PARLIAMENTARY GOVERNMENT

IN THE

BRITISH COLONIES.

BY

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TO

THE EARL OF DUFFERIN,

WHO, FROM HIS FIRMNESS IN UPHOLDING THE LAWFUL AUTHORITY OF THE CROWN, AND HIS UNCEASING EFFORTS TO PROMOTE THE WELFARE OF THE PEOPLE, DURING

HIS ADMINISTRATION IN CANADA,

WAS AN EXAMPLE TO ALL

CONSTITUTIONAL GOVERNORS,

THIS VOLUME IS INSCRIBED.

PREFACE.

In presenting this volume to the public, I have been enabled to complete a design which I have long had in contemplation, and which was partly fulfilled when, about thirteen years ago, I published my treatise on Parliamentary Government in England. In the preface to the first volume of that work, I alluded to the obvious want of some manual to explain the operation of "parliamentary government," in furtherance of its application to colonial institutions. For over a quarter of a century my own researches had been largely directed to this subject, in assisting Canadian statesmen in giving effect to the grant of "responsible government," which began to be extended to the colonies of Great Britain when it was introduced into Canada in 1841. The fruit of this protracted investigation into a hitherto untrodden field was embodied in the publication, in 1867 and in 1869 respectively, of the volumes above mentioned, which, however imperfectly, supplied for the first time a practical exposition of "the laws, usages, and traditions of Parliamentary Government."

The favour with which this attempt was received throughout the British dominions, and the desire so

frequently expressed for additional information upon the matter, in its relation to the British colonies, have induced me to undertake the present work.

Desirous of avoiding needless repetitions, I have referred to my former treatise in all points of detail or of general principle wherein colonial practice is professedly identical with that of the mother country, and have aimed in this volume to treat the subject from a strictly colonial aspect. This has compelled me to cite, more frequently than I could have wished, my previous publication, as it still remains the only existing work devoted to the elucidation of this important topic from a practical point of view.

It will be noticed that I have bestowed much attention to questions which have arisen in the working of the new constitution conferred upon the British North American colonies in 1867, when they were confederated into the Dominion of Canada. Whilst this portion of my work is primarily intended for Canadian use, it may not be without interest or value in other parts of the empire, in anticipation of the contemplated introduction of similar institutions in South Africa and in Australia.

In the discussion of certain weighty precedents which have been recently determined in Canada and elsewhere, it is not unlikely that the opinions I have expressed thereon may differ from those entertained by prominent public men who have taken part in their consideration and settlement. I would, however, venture to affirm, that I have approached the investigation of these "burning questions" in an impartial spirit,

having no party bias or inclinations, and seeking only the public good. If my criticisms contribute, in any measure, to promote that end, they will not have been *in vain*.

I would further remark that in this — as in my larger work — I have directed particular attention to the political functions of the Crown, which are too frequently assumed to have been wholly obliterated wherever a "parliamentary government" has been established. In combating this erroneous idea, I have been careful to claim for a constitutional governor nothing in excess of the recognized authority and vocation of the sovereign whom he represents; while, on the other hand, I have endeavoured to point out the beneficial effects resulting to the whole community from the exercise of this superintending office, within the legitimate lines of its appropriate position in the body-politic.

Practical statesmen are usually well-informed upon this question. But much ignorance and confusion of thought prevails upon it amongst all classes outside of Parliament. As was pertinently observed by the Marquis of Hartington (the leader of the Opposition in the House of Commons), in a debate during the last session of the Imperial Parliament, "There is no doubt that men of great ability, in periodicals of much political influence, have put forward doctrines respecting the relations of the Executive to Parliament and the Crown, which are altogether contrary to the doctrines which have been generally held on both sides of this House" (Hansard's Debates, vol. 246, p. 318).

If, then, I appear to have laid too much stress, in this volume, upon those attributes and functions of the Crown which are lawfully exercisable by a governor under "responsible government," it is because I am impressed with the great and growing necessity for properly instructing the public mind upon a vital question of practical politics. But, as this treatise is intended to be expository and not speculative, I have uniformly refrained from obtruding individual opinions, and have stated nothing therein that is not capable of proof and corroboration from the public utterances of English statesmen of the present day, irrespective of party divisions, and of unquestionable authority in the interpretation of our constitutional system.

ALPHEUS TODD.

LIBRARY OF PARLIAMENT, OTTAWA, CANADA,
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CHAPTER I.

THE SOVEREIGN, IN RELATION TO PARLIAMENTARY GOVERNMENT IN ENGLAND.

English constitutional maxims.

THE government of England is conducted in conformity with certain traditional maxims, which limit and regulate the exercise of all political powers in the state. These maxims are, for the most part, unwritten and conventional. They have never been declared in any formal charter or statute, but have developed, in the course of centuries, side by side with the written law. They embody the matured experience of successive generations of statesmen in the conduct of public affairs, and are known as the precepts of the Constitution.[a]

Prominent amongst these constitutional maxims is the principle that "the king can do no wrong." Rightly understood, this precept means, that the personal actions of the sovereign, not being acts of government, are not under the cognizance of the law, and that as an individual he is not amenable to any earthly power or jurisdiction. He is, nevertheless, in subjection to God and to the law. For the law controls the king, and it is, in fact, "the only rule and measure of the power of the

[a] See Freeman, Growth of Eng. Constitution, chapter iii.

Crown, and of the obedience of the people."[b] And while the sovereign is personally irresponsible for all acts of government, yet the functions of royalty which appertain to him in his political capacity are regulated by law, or by constitutional precept, and must be discharged by him solely for the public good, and not to gratify personal inclinations.[c]

Government by prerogative.

Before the Revolution of 1688, the monarchs of England ruled by virtue of their prerogative, and with the aid of ministers of their own choice. These ministers had no necessary connection with Parliament; although, if peers of the realm, they were entitled to sit therein. The sovereign was the originator of his own policy, and was not bound to take advice before deciding upon affairs of state. Moreover, he was usually sufficiently conversant with the details of administration, to be able to govern independently of the consent of his ministers. They were only answerable to Parliament for high crimes and misdemeanors, and for acts of mal-administration which were directly attributable to themselves. This method of government gave rise to frequent altercations and struggles between the Crown and Parliament, which sometimes could only be decided by an appeal to the sword.

Revolution of 1688.

The Revolution of 1688 was the great epoch at which the power of the Crown was subjected to constitutional limitations and restraints, for the purpose of bringing it into harmony with the will of Parliament. The foundation principle of monarchy, upon which the Constitution of England is based, was carefully maintained: the ancient maxim, that "the king can do no wrong," was deliberately re-asserted, and thereby the monarchy itself was protected from injurious aspersion or assault; but this maxim was interpreted so as to

[b] Sir R. Walpole, in State Trials, vol. xv. p. 115.
[c] Todd, Parl. Govt. vol. i. pp. 168, 242.

mean that no mismanagement in government is imputable to the sovereign personally. Furthermore, another counterbalancing principle of equal importance was then brought into manifestation; namely, that no wrong can be done to the people for which the Constitution does not provide a remedy. The application of these principles, at the period of the Revolution, to acts of government contributed to the introduction of our present political system, under which ministers of state participate in all the functions of royalty, on condition that they assume a full responsibility for the same, before Parliament and the people. And inasmuch as no minister could appropriately undertake to be responsible for a policy which he could not control, or for acts which he did not approve, it has necessarily followed that the direction and administration of the policy of government has passed into the hands of the constitutional advisers of the Crown, for the time being; subject only to their continuing to retain the confidence of their sovereign and of Parliament, and to their administration of public affairs being approved both by the Crown and by the people.

