—*Continued*

MANITOBA—*Continued*

Act	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Page
Chap. 39.....	An Act to incorporate the Emmerson & Northwestern Railway Co.	Act conflicts with policy of the government, ratified by parliament, to prevent diversion of traffic of Northwest Territories, to railway system of United States, and to endeavour by all means possible to secure it to Canadian railways.	31 Oct., 1882....	829
45 Vict., 1882, chap. 30.	An Act to Encourage the Building of Railways in Manitoba.	Act conflicts with policy of the government, ratified by parliament, to prevent diversion of traffic of Northwest Territories, to railway system of United States, and to endeavour by all means possible to secure it to Canadian railways. Act is also capable of being used to contravene the terms in regard to Canadian Pacific Railway, upon which the boundaries of Manitoba were enlarged.	31 Oct., 1882....	829
47 Vict., 1884, chap. 26.	An Act respecting Escheats and Forfeitures and Estates of Intestates	Decision in Attorney General of Ontario vs. Mercer not applicable to Manitoba. At date of transfer of province to Canada, all ungranted or waste lands in province were vested in Crown and were administered by government of Canada for purposes of Dominion. Section 109 of British North America Act not applicable to province.	25 Aug., 1885....	838
47 Vict., 1884, chap. 68.	An Act to incorporate the Emerson & Northwestern Railway Co.	Apprehension that the Company will be able to divert trade from the Canadian system of railways to the railways of the United States.	25 Feb., 1886....	842
Chap. 70 and amending Acts	An Act to amend an Act to incorporate the Manitoba Central Railway Co.	Apprehension that the Company will be able to divert trade from the Canadian system of railways to the railways of the United States.	26 Feb., 1886....	842
48 Vict., 1885, chap. 2.	An Act respecting the Lieutenant Governor and his Deputies.	Act not within competence of provincial legislature, as legislative authority of provincial legislature, with respect to lieutenant governor, is excepted by 1st clause of section 92, British North America Act.	13 Jan., 1887....	851
Chap. 45.....	An Act to incorporate the Rock Lake Souris Valley & Brandon Railway Co.	Act within competence of provincial legislature, but it affects general policy of government, to prevent diversion of traffic from Canadian to the United States system of railways.	10 Jan., 1887....	850
50 Vict., 1887, chap. 1.	An Act to incorporate the Manitoba Central Railway Co.	Act conflicts with policy of government, which is designed to prevent diversion of traffic from Canadian to the United States system of railways, and violates essential conditions of stipulations with Canadian Pacific Railway.	5 Aug., 1887....	857

Table of Disallowed Provincial Acts 1867-1924

1867-1895—*Continued*

MANITOBA—*Concluded*

Act	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Page
Chap. 2.....	An Act to incorporate the Winnipeg and Southern Railway Company.	Act conflicts with policy of government, which is designed to prevent diversion of traffic from Canadian to the United States system of railways, and violates essential conditions of stipulations with Canadian Pacific Railway.	5 Aug., 1887....	857
Chap. 4.....	An Act respecting the construction of the Red River Valley Railway..	Act conflicts with policy of government, which is designed to prevent diversion of traffic from Canadian to the United States system of railways, and violates essential conditions of stipulations with Canadian Pacific Railway.	4 July, 1887....	855
Chap. 28.....	An Act for further improving the law.	Immunity from responsibility and liability for their acts, given to contractors and persons employed in construction of Public works, or doing work under Minister of Public Works or Commissioner of Railways in Manitoba, is of so unusual and extraordinary character, and constitutes manifest interference with private rights.	14 July, 1887....	856
Chap. 47.....	An Act to amend the Public Works Act of Manitoba.	Under this Act, railways could be constructed by Minister of Public Works as a public work of Manitoba. Act therefore in conflict with policy of government respecting construction of railways in Manitoba.	4 July, 1887....	855
Chap. 54.....	An Act to incorporate the Emerson and Northwestern Railway Co.	Act conflicts with policy of government to prevent diversion of traffic from Canadian system to the United States system of railways, and violates essential condition of stipulation with Canadian Pacific Railway.	5 Aug., 1887....	857
52 Vict., 1888, 1889, chap. 45.	An Act to further amend Chapter fifty-two of Forty-nine Victoria, being the Manitoba Municipal Act, 1886, and amendments.	Imposition of additional percentage on taxes in arrears, is ultra vires of provincial legislature, as it is legislation respecting "interest", which, by sec. 91, Art. 19, of British North America Act, is within jurisdiction of Dominion Parliament.	1 Mar., 1890... "	910
53 Vict., 1890, chap. 23.	An Act to authorize Companies, Institutions or Corporations incorporated out of their Province to transact business therein.	Act is *ultra vires* of provincial legislature. Specially affects rights and property of the Canadian Pacific Railway and the Hudson Bay Co. Also on grounds mentioned in report of 16th July, 1887, on Quebec Act 49-50 Vict., chap. 39. (See page 339.)	21 Mar., 1891...	941
Chap. 31.....	An Act respecting the diseases of Animals.	Is legislation affecting trade and commerce as well as matters relating to quarantine, both of which are assigned to parliament by British North America Act.	21 Mar., 1891...	946
58 Vict., 1895, chap. 4.	An Act respecting Corporations incorporated out of Manitoba.	Statute is *ultra vires* so far as it relates to companies incorporated by the parliament of Canada, and for reasons mentioned in report of Minister of Justice on Quebec Act of 1887, chap. 39. (See page 339) and on Manitoba Act of 1891, chap. 23. (See page 941.)	24 Oct., 1895.... 12 Mar., 1896...	1005 1009

