

The question at issue is by whom and under what responsibilities the power of disallowance is to be exercised.

The power of disallowance of Canadian Statutes is by Section 56 of the British North America Act, 1867, vested in the Queen in Council.

By Section 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 among 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 for Canada.”

If the British North America Act had not contained these express provisions, it would seem that upon the plain principles of the constitution the result would have been the same.

Supposing that the Act had vested the power of disallowance of Canadian Statutes in Her Majesty not adding the words “in Council” it will not be contended that the power so given could be constitutionally exercised otherwise than under the advice of Her Majesty’s Ministers, who would be responsible for Her Majesty’s action, and, by parity of reasoning, a power of disallowance of Provincial Statutes given to the Governor could be exercised only under the advice of his Ministers, who would be responsible for his action.

It results from 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 Council is that neither of these things can be done; that the power being vested in the Governor in Council, any action taken must be accomplished by Order in Council, and that a Governor 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 assent of the Governor to its disallowance,—Ministers being in every case responsible to Parliament for the course taken.

Lord Carnarvon suggests that the question is one in respect of which it is more in accordance with the spirit of the constitution that a rigid rule of action should not be established.

But the undersigned ventures to submit that the question involves simply the application to a plain statute of the well-settled rules of construction, and the application to a plain case of the fundamental principle of the constitution.

It is to the spirit as well as to the letter of the constitution that Council have appealed, and grave would be their responsibility were they to agree that either spirit or letter contemplates a rule of action so lax as to justify or even to render possible the violation of its fundamental principle.

Lord Carnarvon refers to a correspondence (annexed to his despatch) with an Australian colony upon the subject of the exercise of the Prerogative of Pardon, and suggests that the rule there propounded is applicable to the present case.

It seems needless to complicate the question in hand by any extended discussion of the views expressed in that correspondence, which will come more fitly under review in connection with another despatch now under the consideration of Council.

Were the undersigned to assume (without admitting) the accuracy, as applied to Canada, of the propositions there advanced, he would yet observe that whether sound or unsound they are founded upon one main consideration, which is supposed to involve exceptional treatment of the question, namely, that “the Governor to whom personally the Queen delegates a very high prerogative (that of pardon) cannot in any way be relieved from the duty of judging for himself in every case in which