Definition of Parliamentary Government.

The three leading maxims of the British Constitution, in its modern form and developments, are: the personal irresponsibility of the king; the responsibility of his ministers for all acts of the Crown; and the inquisitorial power and ultimate control of Parliament. These maxims were first distinctly asserted and potentially secured by the Revolution of 1688. Since that epoch, they have been gradually matured, by practice and precedent, so as to embody and constitute in their operation what is known as Parliamentary Government.

Personal government by royal prerogative having given place, under the British Constitution as now interpreted, to parliamentary government, the question arises as to what is the actual position, and what are the

Constitutional powers of the sovereign.

powers possessed by the sovereign in connection therewith. To assume that the sovereign has become a cipher in the state, — "a dumb and senseless idol," — without any measure of political power, is entirely inconsistent with the continued existence in England of a monarchical government. Such an assumption would transform the queen's cabinet ministers into an oligarchy, exercising an uncontrolled power over the prerogatives of the Crown and the administration of public affairs, upon the sole condition that they are able to secure and retain a majority in the popular branch of the legislature, to approve their policy and to justify their continuance in office. There have not been wanting some political thinkers who have argued in favour of a system of this kind; but, however theoretically defensible it may appear from their point of view, it is not a true representation of the British Constitution, and, should it ever unhappily prevail, would deprive us of one of the main securities upon which the liberties of England depend.

Moreover, the fallacy of such an idea, and its contrariety to existing constitutional practice, will be readily apparent to those who will refer to the expressed opinions of the most eminent British statesmen of our own day upon this subject. Brougham, Grey, Russell, Derby, Gladstone, Disraeli, and Stafford Northcote — all of them representative men, of diverse parties — have severally testified, upon different occasions, to the vital and influential position which appertains to the sovereign of Great Britain under parliamentary government.[d]

[d] See Todd, Parl. Govt., vol. i. pp. 201–211, vol. ii. pp. 205–214, 408. Mr. Gladstone, in Contemporary Review, vol xxvi. p. 10; and see, especially, his able paper, hereinafter cited, in the North American Review, for Sept.-Oct. 1878, pp. 179–212. (See his Gleanings of Past Years, vol. i. for a reprint of both these articles.) "The constitutional maxim, 'the king reigns and does not govern,' has never been accepted in England in the sense of reducing the sovereign to a cipher.'"

Functions of the Crown.

It is true that, under our parliamentary system, which regards the sovereign as the representative and living symbol of the institutions of the country,[e] rather than as an active, energetic personality, the personal will of the monarch can only find a legitimate public expression through official channels, or in the performance of acts of state which have been advised or approved by responsible ministers. But we must not lose sight of the fact, that what has been termed the impersonality of the Crown only extends to direct acts of government; that the sovereign is no mere automaton, or ornamental appendage to the body-politic,— but is a personage whose consent is necessary to every act of state, and who possesses full discretionary powers to deliberate and determine upon every recommendation which is tendered for the royal sanction by the ministers of the Crown. As every important act — that is to say, every thing that is not in the nature of ordinary official routine, but which involves a distinct policy, or would commit the Crown to a definite action, or line of conduct, which had not previously received the royal approbation — should first be sanctioned by the sovereign, the Crown is thereby enabled to exercise a beneficial influence, and an active supervision over the government of the empire; and an opportunity is afforded to the sovereign for exercising that "constitutional criticism" in all affairs of state, which is the undoubted right and duty of the Crown, and which, in its operation, Earl Grey and Mr. Disraeli, amongst living statesmen, have concurred in declaring to be most salutary and efficacious.[f]

During the lifetime of the prince consort, her

Mr. Cardwell's opinion (secretary of state for the colonies), cited in Commons Papers, **1867**, *v.* 49, p. 664. Hansard Debates, vol. clxxxviii. p. 1113, vol. cxci. p. 1705: vol. cxlvi. p. 311.

[e] Martin, Life of the Prince Consort, vol. iv. pp. 40, 154.

[f] Todd, Parl. Govt. vol. ii. pp. 209, 212.

The Prince Consort.

present Most Gracious Majesty enjoyed, as is well known, exceptional advantages in the fulfilment of the arduous and responsible duties which devolve upon the Crown. The eminent qualities of Prince Albert, his extensive and accurate political knowledge, and his varied attainments in other fields of research and observation, enabled him to render incalculable service to the queen, and his acknowledged constitutional position as her Majesty's *alter ego*, justified him in the performance of the onerous and multifarious duties, appertaining to the "consort and confidential adviser and assistant of a female sovereign."[g]

Queen Victoria.

After the lamented death of the prince, in 1861, her Majesty was compelled to withdraw, for a season, into retirement, and she has never since been able to resume, as fully as before, her public and ceremonial duties. But while her long continued seclusion has been a source of universal regret, and even to some extent of complaint, "it is the only reproach which her people have ever addressed to her." Ten years after this overwhelming affliction befell the queen, two eminent English statesmen gave assurance of her Majesty's unabated zeal and efficiency in the fulfilment of all other duties appropriate to her exalted station. Earl Granville, then secretary of state for foreign affairs, said, in the House of Lords, on August 8, 1871, "I do not know any time of her life when her Majesty has given more attention than she does at present to the current business of the state, or when the interest she takes in all parliamentary and administrative measures, the knowledge she takes care to possess on all important measures, whether home or foreign, and the supervision she exercises over all appointments to be made and honours to be distributed, have been more

[g] For a discussion of the constitutional position of a prince consort, see *ibid.* vol. i. p. 195.

strikingly shown." He added, that so far from her Majesty, as some had surmised, "only getting information from one political party," it was characteristic of her "that, whatever party may be in power, she ever holds the most open and confidential communications with them;" but that, "without in any degree acting in a manner liable to misconstruction, she does see the leaders of the party in opposition to the government."[h]

A few weeks afterwards, Mr. Disraeli (then the leader of the opposition) corroborated the foregoing statement; and took occasion to observe that, although the queen was still unable "to resume the performance of those public and active duties which it was once her pride and pleasure to fulfil," yet that, "with regard to those much higher duties which her Majesty is called upon to perform, she still performs them with a punctuality and a precision which have certainly never been surpassed and rarely equalled by any monarch of these realms." He went on to say that "a very erroneous impression is prevalent respecting the duties of a sovereign of this country. Those duties are multifarious; they are weighty; they are incessant. I will venture to say that no head of any department of the state performs more laborious duties than those which fall to the sovereign of this country. There is no despatch received from abroad, nor any sent from the country, which is not submitted to the queen; the whole of the national administration of this country greatly depends upon the sign-manual; and of our present sovereign it may be said that her signature has never been placed to any public document of which she did not approve. Cabinet councils . . . are reported and communicated on their termination by the

[h] Hans. Deb. vol. ccviii. p. 1069. See also the observations of Sir Stafford Northcote (chancellor of the exchequer) in the House of Commons, in the debate on May 13, 1879, on the Prerogative of the Crown. *Ibid.* vol. ccxlvi. p. 311.

minister to the sovereign, and they often call from her remarks that are critical, and necessarily require considerable attention," . . . and "such complete mastery of what has occurred in this country, and of the great, important subjects of state policy, foreign and domestic, for the last thirty years," is possessed by the queen, that "he must be a wise man who could not profit by her judgment and experience."[1]

Formation of opinion by the sovereign.