Table of Disallowed Provincial Acts 1867-1924

1867-1895—*Continued*

BRITISH COLUMBIA

Act	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Page
36 Vict., 1872-73, chap. 2.	An Act to authorize one Justice of the Peace to do any act, matter or thing heretofore to be done by two Justices of the Peace and to give an appeal to Courts of General or Quarter Sessions.	The Act is legislation respecting Law of Criminal procedure which appertains solely to Dominion parliament.	9 Mar., 1874...	1023
37 Vict., 1873-74, chap. 2.	An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia.	Act tends to deal with lands which are assumed to be the actual property of the province, assumption completely ignoring as applicable to Indians of British Columbia the honour and good faith with which the Crown has always dealt with their Indian tribes, and see sec. 109 of the British North America Act.	19 Jan., 1875.... 11 Mar., 1875...	1024 1029
Chap. 9.....	An Act to make provision for the better administration of Justice.	Provision of Act authorizing the Lieutenant Governor to appoint places where County Court Judges shall reside, is practically assuming a power of appointment of Judges.	9 Mar., 1875...	1052
38 Vict., 1875, chap. 5.	An Act to make provision for the better administration of Justice.	If Act allowed to go into operation consequence would be to permit Lieutenant Governor in Council to arrange boundaries of County Court Districts or to alter them at pleasure, such alterations as result in appointment by local government of a County Court Judge to new district or Judgeship thus transferring to local government part of power of appointment of judges which is vested in the Governor General.	30 Oct., 1875.... 28 April, 1876...	1037 1039
40 Vict., 1877, chap. 22.	An Act to provide for the better administration of Justice.	Enactment in Sec. 27 providing that present incumbents of County Court Bench should not be removed except on terms mentioned for the purpose of appointing professional men, is *ultra vires* of provincial legislature, as it assumes to limit power of Dominion government in respect of retirement or removal of officers, appointed, paid by, and holding office during pleasure of government of Canada.	21 Feb., 1878.... 15 May, 1878....	1054 1057
40 Vict., 1877, chap. 32.	An Act to incorporate the Alexandra Company (Limited).	Incorporation is for objects beyond power and control of provincial legislation, as coming within exception mentioned in 10th and 11th subsections of section 92 of British North America Act.	29 Sept., 1877... 15 May, 1878....	1052 1057
Chap. 33.....	An Act to incorporate the British Columbia Insurance Company (Limited)	Powers conferred by Act appear to be too wide, as the company is in effect authorized to do a universal insurance business. Provisions trench on 11th subsection of section 92 of British North America Act. Also on subject of interest.	29 Sept., 1877... 15 May, 1878....	1053 1057
42-43 Vict., 1878, chap. 25.	An Act relating to Crown Lands in British Columbia.	Act attempts to deal with the question of interest, a subject assigned exclusively to parliament of Canada by the British North America Act.	15 Aug., 1879....	1066

Table of Disallowed Provincial Acts 1867-1924

1867-1895—*Continued*

BRITISH COLUMBIA—*Continued*

Act	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Page
Chap. 35.....	An Act to provide for the better collection of Provincial Taxes from Chinese.	Act declared by Supreme Court of British Columbia to be unconstitutional and void, and the Dominion government cannot allow Act so declared to remain on the Statute Book.	15 Aug., 1879....	1076
Chap. 37.....	An Act to amend the Cariboo Wagon Road Tolls Act, 1878.	Act is interference with the regulation of Trade and Commerce and the possible imposition, under its provisions, of unfair charges upon the Dominion Exchequer.	24 Sept., 1879...	1068
43 Vict., 1880, chap. 28.	An Act to amend the Cariboo Wagon Road Tolls Act, 1878.	Act is interference with the regulation of Trade and Commerce and the possible imposition, under its provisions, of unfair charges upon the Dominion Exchequer.	27 July, 1881....	1078
Chap. 29.....	An Act respecting Tolls on the Cariboo Wagon Road	Act is interference with the regulation of Trade and Commerce and the possible imposition, under its provisions, of unfair charges upon the Dominion Exchequer.	27 July, 1881....	1078
45 Vict., 1882, chap. 8.	An Act to consolidate and amend the laws relating to Gold and other minerals, except coal.	Appointment of Gold Commissioner as a judge performing judicial functions is, in effect, an appointment of a judge made by Lieutenant Governor instead of by Governor General in Council as provided by British North America Act.	8 May, 1883....	1080
46 Vict., 1883, chap. 26.	An Act to incorporate the Fraser River Railway Company.	Acts possibly beyond power of provincial legislation as trenching or exception made by clause (4) of 10th subsection of section 92 of British North America Act. Objects of companies contrary to legislation of parliament and settled policy of country respecting Canadian Pacific Railway. If constructed, they will direct trade from Canada to the United States and from the Canadian to the United States system of railways.	25 Sept., 1883...	1082
Chap. 27.....	An Act to incorporate the New Westminster Southern Railway Co.	Acts possibly beyond power of provincial legislation as trenching or exception made by clause (4) of 10th subsection of section 92 of British North America Act. Objects of companies contrary to legislation of parliament and settled policy of country respecting Canadian Pacific Railway. If constructed, they will direct trade from Canada to the United States and from the Canadian to the United States system of railways.	25 Sept., 1883...	1082
47 Vict., 1884, chap. 3.	An Act to prevent the Immigration of Chinese.	Act discriminates against Chinese. Imposes great penalties upon Chinamen coming into British Columbia. Act involves Dominion and possibly imperial interests. Authority of provincial legislature to pass the Act is very doubtful.	7 April, 1884...	1092