Adverting to a point referred to in Earl Granville's speech, in 1871, above cited, and discussing the delicate constitutional question involved in the peculiar relations occupied, as well by Baron Stockmar and by the prince consort, in their lifetime, towards the Throne, Mr. Gladstone — speaking with the weight which belongs to his position as an ex-prime-minister, and with the precision which distinguishes his utterances upon public questions — claims for the sovereign, liberty to seek for information, to assist her own judgment, from every available source at her command. He says, "it does not seem easy to limit the sovereign's right of taking friendly counsel, by any absolute rule, to the case of a husband. If it is the queen's duty to form a judgment upon important proposals submitted to her by her ministers, she has an indisputable right to the use of all instruments which will enable her to discharge that duty with effect; subject always, and subject only, to the one vital condition that they do not disturb the relation, on which the whole machinery of the Constitution hinges, between those ministers and the queen. She cannot, therefore, as a rule, legitimately consult in private on political matters with the party in opposi-

[1] Speech at Hughendon, on Sept. 26, 1871. Remarkable examples of judicious and efficacious criticism upon ministerial measures, submitted for the consideration and approval of her Majesty, are cited in Martin's Life of the Prince Consort, vol. iv. pp. 78, 88, 90, 201–205, 284, 310, 486.

tion to the government of the day; but she will have copious public means, in common with the rest of the nation, for knowing their general views, through Parliament and the press. She cannot consult at all, except in the strictest secrecy; for the doubts, the misgivings, the inquiries, which accompany all impartial deliberation in the mind of a sovereign as well as of a subject, and which would transpire in the course of promiscuous conversation, are not matters fit for exhibition to the world." Of such private and confidential counsellors, Prince Albert was a conspicuous and truly normal example; "and another, hardly less normal, was Baron Stockmar. Both of them observed, all along, the essential condition, without which their action would have been not only most perilous, but most mischievous. That is to say, they never affected or set up any separate province or authority of their own; never aimed at standing as an opaque medium between the sovereign and her constitutional advisers. In their legitimate place, they took up their position behind the queen; but not, so to speak, behind the Throne. They assisted her in arriving at her conclusions; but those conclusions, once adopted, were hers and hers alone. She, and she only, could be recognized by a minister as speaking for the monarch's office. The prince, lofty as was his position, and excellent as was his capacity, vanished as it were from view, and did not and could not carry, as towards them, a single ounce of substantive authority."[j]

Coinciding, unreservedly, in the caution conveyed in the foregoing extract, as to the need for the most scrupulous avoidance, on the part of the sovereign, of any communication with non-official persons, which would justify an imputation of a desire to revive the

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j Gladstone's Gleanings of Past Years, vol. i. pp. 72–74.

unconstitutional practices of a former reign; — when there was an influence behind the Throne, known as that of "the king's friends," [k] — and repudiating any attempt to disturb the harmonious relations which should always subsist between the Crown and its constitutional advisers, — we may nevertheless perceive, in the frank admission of the right of the sovereign to avail herself of all proper means to enlighten and inform her own judgment, how completely the independent position of the sovereign of Great Britain, under parliamentary government, is recognized by English statesmen. We may also learn from this argument that no obstacle should be interposed to prevent any legitimate endeavour, by the sovereign, to obtain all needful assistance to enable her to fulfil her constitutional functions to the best advantage. The possible abuse of such freedom of action, in any given case, would be effectually restrained by the equally independent attitude of ministers towards the Crown; by their liberty to accept or to reject the ultimate conclusions of the sovereign upon all public questions; and by the consideration that they alone are held responsible to Parliament and to the nation for every act of state, and for everything which is done in the name of the Crown.

Independent position of the sovereign.

Bearing in mind the weight of responsibility which devolves upon the sovereign, personally, in the fulfilment of the onerous functions of royalty, it is manifest that a constitutional monarch "should be, if possible, the best informed person in the empire, as to the progress of political events, and the current of political opinion, both at home and abroad." "Ministers change, and when they go out of office lose the means of access to the best information, which they had formerly at

Value of the sovereign's office.

[k] See Todd, Parl. Govt. vol. i. p. 49.

command. The sovereign remains, and to him this information is always open." Moreover, "the most patriotic minister has to think of his party. His judgment, therefore, is often insensibly warped by party considerations. Not so the constitutional sovereign, who is exposed to no such disturbing agency. As the permanent head of the nation, he has only to consider what is best for its welfare and its honour; and his accumulated knowledge and experience, and his calm and practised judgment, are always available, in council, to the ministry for the time, without distinction of party."[1]

A constitutional ruler is, in fact, the permanent president of his own ministry; with liberty to share in the initiation, as well as in the maturing of public measures: provided only, that he does not limit the right of his ministers to deliberate, in private, before submitting for his approval their conclusions in council; and that they, on their part, are equally careful to afford to their sovereign an opportunity of exercising an independent judgment upon whatever advice they may tender for his acceptance.

In subjecting that advice to the scrutiny of a mind intent only upon promoting the public good, an experienced and sagacious sovereign is able (should the necessity unfortunately arise) to detect and rebuke selfish and unworthy aims, unmask the character of measures which may have been prompted by party motives rather than by a regard for the interests of the state, and exert, towards his ministers, on the public behalf, a healthy moral suasion, capable of correcting the injurious operation of partisan or sectional influences.

As Earl Grey has pointed out, in his admirable Essay

[1] Prince Albert's Memorandum, in Martin's Life of the Prince Consort, vol. ii. p. 159.

on Parliamentary Government, the obligation imposed upon the sovereign's ministers that they should obtain the direct sanction of the Crown for all their most important measures is a safeguard against abuse. "The Crown, it is true, seldom refuses to act upon advice deliberately pressed upon it by its servants, nor could it do so frequently without creating great inconvenience. But the sovereigns of this country may, and generally have, exercised much influence over the conduct of the government; and in extreme cases the power of the Crown to refuse its consent to what is proposed by its servants may be used with the greatest benefit to the nation." [m]

Safeguards against abuse of ministerial power,

Should it be needful for the sovereign to proceed to extremity, and reject the advice of his ministers, upon a particular occasion, it is for them to consider whether they will defer to the judgment of their sovereign, or insist upon their own opinion; and as a last resort they must decide whether they will yield the point of difference, or tender their resignations. For a minister, in such a position, "is bound either to obey the Crown, or to leave to the Crown that full liberty which the Crown must possess of no longer continuing that minister in office." [n]

or of royal authority.