Table of Disallowed Provincial Acts 1867-1924

1867-1895—*Concluded*

BRITISH COLUMBIA—*Concluded*

Act	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Page
48 Vict., 1885, chap. 9.	An Act to amend "The Sumas Dyking Act, 1878".	Provisions of Act are in conflict with the grant of a railway belt to the Dominion government by the Act 47 Vict., chap. 14, and Act is *ultra vires*.	11 Mar., 1886...	1096
Chap. 13.....	An Act to prevent the Immigration of Chinese.	Act is interference with power of parliament to regulate trade and commerce. Ordinary tribunals can afford no adequate remedy for or protection against injuries resulting from allowing Act to go into operation. See also 47 Vict., 1884, chap. 3, and reasons for its disallowance (page 1,092 *ante*).	11 Mar., 1886...	1099
Chap. 16.....	An Act to amend the Land Act, 1884.	Questions as to validity of grants made by government of British Columbia are before the courts. Pending a decision, no Act of legislature should be left to its operation which should have effect of confirming grants so called in question.	11 Mar., 1886...	1103
51 Vict., 1887, chap. 7.	An Act to establish a Court of Appeal from The Summary decisions of Magistrates.	Act at variance with provision of s. 91 of British North America Act, it being legislation affecting procedure in criminal matters, also at variance with s. 76 of Summary Convictions Act..	April 10, 1888...	1108
	PRINCE EDWARD ISLAND			
37 Vict., 1874, chap. 00 (Revised Bill)	The Land Purchase Act, 1874.*	Provision of Act contrary to principles of legislation in respect to private rights and property. Act does not provide for impartial arbitration for arriving at decision on nature of rights and value of the property involved, and for securing speedy determination and settlement of matters in dispute.	Mar. 25, 1874... Dec. 23, 1876...	1153 1154
39 Vict., 1876, chap. 00 (Revised Bill)	An Act to amend "The Land Purchase Act, 1875".*	Bill is retrospective in its effects. Deals with rights of parties now in litigation under the Act which it is proposed to amend, or which may yet fairly form the subject of litigation. Absence of any provision saving the rights and proceedings of persons whose properties have been dealt with under the Act of 1875.	July 18, 1876....	1176

*These Bills were reserved for signification of the pleasure of His Excellency the Governor General.

Table of Disallowed Provincial Acts 1867-1924

1896-1920

Ontario

Year	Chap.	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Date of Approval	Page
1908	42	Act to revise and amend the Chartered Accountants Act.	Sec. 13 invalid as being in direct conflict with competently enacted Dominion legislation incorporating Dominion Association of Chartered Accountants.	April 19, 1909.	April 23, 1909.	89

Quebec

Year	Chap.	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Date of Approval	Page
1910	82	Act to amend the charter of General Trust.	Not within competence of legislature because it professes to confer powers which infringe upon the subject of banking and also exceeds the constitutional power of the legislature to incorporate companies with provincial objects.	Jan. 12, 1911.. May 23, 1911..	May 31, 1911..	259

Manitoba

Year	Chap.	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Date of Approval	Page
1897	2	An Act respecting Corporations incorporated out of Manitoba.	Not within competence of legislature in that Act professes to make the obtaining of a license even by a company incorporated by Dominion Parliament in execution of one or more of its special and exclusive powers of legislation a condition of its right to do business in the province, and further the provisions of the Act might very seriously interfere with the proprietary interests of the Dominion within the province.	Mar. 8, 1898.. April 2, 1898..	Mar. 14, 1898.. April 2, 1898..	455 457
1900	47	An Act respecting Real Property in Province of Manitoba.	Certain provisions of the Act had been found to be embarrassing and vexatious in so far as they applied to Dominion lands in that province.	June 6, 1901.. July 15, 1901..	June 13, 1901.. July 18, 1901..	466 471
1910	82	An Act to incorporate The Accident Insurance.	Act professes to authorize company thereby incorporated to carry on business outside of the province in excess of constitutional authority of legislature to incorporate companies with provincial objects and cannot in the public interest be allowed to stand.	Dec. 7, 1910... April 4, 1911..	Jan. 11, 1911.. April 6, 1911..	513 515

British Columbia

Year	Chap.	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Date of Approval	Page
1898	28	Labour Regulation Act.	Act affects not only the relations between the Dominion and Japan but also the relations of the Empire with the latter country. Further, power of legislature to enact statutes affecting rights of aliens not free from doubt.	Nov. 8, 1898.. May 29, 1899..	Dec. 17, 1898.. June 5, 1899...	536 555

Table of Disallowed Provincial Acts 1867-1924

1896-1920—*Continued*

BRITISH COLUMBIA—*Continued*

Year	Chap.	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Date of Approval	Page
1898	44	The Tramway Incorporation Amendment Act.	Act affects not only the relations between the Dominion and Japan but also the relations of the Empire with the latter country. Further, power of legislature to enact statutes affecting rights of aliens not free from doubt.	Nov. 8, 1898.. May 29, 1899..	Dec. 17, 1898.. June 5, 1899...	536 555
1899	39	An Act respecting Liquor Licenses.	Contains a provision that no license thereunder shall be issued or transferred to any person of, *inter alia*, Chinese or Japanese race and, therefore, open to same objections as legislation of 1898 affecting Japanese.	Nov. 14, 1899. April 12, 1900.	Dec. 14, 1899.. April 24, 1900.	566 583
1899	44	An Act to grant a subsidy to a railway from Midway to Penticton.	Act provides, under penalty, that no Chinese or Japanese person shall be employed or permitted to work in the construction or operation of any railway subsidized thereunder, and therefore open to the same objections as anti-Japanese legislation of 1898.	Nov. 14, 1899. April 12, 1900.	Dec. 14, 1899.. April 24, 1900.	566 583
1899	46	An Act to amend the Coal Mines Regulation Act.	Act contains a provision in effect prohibiting employment of Chinese or Japanese persons and therefore open to same objections as anti-Japanese legislation of 1898.	Nov. 14, 1899. April 12, 1900.	Dec. 14, 1899.. April 24, 1900.	566 583
1899	50	An Act to amend the Placer Mining Act.	Act trenches on exclusive Dominion legislative authority in relation to aliens, and, as regards exclusion of Dominion companies, the regulation of trade and commerce.	Jan. 12, 1900. April 12, 1900.	Feb. 10, 1900.. April 24, 1900.	577 583
1900	11	An Act to Regulate Immigration into British Columbia.	Act inconsistent with the general policy of the Dominion Immigration Act and where foreign relations involved not desirable uniformity of immigration laws should be interfered with by special provincial legislation. Further, act virtually prohibits immigration of those not possessing statutory qualifications except under exemption granted by provincial authorities, thus giving latter scope for discrimination, which Dominion government, though not responsible for administration of law, might be called upon to explain or justify.	Jan. 5, 1901... Sept. 4, 1901..	..... Sept. 11, 1901.	594 604
1900	14	An Act relating to the employment on Works carried on under Franchise granted by Private Acts.	Act solely directed against Asiatics, including Japanese and Chinese, and therefore open to same objections as anti-Japanese legislation of 1898, as well as being at variance with policy of Dominion Immigration Act.	Jan. 5, 1901.. Sept. 4, 1901..	..... Sept. 11, 1901.	594 604

Table of Disallowed Provincial Acts 1867-1924

1896-1920—*Continued*

BRITISH COLUMBIA—*Continued*

Year	Chap.	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Date of Approval	Page
1901	80	An Act to incorporate the Lake Bennett Railway Company.	Disallowed, (1) because territory proposed to be traversed by the line of railway is in dispute between the United States and Canada; (2) because of doubt as to competence of legislature to authorize construction of this railway to the northern boundary of the province; and (3) because Act is not considered in public interest or consistent with the policy of Dominion Government.	May 3, 1902...	May 10, 1902..	627
1902	34	An Act to Regulate Immigration into British Columbia.	Being a re-enactment of chap. 11 of 1900, this act is open to the same objections as those assigned for disallowance of that statute.	Nov. 14, 1902.	Dec. 5, 1902...	637
1902	38	An Act relating to the employment on Works carried on under Franchises granted by Private Acts.	Act, being a re-enactment of chap. 38 of 1900, this is open to same objections as those assigned for disallowance of that statute.	Nov. 14, 1902.	Dec. 5, 1902...	637
1902	48	An Act to further amend the Coal Mines Regulations Act.	In so far as it affected Japanese as aliens or as naturalized British subjects, the Act is *ultra vires* under decision of Judicial Committee of the Privy Council in Union Colliery v. Bryden (1898) A.C. 580, and is also an example of discriminating legislation sueh as had been on several occasions disallowed as being incompetent to a provincial legislature or upon grounds of public policy.	Nov. 14, 1902.	Dec. 5, 1902...	637
1903	12	An Act to Regulate Immigration into British Columbia.	This Act corresponds with chap. 34 of 1902, and is open the same objections as those assigned for disallowance of that statute.	Oct. 1, 1903...	Mar. 26, 1904..	643
1904	14	An Act relating to the employment on Works carried on under Franchises granted by Private Acts.	This Act corresponds with chap. 38 of 1902, and is open to to the same objections as those assigned for disallowance of that statute.	Oct. 1, 1903...	Mar. 23, 1904..	643
1903	17	An Act further to amend the Coal Mines Regulation Act.	This Act corresponds with chap. 48 of 1902, and is open to the same objections as those assigned for disallowance of that statute.	Oct. 1, 1903...	Mar. 26, 1904..	643
1904	26	An Act to Regulate Immigration into British Columbia.	Act is essentially of same effect as chap. 11 of 1900, and is open to same objections as those assigned for disallowance of that statute.	Nov. 16, 1904.	Jan. 20, 1905...	659

Table of Disallowed Provincial Acts 1867-1924

1896-1920—*Concluded*

BRITISH COLUMBIA—*Concluded*

Year	Chap.	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Date of Approval	Page
1905	28	An Act to Regulate Immigration into British Columbia.	These are essentially re-enactments of former anti-Japanese legislation, and are open to same objections as those assigned for disallowance of such former legislation.	April 19, 1905. Sept., 1905....	April 28, 1905. Sept. 30, 1905.	664 676
1905	30	An Act relating to the employment on Works carried on under Franchises granted by Private Acts.				
1905	35	An Act to further amend the Coal Mines Regulation Act.				
1905	18	An Act further to amend the Supreme Court Act.	*Ultra vires* as being an attempt to impose a limitation upon the Governor General's power of selection of judges under s. 97 of the British North America Act.	Nov. 1, 1905..	Nov. 13, 1905.	679
1908	23	An Act to Regulate Immigration into British Columbia.	Being substantially a re-enactment of a similar statute bearing the same title several times enacted by the Loca. Legislature and is often disallowed between 1901 and 1905, this Act is open to the same objection as the others, and is also, in so far as it affects Japanese subjects coming into British Columbia, repugnant to the provisions of the Dominion Statute, The Japanese Act, 1907, sanctioning the Convention of Jan. 31, 1906, between the United Kingdom and Japan.	Nov. 19, 1908.	Feb. 15, 1909..	691
1917	71	Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917.	An invasion of valuable proprietary rights of the Esquimault and Nanaimo Railway Co. under an agreement sanctioned by Dominion and Provincial legislation, and undue interference with the policy of the Dominion.	May 21, 1918..	May 30, 1918..	704