In such an emergency, of course, the personal will and opinions of the sovereign are, for the time, apparent and predominant. But these occasions are of rare occurrence in the practical operation of parliamentary government. And when they do happen, all possible abuse is prevented by the necessity which then arises for the sovereign to find other advisers, who are willing to accept his views, and become responsible for them to Parliament and to the country. Should he fail in this endeavour, then comes into operation one of those salu-

[m] Grey, Parl. Govt. (ed. 1864) p. 5.
[n] Lord John Russell, Hansard's Debates, vol. cxix. p. 90.

tary checks, which the practice of the Constitution has imposed upon the exercise of the royal prerogative, and the sovereign is compelled to abandon a line of conduct for which he cannot find any statesmen who are willing to become responsible.

Prerogative of dissolution.

But if, in the question at issue between the sovereign and his ministers, those ministers are sustained by a majority in the Commons, House of Parliament, or are in the enjoyment of the confidence of that house upon their general policy, it is still open to the Crown to appeal to the country. In order that the sovereign may be able to appeal, in a constitutional manner, from the advice of his ministers, and from the expressed approval of the ministerial policy by the popular chamber, recourse must be had to the prerogative of dissolution. It is true that this prerogative, like all other acts of sovereignty, is ordinarily exercised upon the advice of ministers, for the purpose of determining an issue between themselves and the House of Commons. But it may suitably be resorted to by the sovereign, after the resignation or dismissal of ministers whose advice the sovereign has been unable to accept, or whose policy and public conduct the sovereign has ceased to approve. This reserved power is inherent in the Crown, in the English Constitution: although it can only be constitutionally invoked upon grave necessity, and for reasons which are capable of being explained and justified to Parliament. And, as a security against arbitrary or unreasonable action on the part of the sovereign, it is needful that a new administration should first be formed, who are willing to assume responsibility for the action of the Crown in the dismissal or resignation of their predecessors; and for any consequent appeal to the constituencies. And, furthermore, that there should be a reasonable ground for believing that, upon the question involved in the

change of administration, the existing House of Commons does not correctly represent the opinions and wishes of the nation.[o]

"The sovereign cannot, indeed, impose a policy, either upon his minister or his Parliament, but he can dismiss his minister, and he can appeal to the country against the judgment of Parliament. George III. was strictly within his rights when he dismissed the Coalition [both in 1784 and in 1807]. William IV. was equally within his rights when he dismissed Lord Melbourne, and appealed to the country. In these several cases a great question of policy was raised, and determined by competent authority. In the one case [or, rather, in the first two cases], the action of the king was confirmed by the nation; in the other, it was reversed. Everything was done constitutionally and in order." [p]

Differences between ministers and the Crown.

Differences of opinion, between the sovereign and his constitutional advisers, upon minor matters, are easily susceptible of adjustment, by concession or compromise. But vital and essential disagreement must inevitably result in a surrender of the question at issue, or in a change of ministers. And the practical obligation, which the Crown thereby incurs, of finding a ministry who are willing to assume full responsibility for the policy which occasioned the transfer of power to themselves, and the necessity for a ratification of that policy by the newly elected House of Commons, will always suffice to restrain the Crown from an undue exercise of prerogative in this direction; and from the endeavour to impress the personal will of the sovereign upon the government of the empire, where that will is not sustained and approved, in the last resort, by public opinion and national consent.

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[o] See Todd, Parl. Govt. vol. i. p. 223: vol. ii. p. 405 *et seq.*

[p] Edinburgh Review, July, 1878, p. 274, and see Mr. Gladstone's remarks in his Gleanings of Past Years, vol. i. p. 231.

Ample security is thus obtained that no changes of administration will be effected by the intervention of the Crown, but such as would ultimately commend themselves to the judgment of Parliament.

The right of a sovereign to dismiss his ministers is unquestionable; but that right should be exercised solely in the interests of the state, and on grounds which can be justified to Parliament. By the operation of this principle, the personal interference of the sovereign in state affairs is restrained within appropriate limits. It is prevented from assuming an arbitrary or self-willed aspect, and is rendered constitutional and beneficent.

Limitations on the action of the Crown.

Thus far, we have been endeavouring to ascertain the exact limits within which, in the constitutional monarchy of Great Britain, the Crown is competent to act, in accepting or rejecting the advice of ministers who are responsible to Parliament for the government of the empire. We have considered the circumstances under which the sovereign would be justified in withholding his consent from recommendations submitted for his approval, and the ultimate consequences of such disagreement. And we have arrived at the conclusion that, under parliamentary government, the national will, as conveyed to the sovereign through ministers in whom Parliament, and particularly the House of Commons, has placed its confidence, must finally and absolutely prevail.

The unqualified acceptance and cordial recognition of this principle, by the occupants of the throne, since the constitutional system of England has assumed its present shape, have contributed to produce the best understanding between the sovereign and Parliament without hindering the exercise of the rightful influence of the monarch in the conduct of public affairs.

On the one hand, the sovereign supports frankly and

Interaction between the Crown and its advisers.

honourably, and with all his might, the ministry for the time being, so long as it commands a majority in the House of Commons, and administers the government with integrity, for the welfare of the nation. Elevated above the blinding influences of party, and intent only upon promoting the public good, the sovereign never ceases to influence, by opinion or suggestion, the direction of the state. And to this end he is free to avail himself of all the opportunities afforded by his exalted station and eminent advantages. By suggestion or remonstrance, by impartial advice, and by enlightened criticism, proceeding from a mind that should be richly stored with knowledge and experience upon all affairs of state, or questions of public policy, that might at any time demand consideration or settlement, the influence of the monarch may be legitimately exercised and expressed. But the final conclusion of the matter must rest with the minister, upon whom devolves responsibility to Parliament for every act of executive authority.

Unreserved application of ministerial responsibility.

On the other hand, it is in the highest degree unwarrantable to assume that any exception exists to the operation of the constitutional rule which requires that the ministers of the Crown should be held responsible for the performance, by the sovereign, of all acts of state. It is obviously impossible to require responsibility where power has not been previously entrusted. Accordingly, an endeavour to exempt from the operation of this rule the exercise of any prerogative, or the fulfilment of any function of royalty, would be a violation of the first principles of parliamentary government. The prerogatives of the Crown in relation to the army and navy, and in the direction of the foreign policy of the empire, were at first, and for a time, practically excluded from ministerial control; but these monarchical functions gradually became subject to the

supervision of ministers:[q] and it is now obvious that any attempt on the part of the sovereign to retain in his own hands power, in respect to military administration or diplomacy, would be as inconsistent with constitutional usage as would be the personal and direct interference by the sovereign in domestic affairs. In all acts of government, the ministers of the Crown are required to assume, on behalf of and with the consent of the sovereign, the burden of personal power, and thereby relieve the Crown of all personal responsibility. Even in his choice of a first minister, which has been termed "the only personal act the King of England has to perform,"[r] that choice is practically influenced by the necessity for its being confirmed by the approbation of Parliament: so that, in a constitutional point of view, so universal is this principle that "there is not a moment in the king's life, from his accession to his demise, during which there is not some one responsible to Parliament for his public conduct; and 'there can be no exercise of the Crown's authority for which it must not find some minister willing to make himself responsible.'"[s]

The personal irresponsibility of the sovereign, and

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[q] See Todd, Parl. Govt. vol. i. pp. 44, 56.