SASKATCHEWAN

1909	43	An Act to Incorporate The Gardner Boggs Investment and Trust Corporation.	These Acts profess to authorize the companies thereby incorporated to carry on their business beyond the limits of the province: *ultra vires* of the Legislature as being in excess of the constitutional power to incorporate companies with provincial objects.	Jan. 9, 1911...	Jan. 9, 1911...	785
1909	44	An Act to incorporate Saskatchewan Securities and Trust Corporation.				
1909	45	An Act to incorporate the Saskatchewan Loan Company.				

Table of Disallowed Provincial Acts 1867-1924

1921-1924

Nova Scotia

Year	Chap.	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Date of Approval	Page
1921	177	An Act to Vest Certain Lands in Victoria County in Jane E. MacNeil.	(1) The Minister is not aware of any circumstance whatever—moral, equitable or legal—which could be pointed to in justification of the legislation; (2) the legislature, in passing the Act in question, constituted itself a Court of Appeal from the Supreme Court of Canada.	Oct. 17, 1922..	Oct. 21, 1922..	
1922	14	An Act to Amend Chap. 81, Revised Statutes, 1900. "Of the Use of Roads".	Disallowed on request of the Provincial Government. The purpose of these Acts was to change the Rule of the road in Nova Scotia. Chap. 14 regarding the use of roads, provided that it should come into force on the 1st Jan., 1923, but, by legislative accident, chap. 40, regarding the use of vehicles, did not so provide. The confusion which would have been consequent upon this situation, if the Acts had been left to their operation, would have continued until the 1st Jan., 1923, and the Province accordingly requested that the statutes be disallowed.	July 31, 1922..	Aug. 5, 1922...	
1922	40	An Act to Amend Chap. 12, Acts of 1918, "The Motor Vehicle Act, Acts in Amendment thereof.				

Alberta

Year	Chap.	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Date of Approval	Page
1923	32	An Act to Impose a Tax on Minerals.	Interferes with Dominion interests and policies in that the legislation might operate directly to divest Dominion interest in minerals on Dominion lands and to give the Provincial authorities right of entry and distress upon such lands, and therefore those provisions of the statute which affected or purported to affect in this manner the public property of Canada were *extra vires* of the province. Further the legislation was so embarrassing and essentially at variance with the policy of the Dominion Government as to justify and require exercise of power of disallowance.	Feb. 2, 1924...	April 29, 1924.	

Table of Disallowed Provincial Acts 1867-1924

1921-1924—*Concluded*

BRITISH COLUMBIA

Year	Chap.	Title	Reasons for Disallowance	Date of Report of Minister of Justice	Date of Approval	Page
1921	49	An Act to validate and confirm certain Orders in Council and Provisions relating to the Employment of Persons on Crown Property.	A question was referred to the Supreme Court of Canada as to whether this statute was *intra vires* of the Province and the Supreme Court having by judgment dated Feb. 7, 1922, answered the question in the negative, the statute was accordingly disallowed. The Judgment of the Supreme Court was affirmed by the Judicial Committee of the Privy Council in Attorney-General of British Columbia v. Attorney-General of Canada (1924) A.C. 203	Mar. 27, 1922..	Mar. 31, 1922..	

APPENDIX "D"

HOUSE OF COMMONS DEBATES, SESSION 1890, VOLUME II

On April 29, 1890, Mr. Blake moved the following resolution:

"To leave out all the words after 'That' and insert the following:—'it is expedient to provide means whereby on solemn occasions touching the exercise of the power of disallowance, or of the appellate power as to educational legislation, important questions of law or fact may be referred by the Executive to a high judicial tribunal for hearing and consideration, in such mode that the authorities and parties interested may be represented and that a reasoned opinion may be obtained for the information of the Executive."

In support of this resolution Mr. Blake said, in part, as follows:

". . . . . .

Col. 4084. ". . . Now, Sir, the federal constitution of Canada specially demands our attention to the legality of its legislative Acts. We have within our borders seven Provincial Legislatures, one Territorial Assembly and this Parliament, all and each with limited powers, all and each hedged in by limitations—with reference to the Provincial Legislatures and the Parliament as between these two, and with reference to both the Provincial Legislatures and the Parliament, as between them both and the reserved powers of the Imperial Parliament—with limited powers, I say, any excess, or attempted excess of which in legislation is absolutely void. Our several constitutions are partly unwritten and undefined; they are also largely, perhaps, I may say, mainly, written and defined. And so it has happened that we have fallen into the use of the word constitutional in two very different senses: one, the only sense in which it is used in the mother country, whose constitution, being the growth of customs, precedents, practices and principles, and not being a written instrument unalterable by the Parliament, Parliament being itself supreme—whose constitution, I say is a thing elastic, plastic, changing, of the spirit, not of the letter; and so, when we speak, in the English sense, of an Act being constitutional or unconstitutional, we refer to its spirit, we refer to the question whether it is in accord with, or in violation of, the spirit of the constitution. But we have another sense in which we use the word in a sense peculiar to ourselves, or at any rate, distinct from its use in the mother country; we use it also to express an Act in excess of our legal powers. In the first class of cases, however obnoxious may be the Act that we condemn, it is nevertheless indisputably valid; in the second class of cases, however useful we may consider the Act we are discussing, it is null and void. The first class of cases depends on political considerations entirely outside the judicial domain, which is quite unfitted for their disposition; the second class depends upon legal considerations fitted for the judicial domain,

Col. 4085. and which ought, as far as may be, to be kept within it. Yet, Sir, no Legislature or Executive can, any more than any private individual, act at all without considering, and in a sense deciding for itself, the legality of its acts, and so in some sort, entering upon the judicial department.

But not upon the domain of the judicial power; because our opinion that our acts are valid does not make them so; their validity depends upon the decision of the judicial authority, and upon that alone. Now, Sir, the general notion that the executive, the legislative and the judicial departments of government ought to be, so far as practicable, separate and apart, is one held by many of the most eminent constitutionalists as a fundamental principle. There can be no doubt that the absolute union of these departments is neither more nor less than absolute despotism. Unite in one hand, I care not whether it be the hand of an autocrat or the hand of a Council, the power of legislation, the power of adjudication, and the power of administration, and you make the most absolute despot that is conceivable. The separation, therefore, of these departments, the degree to which, without over-weakening or over-complicating the action of the machine, you can separate them, marks the degree to which, in this aspect of a constitutional system, you have attained perfection. I do not say that they can be absolutely and always separated. It is not so. Now, my object is to apply these general views, which I have briefly stated, to one important class of public transactions so far as may be found practicable; and that class of public transactions is divided, as you will see by my notice, into two subject-matters, in which the Dominion Executive, itself a political body, has a constitutional duty, the discharge of which involves the interpretation of statutes and thus the solution of strictly legal questions; and in which also this Parliament, which has the right to advise, to condemn or to approve, has, or may have, duties of its own. I by no means propose to withdraw from the Executive its duty; my object is to aid it in the efficient execution of its duty. I make no attempt at this time to discuss the propriety of these constitutional provisions, or, in any general sense, the executive, the parliamentary or the party action which has tended more or less, to elucidate the generally accepted or the generally opposing views upon these subjects. My only wish is, without discussing how far these provisions are wise, taking them as they are, to facilitate the better working of them. The first of the two classes to which I allude is that in which the proposal comes before the Executive, to disallow an Act of a Provincial Legislature on the ground that that Act is *ultra vires*. If it be so, the Act is void; and I think I may say, that it is now generally agreed that void Acts should not be disallowed, but should be left to the action of the courts. It is, nevertheless, and I think with sound reason, contended, that circumstances of great general inconvenience or prejudice from a Dominion standpoint, and involving difficulty, delay, or the impossibility of a resort to law, may justify the policy of disallowance, even in cases in which the Act is *ultra vires*, and therefore void. In that view there would arise two questions, the question of policy, and the question of legality; because the question of legality leaves untouched the question of policy, which is, 'even if the Act be void, shall it be disallowed or no?' The other class to which my motion Col. 4086. alludes is that of the Educational appeal, which arises under section 93 of the Constitutional Act, and under the analogous provision of the Manitoba Constitutional Act. . . . I regard it as settled, for myself at any rate, first of all, that, as a question of policy, there shall be no disallowance of Educational legislation, for the mere reason that, in the opinion of this Parliament, some other or different policy than that which the Province has thought fit to adopt would be a better policy. I hold it to be settled, in the second place, that no Address to the Crown shall be passed by this Parliament asking for a change of the Constitutional Act as affecting any Province, at any rate against the will of that Province, in this particular.

* * * * *

Col. 4088. Now, Sir, in the exercise of this power of disallowance by the Government, political questions will, or at any rate may, probably, always arise. Questions of policy may present themselves, that is questions of expediency, of convenience, of the public interest, of the spirit of the constitution or of the form of legislation. All these are clearly, exclusively for the executive and legislative, that is for the political departments of the Government. But it is equally clear, that when in order to determine your course you must find whether a particular act is *ultra* or *intra vires*, you are discharging a legal and a judicial function. What do you do? You proceed to interpret the Constitutional Act, and to declare its meaning; you proceed to interpret the Provincial Act under consideration and to declare its meaning; you proceed to compare the two statutes so interpreted and declared; and you proceed, finally, to conclude whether or not the law conflicts with, or transcends the powers which are conferred upon the Legislature which passed it. Nothing that can be conceived partakes more exclusively of the character of a legal and judicial operation than what I have just now described. Again, when you act on the appellate Educational clauses; as, for example, in the case of Manitoba, the very case which is now in a sense pending, as to whether recent legislation be within the limits of the rights of the Provincial Legislature, and whether any relief is due under the appellate clause to those who claim it, you have a legal question, or rather, in this case, a mixed question of law and of fact; which circumstance it was that induced me to insert the word 'fact' in my motion, conscious as I was that it was only on the rarest occasions that any reference of that description would be necessary. Yet it seemed to me that, in this particular instance, I was constrained to provide for an emergency which may arise. Now, what is the process to be gone through in order to reach a conclusion? The first involves that very question of fact, or rather a mixed question of law and fact. You have to find whether any class of the population had by law or practice, at the time of the Union, any, and, if so, what right or privilege with respect to denominational schools. Secondly if so, you have to find whether that right or privilege has been affected, and how it has been affected, by the legislation complained of; and thirdly, if so, you have to find what legislative action is required to redress the wrong. The first two questions at any rate are legal and not at all political. Now, I aver that in the decision of all legal questions, it is important that the political executive should not, more than can be avoided, arrogate to itself judicial powers; and that when, in the discharge of its political duties, it is called upon to deal with legal questions, it ought have the power in cases of solemnity and importance, where it may be thought expedient so to do, to call in aid the judicial department in order to arrive at a correct solution. The decision that an Act is *ultra vires*, and its consequent disallowance by the Executive are incidents peculiar in practice to ourselves. They do not exist in the great example of the Republic to the south of us. It is a most delicate function, and its exercise involves most serious ulterior consequences. The question is by the decision of the Executive finally decided, and the Act is obliterated and annulled. The question
Col. 4089. whether it was or was not valid is so removed from judicial cognisance for ever. And thus by repeated exercises of the power of disallowance, in respect to repeated provincial legislation, the Province may practically be deprived of that which all the time may be a real right;—a right claimed, which may be a right justly claimed. Thus, one of two limited Governments, of which it may be said in a general sense that the sphere of the jurisdiction of the one is limited by the sphere of the jurisdiction