[r] By the Duke of Wellington: see Colchester Diary, vol. iii. p. 501.

[s] Todd, vol. i. p. 170. The political acts of the sovereign during a ministerial interregnum are no exceptions to this rule. When Sir Robert Peel took office, after the dismissal, by William IV. of the Melbourne administration, he "accepted the responsibility of everything that had been done in the interval between his accession to office and the dismissal" of his predecessor, thereby proving that not even in such an extreme case "could the Crown itself commit an act which could be the subject of censure or blame." (See Mr. Courtney's speech in Hans. Deb. vol. ccxlvi. p. 253.) The reasonableness of such a rule, as well as its necessity, cannot be questioned. "An incoming premier, in order to justify his own acceptance of office, must acquaint himself with the circumstances in which the offer is made, including all that has been done since the office became vacant; and his acceptance of office thus becomes a guarantee to the nation, that to the best of his judgment and conscience everything has been rightly done." (Henry Dunckley, in Fortnightly Review, June 1879, p. 870.)

Irresponsibility of the sovereign.

his absolute immunity from the consequences of misgovernment, is a fixed principle in the English political system. "There is no provision in the law of the United Empire, or in the machinery of the Constitution, for calling the sovereign to account; and only in one solitary and improbable, but perfectly defined, case,—that of his submitting to the jurisdiction of the Pope,—is he deprived by statute of the throne. Setting aside that peculiar exception, the offspring of a necessity still freshly felt when it was made, the Constitution might seem to be founded on the belief of a real infallibility in its head."

The cabinet.

The counterpoise and correlative of this constitutional maxim is in another, no less important, which affixes upon the cabinet—in other words, upon the advisers and ministers of the Crown—the ultimate and unqualified "responsibility of deciding what shall be done in the Crown's name, in every branch of administration, and every department of policy, coupled only with the alternative of ceasing to be ministers, if what they may advisedly deem the requisite power of action be denied them." The political action of the monarch must invariably and "everywhere be mediate, and conditional upon the concurrence of confidential advisers." He cannot "assume or claim for himself final or preponderating, or even independent, power in any one department of state."

"The cabinet is the threefold hinge that connects together for action the British Constitution of King or Queen, Lords, and Commons. Upon it is concentrated the whole strain of the government, and it constitutes, from day to day, the true centre of gravity for the working system of the state, although the ultimate superiority of force resides in the representative chamber." And upon the cabinet "it devolves to provide that the House of Parliament shall loyally counsel and

serve the Crown, and that the Crown shall act strictly in accordance with its obligations to the nation." It is, therefore, incumbent upon ministers always to remember that they are charged with the defence and maintenance of the rights of the Crown under the British Constitution, and that it is their especial duty to protect and preserve intact, to the utmost of their power, the royal prerogative. Practically, ever since the commencement of the Reform movement, in 1830, the constitutional monarchy of England has been in danger, through the onward progress of democratic ideas, of being converted into a purely ministerial oligarchy; to the detriment, not only of the personal rights of the Crown in the body-politic, but also of those vital interests therein which are of national concern, and which it is the peculiar province of the sovereign to conserve. It is upon the fidelity of ministers to the principles of the Constitution, as well as upon their personal loyalty to the sovereign, that the nation must rely for the prevention of such a calamity. "This ring of responsible ministerial agency forms a fence around the person of the sovereign, which has thus far proved impregnable to all assaults.

Duty of ministers to the Crown.

"In the face of the country, the sovereign and the ministers are an absolute unity. The one may concede to the other: but the limits of concessions by the sovereign is at the point where he becomes willing to try the experiment of changing his government; and the limit of concession by the ministers is at the point where they become unwilling to bear, what in all circumstances they must bear while they remain ministers, the undivided responsibility of all that is done in the Crown's name."

"There is, indeed, one great and critical act, the responsibility for which falls momentarily or provisionally on the sovereign; it is the dismissal of an existing

Dismissal of ministers.

ministry, and the appointment of a new one." "Unconditionally entitled to dismiss the ministers, the sovereign can, of course, choose his own opportunity. He may defy the Parliament, if he can count upon the people. William IV., in the year 1834 [when he dismissed the government of Lord Melbourne], had neither Parliament nor people with him. His act was within the limits of the Constitution, for it was covered by the responsibility of the acceding ministry. But it reduced the liberal majority from a number considerably beyond three hundred to about thirty, and it constituted an exceptional, but very real and large, action on the politics of the country by the direct will of the king."

"But this power of dismissing a ministry at will, large as it may be under given circumstances, is neither the safest, nor the only power which, in the ordinary course of things, falls constitutionally to the personal share of the wearer of the Crown. He is entitled, on all subjects coming before the ministry, to knowledge and opportunities of discussion unlimited save by the iron necessities of business. Though decisions must ultimately conform to the sense of those who are to be responsible for them, yet their business is to inform and persuade the sovereign, not to overrule him. Were it possible for him, within the limits of human time and strength, to enter actively into all public transactions, he would be fully entitled to do so. What is actually submitted is supposed to be the most fruitful and important part, the cream of affairs. In the discussion of them, the monarch has more than one advantage over his advisers." "He may be therefore a weighty factor in all deliberations of state." The sovereign is, moreover, entitled to invite the consideration of ministers to any matter or question which may appear to the Crown to be deserving of atten-

Constitutional powers of the sovereign.

tion. This privilege is not to be regarded as warranting the initiation, by the sovereign, of questions of public policy, in derogation of the special functions and responsibility of the advisers of the Crown. The right to initiate, in the sense of dictation, would involve a claim to control or impair the right of free deliberation, and would savour too much of personal government. It is otherwise when the sovereign simply suggests to ministers topics or arguments, in relation to public affairs, to which their consideration is invited, without endeavouring to coerce their freedom of action or of deliberation thereon. If the ministry agree to carry out such suggestions, they must do so on condition of assuming entire responsibility for the same; for no responsibility can be attached to the Crown itself. After all, the power of the sovereign "spontaneously takes the form of influence; and the amount of it depends on a variety of circumstances, — on talent, experience, tact, weight of character, steady untiring industry, and habitual presence at the seat of government. In proportion as any of these might fail, the real and legitimate influence of the monarch over the course of affairs would diminish; in proportion as they attain to fuller action, it would increase. It is a moral, not a coercive, influence. It operates through the will and reason of the ministry, not over or against them."

Supremacy of the House of Commons.

Finally, "it is a cardinal axiom of the modern British Constitution, that the House of Commons is the greatest of the powers of the state." It is to the House of Commons that every act of government, performed by responsible ministers in the name and on behalf of the Crown, must be explained and justified, and by them that it must be ultimately approved. And "the sole appeal from the verdict of the house is a rightful ap-

peal to those from whom it received its commission."[t]

Queen Victoria.

The strict adherence to the maxims of parliamentary government which has characterized the conduct of her Majesty Queen Victoria, since her accession to the throne, is too well known to need remark in these pages. But it fortunately happens that the public has been placed in possession of her Majesty's own ideas of her duty as a constitutional sovereign. Writing to the Emperor Napoleon III., in explanation of the difference between the English and French systems of government, the Queen observes: "I am bound by certain rules and usages. I have no uncontrolled power of decision. I must adopt the advice of a council of responsible ministers, and these ministers have to meet and to agree on a course of action, after having arrived at a joint conviction of its justice and utility. They have, at the same time, to take care that the steps which they wish to take are not only in accordance with the best interests of the country, but also such that they can be explained to and defended in Parliament, and that their fitness may be brought home to the conviction of the nation." In this system, her Majesty proceeds to point out, she has an advantage of which the Emperor of the French is deprived: "I can allow my policy free scope to work out its own consequences, certain of the steady and consistent support of my own people, who, having had a share in determining my policy, feel themselves to be identified with it."[u]

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[t] The quotations, in the seven preceding paragraphs, are taken from a paper by the Rt. Hon. W. E. Gladstone with the fanciful title of "Kin beyond the Sea," first published in the "North American Review" for Sept.–Oct. 1878, (and afterwards included in his "Gleanings of Past Years," vol. i. pp. 203–248) which met my eye after the previous pages were written. The intrinsic value of Mr. Gladstone's observations upon the question under discussion, and their complete accord with the opinions advanced in the text, induced me to epitomize them, in this form, as corroborating my own exposition of the subject. The whole paper is deserving of careful study.

[u] Martin, Life of the Prince Consort, vol. iii. pp. 397, 398.

From the secrecy which properly enshrines the intercourse between the Crown and its advisers, it rarely happens that the opinions or conduct of the sovereign in governmental matters become known to the public at large. Accordingly, those functions of the Crown which are most beneficial in their operation are apt to be undervalued; because, whilst strictly constitutional, they are hidden from the public eye. But no attentive reader of English political history, since the accession of Queen Victoria, can fail to have noted frequent instances of timely action, wise interposition, or valuable suggestion upon affairs of state, which have emanated from her Most Gracious Majesty or her consort; and which, being approved and endorsed by the existing administration, have contributed largely to the promotion of the public good. In Martin's Life of Prince Albert, especially, repeated mention is made of valuable memorandums upon public questions, prepared by the queen, or by the prince on her behalf, and submitted for the consideration of ministers. These papers were often of great service, and sometimes contained the germs of practical administrative reforms, which, sooner or later, were advantageously accomplished. And this was in addition to the unceasing exercise, by the sovereign, of that "constitutional criticism" over all state papers, already referred to; and which on one memorable occasion (during "the Trent affair" in 1861) led to the modification of terms of remonstrance addressed in a despatch to the United States government, and largely contributed to avert a threatened rupture between Great Britain and America.[v]

These facts and considerations may suffice to explain the actual position and powers of a British sovereign, under parliamentary government.

[v] Martin, Life of the Prince Consort, vol. ii. pp. 433–445; vol. iii. pp. 146, 382.

CHAPTER II.

THE APPLICATION OF PARLIAMENTARY GOVERNMENT TO COLONIAL INSTITUTIONS.

LET us now turn our attention to the colonies of Great Britain, and briefly examine the reasons which led to the introduction therein of the political system of the mother country. This will lead us to consider the manner in which parliamentary government has been applied to colonial institutions.

Old system of colonial government.

Until within the past forty years, the administration of public affairs in such of the British Colonies as were in the possession of representative institutions was undeniably in an unsatisfactory state. An irresponsible system of government prevailed therein, which was analogous to the method of administration in England under the personal rule of the house of Stuart.

Under this polity, the responsibility of government was centred, absolutely and exclusively, in the governor. He was, indeed, assisted by an executive council, nominated by the Crown, and selected from the principal administrative officers in the colony. But these functionaries, though accountable to the Crown for the faithful discharge of their respective official duties, were not answerable, either individually or collectively, for the result of the advice they might offer to the governor. He consulted them at his own discretion; and the responsibility of government in no way devolved upon them. This rested solely upon the governor; and

he was responsible only to the supreme authority of the empire.[a]

Defects of the old colonial system.

Complaints of misgovernment, and of the want of harmony between the executive and legislative bodies, in the principal colonies of Great Britain, were frequent; and the necessity for some reform in colonial administration was obvious and unquestionable, though the sagacity of British statesmen was severely tried to find an adequate solution of this perplexing and difficult problem. It was during the administration of Lord Melbourne (in the years 1835 to 1841) that a remedy was first devised for colonial grievances, whereby the prevailing discontents in the colonies were removed. This was effected by the wise adaptation of British constitutional principles to colonial polity; and by the gradual introduction into each dependency, according to its political condition and circumstances, of the principle of self-government in all matters of local concern, coupled with the unreserved application, in regard to the same, of the constitutional maxim of ministerial responsibility to the colonial assembly.[b]

Introduction of responsible government.

During the period of transition from the paternal government of the colonial office in London to the establishment of self-government in British North America and in Australia, the office of her Majesty's secretary of state for the colonies was held, first, by Lord John Russell, from 1839 to 1841; and afterwards in succession, from 1841 to 1852, by Lord Stanley, by Mr. Gladstone, and by Earl Grey. So that all these eminent statesmen, representing both political parties, shared in the work of extending to the most distant parts of the empire, the full benefits of the British Constitution.

The change to "responsible government" was one

[a] Votes and Proc. Leg. Assembly, New South Wales, 1859–60, vol. i. p. 1130.

[b] Mills, Colonial Constitutions, Introd. p. xlviii.

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which required no legislative process to effect or ratify it. It scarcely necessitated any alteration in the governor's "Commission and Instructions;" although, as the new system has matured, these organic instruments of colonial government have been occasionally modified, so as to bring them into more perfect accord with the existing polity. The only definite change in the royal instructions upon the introduction of responsible government into a colony was to provide that henceforth the members of the Executive Council should be appointed with the understanding that, upon their ceasing to retain the confidence of the popular branch of the legislature, they must resign office. But, in connection with this virtual transfer of power from an irresponsible to a responsible executive, the imperial government surrendered the exercise of local patronage; and appointments to places of power and profit in the colony passed from the hands of the governor and the home authorities into those of the Executive Council, or "responsible" ministry.

Local self-government.

At the first introduction of this new method of administration, it was frequently necessary for the secretary of state to advise, admonish, and instruct the queen's representative in the several colonies, in the application of the novel principles of parliamentary government to colonial use; and to assist in determining controversies between the governor and his advisers, or between the local executive and the legislative bodies. But gradually, as the colonies which were intrusted with powers of local self-government began to appreciate the value of the gift and the obligations which it entailed upon them to use their freedom with wisdom and mutual forbearance, it has become the polity of the imperial government to withdraw from any interference with colonial legislation and administration in matters of local concern.

The mother country, however, still retains the right to interpose, — either by advice, remonstrance, or, if need be, by active measures of control, — whenever the powers of self-government are attempted to be exercised, by any colony, in an unlawful, unconstitutional, or oppressive manner. "The whole question of the relations of the imperial authority to the representative colonies is one of great difficulty and delicacy. It requires consummate prudence and statesmanship to reconcile the metropolitan supremacy with the worthy spirit of colonial independence. As a matter of abstract right, the mother country has never parted with the claim of ultimate, supreme authority for the imperial legislature. If it did so, it would dissolve the imperial tie, and convert the colonies into foreign and independent states." [c]

Imperial control.