of the other;—one of these two limited Governments, may practically decide the extent of the limits, of what in a sense, is its rival Government. That is a very delicate position. It is a little like the position which a great many very good and wise persons contemplate with grave alarm, as to the pretensions of one church to decide what are the limits of power, as between Church and State,—to decide for itself these limits and thus, if that power be admitted, to arrogate such rights as it pleases to itself. A decision under such circumstances is almost necessarily a suspected decision. There is a sense in which it is the decision of a party in his own cause. And therefore, for that reason only, if for no other, it should be fortified as far as possible by neutral, dignified and judicial aid. So, in the case of an Educational appeal, analogous results at any rate, may ensue; because here also the decision would bar judicial action, and produce coercive legislation, imposing that decision on the Province; and would thus, according to the opinion of the Dominion Executive and Parliament, and to that alone, end the question. Now, do I say that in all cases the Executive should refer? I do not say so; my motion does not say so; my opinion is not so. I have referred—using language for this purpose which is recorded in the constitutions of some of the most respected States of the Republic—to solemn occasions and to important questions; but my motion is framed in this regard in what I conceive to be the spirit of the British and of our own constitution. It is elastic; it leaves a responsibility to the Executive to decide on the action to be taken in the particular case; it deals with the case as exceptional. My own opinion is, that whenever, in opposition to the continued view of a Provincial Executive and Legislature, it is contemplated by the Dominion Executive to disallow a Provincial Act because it is *ultra vires*, there ought to be a reference; and also that there ought to be a reference in certain cases where the condition of public opinion renders expedient a solution of legal problems, dissociated from those elements of passion and expediency which are rightly or wrongly, too often attributed to the action of political bodies. And again, I for my part would recommend such a reference in all cases of Educational appeal—cases which necessarily evoke the feelings to which I have alluded, and to one of which, I am frank to say, my present motion is mainly due.

* * * * *

But, Sir, besides the great positive gain of obtaining the best guidance, Col. 4091.
there are other, and in my opinion, not unimportant gains besides. Ours is a popular government; and when burning questions arise inflaming the public mind, when agitation is rife as to the political action of the Executive or the Legislature—which action is to be based on legal Col. 4092.
questions, obviously beyond the grasp of the people at large;—when the people are on such questions divided by cries of creed and race; then I maintain that a great public good is attainable by the submission of such legal questions to legal tribunals, with all the customary securities for a sound judgment; and whose decisions—passionless and dignified, accepted by each of us as binding in our own affairs, involving fortune, freedom, honor, life itself—are most likely to be accepted by us all in questions of public concern . . . . . My proposal is by no means radical or revolutionary, compulsory or general. It is but an enabling proposition; it but empowers the Executive to obtain—by a procedure replete with the essential requisites for the production of a sound opinion—the views on legal questions of legal authorities, leaving to the Executive, so aided, the responsibility of final action. I have an absolute confidence that, if my proposal should be declined, the first persons to regret that decision will

be hon gentlemen opposite. My opinion is, that this is a proposal eminently helpful to the Executive of the country at this time; but it is eminently helpful to them, because it is eminently helpful to the good government of this country; and it is in this spirit that I move the amendment which I now submit to the judgment of the House.

Sir John A. Macdonald:

Col. 4093. "When I first read the hon. gentleman's resolution hastily, it occurred to me, as, I dare say, it occurred to many hon. gentlemen who hear me now, that it was an advance towards the American system, and proposed to transfer the responsibility of the Ministry of the day to a judicial tribunal; but on scanning the resolution in its carefully prepared terms, that impression was dissipated, and I saw that the principal object of the resolution, as I read it, is that the questions submitted by the Executive to the judicial tribunal should be enforced, sustained and presented to Parliament, to the public and to the Crown by the fact of this legal decision having been given. As the hon. gentleman has stated, when a question is submitted by the Crown to the courts, the simple answer 'yes' or 'no' is most unsatisfactory. It is a *pronunciamento* of the court without giving any reason for the decision on the decision which has been given. The proposition in this resolution that the courts could be required by the Executive to hear counsel, to take evidence in questions where facts form a portion of the subject to be decided, the fact that it is provided that the courts can and must give reasons for their answer, is sufficient, in my opinion, whether there was or was not any other excellence in the resolution to warrant this House to adopt it. I am strongly of the opinion that this resolution should meet with the favorable consideration of the House. The only objection really that I see to it is the fear that, the power being so emphatically given to the Crown to insist upon reasons being given the Parliament of Canada, and especially the House of Commons, may be continually pressed and urged to refer Bills, whether passed by the Dominion Parliament or the Provincial Legislatures, to the judicial tribunal. We may have very unimportant questions which we would be urged by certain interests to refer to the court. However, the Government of the day must have force enough to resist any such pressure. That is an evil which is comparatively unimportant when you consider the great advantages of the adoption of this resolution, the principle of it being that power is to be given to the Executive—an enabling power, as the hon. gentleman has truly said—to submit any important question to the court, and specially on these two points—the question of disallowance, and the question which may—and I am afraid will—assume large proportions—the educational question. Whenever the question of disallowance is raised on important matters and the reasons alleged for disallowance are that the Act itself was *ultra vires*, that is, that it was beyond the competence of the Legislature which passed it, I coincide with my hon. friend in believing that the Crown should have
Col. 4094. the power of submitting such a question to the courts, and give the opportunity to the authority—be it legislative or executive, which has passed the statute, to appear before such tribunals, and that all parties interested, or that the court should think were interested, should have the opportunity of being heard. Of course my hon. friend (Mr. Blake), in his resolution, has guarded against the supposition that such a decision is binding on the Executive. It is expressly stated—and that is one of the instances which shows that this resolution has been most carefully prepared—that such a decision is only for the information of the Government.

The Executive is not relieved from any responsibility because of any answer being given by the tribunal. If the Executive were to be relieved of any such responsibility, I should consider that a fatal blot in the proposition of my hon. friend. I believe in responsible government. I believe in the responsibility of the Executive. But the answer of the tribunal will be simply for the information of the Government. The Government may dissent from that decision, and it may be their duty to do so if they differ from the conclusion to which the court has come. There is another point in regard to which the court must be guarded in the measure which will be introduced—not this Session but I hope next Session—based on this resolution, and that is, that the answer, whatever it may be, should be considered in the nature of a judgment so far as to allow of an appeal to the Judicial Committee of the Privy Council. With these remarks, I will only say further, that I thank the hon. gentleman for having brought this resolution before the House, as I concur with it generally, though holding the right with a free hand to frame the measure which will have to be brought down to Parliament in accordance with it."

APPENDIX "E"

INSTRUCTIONS TO THE LIEUTENANT-GOVERNOR OR OTHER CHIEF EXECUTIVE OFFICER OR ADMINISTRATOR FOR THE TIME BEING, CARRYING ON THE GOVERNMENT OF THE PROVINCE OF

WHEREAS it is enacted in and by "The British North America Act, 1867," that for each Province there shall be an Officer, styled the Lieutenant-Governor, appointed by the Governor General in Council by instrument under the Great Seal of Canada; and whereas, by and with the advice of the King's Privy Council for Canada, I have, by Commission under the Great Seal of Canada, constituted and appointed,

to be Lieutenant-Governor in and over the said Province of , one of the Provinces of the Dominion of Canada, and thereby authorized and empowered and commanded him in due manner, to do and execute all things belonging to his said command and trust according to the several powers, provisions and directions granted or appointed to him by virtue of the said Act, and of all other Statutes in that behalf, and of the said Commission, according to such instructions as were with the said Commission given unto him, or which might, from time to time, be given to him in respect to the said Province of , under my Sign Manual or by order of the King's Privy Council for Canada, and according to such laws as are or may be in force within the said Province of

I. Now, therefore, I do by these my Instructions under my Sign Manual, by and with the advice of the King's Privy Council for Canada, declare my pleasure to be that the Lieutenant-Governor of the Province of

for the time being, shall, with all due solemnity, cause the said Commission under the Great Seal of Canada, appointing him Lieutenant-Governor, to be read and published in the presence of the Chief Justice for the time being or other Judge of the Supreme Court (*or, as the case may be*) of the said Province and of the members of the Executive Council in the said Province.

II. And I do further declare my pleasure to be that the Lieutenant-Governor and every other Officer appointed to administer the Government of the said Province, shall take the oath of allegiance in the form provided by the said Act, and likewise that he or they shall take the usual oaths for the due execution of the office of Lieutenant-Governor, which oaths the said Chief Justice for the time being of the said Province (*or Court, as the case may be*), or in his absence, or in the event of his being otherwise incapacitated, any Judge of the Supreme Court (*or other Court, as the case may be*) of the said Province, or in the case of emergency any one duly commissioned by me, shall and is hereby required to tender or administer unto him or them.

III. And I do authorize and require the Lieutenant-Governor, from time to time, to administer to all and every person or persons, to whom he is by the said Act directed to administer the same, the said oath of allegiance and generally to administer such other oath or oaths as he lawfully may, and as may from time to time be prescribed by any Laws or Statutes in that behalf provided.

IV. The Lieutenant-Governor is to take care that all Laws assented to by him in my name, or reserved for the signification of my pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margin, and be accompanied in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such Laws.

V. Whenever the Lieutenant-Governor assents to a Bill, he shall, within ten days thereafter, send an authentic copy of the Act to the Secretary of State of Canada.

VI. The Lieutenant-Governor, on receipt of a copy of an Order in Council disallowing an Act with my certificate of the date on which the Act was received by me, shall forthwith make proclamation in the said Province of such certificate, and of the disallowance of the said Act.

VII. The Lieutenant-Governor shall not quit the Province without having first obtained leave from me for so doing, under my Sign Manual, or through the Secretary of State of Canada.