The only instance wherein it would seem that imperial intervention and control had been formally surrendered is in the case of the colonies which are now included as provinces in the Dominion of Canada, and in reference, especially, to local legislation in those provinces. By the British North America Act, 1867, section 90, it is provided that the ultimate authority for determining upon the expediency of giving or withholding the Royal assent to bills passed by the provincial legislatures, shall be the governor-general of Canada, and not the queen. This declaration of the Imperial Parliament has been construed by the imperial government itself to be a virtual relinquishment of the right to interfere with provincial legislation under any circumstances; and as vesting in the Dominion governor in council an absolute and unlimited responsibility for deciding thereupon.[d]

How exercised in Canada.

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[c] "Historicus" (Sir W. Vernon-Harcourt) in the "London Times," 1 June, 1879, p. 10.

[d] See *post*, p. 330.

Adaptation of parliamentary government to an independent community.

And here it may be well to remark that the gradual relaxation, by the mother country, of the tie of political dependence on the central authority of the empire, in respect to any British colony, or even the actual sundering of connection between them, does not necessarily involve the overthrow or abandonment of the system of parliamentary government which, after the model of the parent state, has been established therein. That system might be suitably retained, on account of its obvious advantages, long after the control of the mother country has been relaxed, or even withdrawn.

But in order to secure to a colony the benefit of British institutions, after the relinquishment of the right to interfere with its local self-government, the limits of authority appropriate to the governor should be well defined and carefully secured. To ascertain those limits and to define such powers, we must study the complex phenomena of the British Constitution. In that admirable system, as settled by constitutional usage within the past fifty years, there is — as we have sought to show in the preceding pages — a practical recognition of the authority which appertains to the Crown in a limited monarchy; controlled by the unreserved assertion and exercise of the principles of ministerial responsibility, and of the ultimate supremacy of Parliament. These several principles must each be maintained inviolate, and in harmonious action, wherever it is sought to perpetuate, in any land under whatsoever political conditions, the blessings of constitutional government. And, even in the supposable case of the amicable separation of a colony from the parent state, the superior advantages of possessing institutions based upon the stable foundation of a limited monarchy, and similar in principle to those of England, would naturally induce the young community to retain,

with as little alteration as possible, the most prominent features of a polity that has, for so many generations, preserved freedom without lawlessness to the British race.

These considerations have led to the present attempt to depict, in the first place, the actual position of the sovereign in connection with parliamentary institutions, in the mother country, and then to point out the corresponding position and functions of a constitutional governor, in self-governing communities within the limits of the British Empire.

Functions of a constitutional governor.

There is, no doubt, a general impression abroad, amongst persons who have not bestowed much thought upon the matter, that the governor of a British colony, or province, is little less than an ornamental appendage to our political system; necessary, to fulfil certain ceremonial duties; useful, to represent the community at large upon public occasions, or as the mouth-piece of public sentiment; and of unquestionable service to society, in the discharge of a dignified and liberal hospitality, to be freely extended to whoever may be a suitable recipient of viceregal favour, without distinction of creed or party.

But if this were all that we had a right to expect from a governor, it would be quite insufficient to justify the pre-eminence which is attached to his office as a representative of the Crown. Without underrating for a moment the incalculable advantages which society and the state derive from the fulfilment of the duties above enumerated, by men in exalted positions, — assisted by the ladies of their household, — such ceremonial observances and festivities might, without much loss of dignity or efficiency, be assigned to cabinet ministers, and other prominent officers of government, of adequate rank and fortune.

The governor of a British dependency, however,

within the limits prescribed by his commission, is essentially a political officer; and the necessity for his office must be estimated according to the gravity and importance of the duties allotted to him in the body-politic. If his duties in that relation are mainly formal, and his political functions of small account, the continuance of the office will be apt to be regarded as an expensive luxury, which cannot be justified by an economical people, or endured in an age which is intolerant of shams.

But if, on the other hand, a constitutional governor is actually invested with an authority which is eminently capable of being employed for the public good; and if he fills a place of trust, wherein he is competent, upon fitting occasions, to interpose to guard and protect the political liberties of those over whom he presides, — then it becomes the interest as well as the duty of all good citizens to respect his office, and to strengthen and uphold him in the exercise of its lawful prerogatives.

The gradual but vital change which the present generation has witnessed in the relations of executive authority, in the self-governing colonies of the British empire, to the people, in their local legislatures, has led to the impression that no political duties remain to be fulfilled by a constitutional governor, save only such as are of a formal and ceremonial kind.

This idea has been fostered by the wide-spread but most erroneous assumption that the sovereign herself, whose commission the governor holds, has ceased to be to any appreciable extent a power in the state. We have shown the falsity of this belief, and have endeavored to point out some of the most prominent benefits which accrue to a nation from the existence and operation of the monarchical element in its political constitution.

Colonial institutions.

In the various dependencies of the British empire which are in the enjoyment of representative institutions, their respective constitutions are all, with more or less distinctness, framed on the model of the parent state. The sovereign, the House of Lords, and the House of Commons, are severally reproduced, in so far as the altered circumstances of colonial dependence will permit, by a governor, who represents the Crown; by a legislative council or senate, — either nominated by the Crown or chosen by election, — which is intended to exercise "the legislative functions of the House of Lords;" and by a popular chamber, which possesses, within the colony, "the rights and powers of the House of Commons." [e]

The governor.

In every British colony of adequate extent and importance, the personal authority of the Crown is represented and monarchical functions discharged by a governor, who is nominated to his office by the sovereign in council, and appointed by letters-patent under the Great Seal; his jurisdiction and powers being defined by the terms of his commission, and by the royal instructions which accompany the same.

A governor so appointed is empowered, by his commission, "to do and execute all things that shall belong" to his office, and be appropriate to the trust confided to him by the royal instructions,[f] then or afterwards to be communicated to him through one of her Majesty's principal secretaries of state, who is the consti-

[e] This distinction between the constitutional rights and powers of the two houses is taken from a formal definition of the constitution of Victoria, which was accepted by the Crown and by both houses of parliament in that colony. (Victoria Leg. Assembly Votes and Proc. **1877–78**, vol. i. pp. 192, 289.)

[f] The Royal Instructions are directly referred to in the British North America Act, **1867**, sec. 55, and in the South Africa Act, **1877**, as a part of the constitutional law, for the guidance of a governor. They are issued upon the responsibility of the ministers of the Crown, and especially of the secretary of state for the colonies.

tutional mouthpiece of the Crown. He is authorized to exercise the lawful powers and prerogatives of the Crown, in assembling, proroguing, and dissolving the colonial parliament; to give or withhold the royal assent to bills passed by the parliament; or to reserve them for the signification of the royal pleasure, pursuant to his instructions from the Crown. He is empowered to appoint to office all ministers of state, and other public officers in the colony, and upon sufficient cause to suspend or remove them from office. He is authorized, under certain restrictions, to administer the prerogative of mercy, by the reprieve or pardon of criminal offenders within his jurisdiction; and to remit fines and penalties due to the Crown. All moneys to be expended for the public service are issued from the treasury, under the governor's warrant. And furthermore, it is expressly declared that, "if any thing should happen which may be for the advantage or security of the colony, and is not provided for in the governor's commission and instructions, he may take order for the present therein." [g]

It is true that the governor of a colony is not a viceroy, and that unlimited sovereign authority is not delegated to him. He cannot exercise all the prerogatives of the Crown, but only such as are expressly or impliedly included within the scope of his commission. The lawful extent of a governor's powers has, in repeated instances, been ascertained and determined by courts of law.[h] Nevertheless, there is a general devolution, to every colonial governor, of so much of the authority of the Crown as may be necessary for the purpose of administering the government of the colony over which he is placed by the sovereign, whose

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[g] Col. Reg. 1879, c. 2.

[h] See Broom, Constitutional Law, pp. 623–650. And the Law Magazine (Nov. 1861), vol. 12, pp. 170–185.

office and authority he represents. Pursuant to his commission and the accompanying instructions, he becomes within the limits assigned to him the embodiment and expression of the monarchical element in the colonial polity, so far as that element can find a constitutional channel for its exercise under parliamentary government. The office of governor is as much a constituent part of the constitution, in every colony, as is that of either of the other branches of the local legislature. A constitutional governor is not merely the source and warrant of all executive authority within his jurisdiction: he is also the pledge and safeguard against all abuse of power, by whomsoever it may be proposed or manifested; and to this end, he is entrusted with the maintenance of certain rights and the performance of certain duties which are essential to the welfare of the whole community. And, while he may not encroach upon the rights and privileges of other portions of the body-politic, he is equally bound to preserve inviolate those which appertain to his own office; for they are a trust which he holds, in the name and on the behalf of the Crown, for the benefit of the people.

The governor.

Should a governor exceed his rightful powers, or commit any act to which exception could be justly taken, an appeal is always open to the sovereign, through the secretary of state,[1] and to the Imperial Parliament, which is the grand inquest of the nation for the redress of all grievances.

But a governor is not personally responsible to the colonial parliament or to any local tribunal; save only in respect to civil or criminal liability which he may have incurred for personal acts of wrong-doing committed while holding the royal commission, and wherein

[1] Col. Reg. 1879, c. 7, sec. 6.

the courts of law may be capable of affording redress or of awarding punishment.[j]

Reserved imperial authority.

Throughout the British empire, — even in colonies where self-government has been conceded to the fullest extent compatible with the maintenance of imperial supremacy, — there is a reservation of the paramount authority of Parliament, and of the right of every British subject to appeal to that tribunal. But while the ultimate control, alike over colonial and imperial administration, is vested by the Constitution in the Imperial Parliament, which is at all times ready to listen to complaints of an undue exercise of power on the part of any minister of the Crown, that supreme authority may be constitutionally invoked only in extreme cases, and enforced only when it is indispensably necessary to maintain the integrity of the empire.[k]

Moreover, certain prerogatives of the Crown are suitably reserved, in every colony, to the direct and immediate expression of the royal pleasure thereon. The powers so reserved differ, according to the position and circumstances of the particular colony; but they invariably include the abstract right of dealing with all colonial legislation, and of disallowing such acts as may be deemed objectionable, or in direct opposition to imperial policy.[l] Sometimes, colonial laws which, for defect in form or substance, might otherwise need to be disallowed, are remitted to the colony wherein they were

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[j] See Forsyth, Constitutional Cases, pp. 84–88; Haynes, Student's Leading Cases, pp. 15–23. And see the Imperial Act 11 William III. c. 12 (which is still in force), "to punish Governors of Plantations in this kingdom for crimes by them committed in the Plantations;" also, 42 Geo. III. c. 85; and the Act 13 Geo. III. c. 63, sec. 39. And see a memorandum by the Marquis of Normanby, governor of New Zealand, to the premier of the colony, dated June 17, 1878, in the New Zealand Gazette of June 21, 1878.

[k] See Secretary Cardwell's despatch to Governor Eyre, dated Dec. 1, 1865, in Commons Papers (on Jamaica), 1866, vol. li. p. 250; Forsyth's Cases, p. 21.

[l] Col. Reg. 1878, c. 3.

enacted, accompanied by a despatch from the secretary of state for the colonies, suggesting their modification or repeal.[m] The judicial prerogative of the Crown, or the right of determining in the last resort all controversies between subjects in every part of the empire, has been universally reserved, as being one of the most stable safeguards, and most beneficial acts of sovereign power.[n] The administration of the prerogatives of mercy and of honour is either reserved to the Crown or is made the subject of special and limited delegation. Finally, all questions which involve the relations of British dependencies, and consequently of the United Kingdom itself, with foreign states, — the formation of treaties and alliances; the naturalization of aliens; the declaration of war or peace, and, by consequence, all regulations affecting the disposition or control of imperial military forces, — are, invariably and for obvious reasons, reserved for the direction and control of the parent state.[o]

The governor.

The governor of every British colony, as representing the authority of the Crown therein, is appropriately entrusted with the exercise of all lawful powers of control over all public officers, whether civil or military, within the limits of his government; and he is ordinarily nominated as captain-general, commander-in-chief, and vice-admiral therein.[p] But, though he may be styled commander-in-chief, he is not thereby invested, without a special appointment from the sovereign, with the command of the regular forces in the colony. In military matters, he must act in concert with the officer in command of the forces, who, in the event of the colony being invaded or assailed by a fo-

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[m] Mills, Col. Const. p. 36.
[n] *Ibid.* p. 47.
[o] *Ibid.* p. 48.
[p] *Ibid.* pp. 24–26. And see the terms of the several commissions and letters-patent constituting the office of governor in different colonies.

reign enemy, and becoming the scene of active military operations, assumes the entire military control of the troops.[q]

In colonies possessing responsible government, the ordinary control over civil servants — including their nomination, appointment, and removal from office — is practically vested in the hands of the local administration. Appointments are made, in such colonies, by the governor, with the advice of his executive council; and they do not require confirmation by the imperial government. And the governor, acting by and with his council, possesses the absolute right of suspending or dismissing all public servants who hold office during pleasure.[r] While the governor is free to suggest or remonstrate with his ministers, when requested to give the sanction of the Crown in cases of appointments or removals from office, it is only under very exceptional circumstances that he would be justified in disregarding the recommendation of his responsible advisers on such subjects.[s]

In the case of offices not of a political nature, it is, however, highly inexpedient, improper, and at variance with the constitutional practice of the mother country to remove individuals from office from political motives, or for any cause other than incompetency or official misconduct.[t] But an active interference in political contests, in opposition to the existing administration,

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[q] Col. Reg. 1879, secs. 10–20. And see *post*, p. 279.

[r] *Ibid.* 1879, secs. 4, 30, 63.

[s] Hon. E. B. Chandler's case (New Brunswick Assembly Journals, **1862**, pp. 192–196). See Governor Musgrave's message to the Legislative Council of South Australia, in reply to their address remonstrating against a certain appointment, in alleged violation of the Civil Service Act. (South Australia Parl. Proceed. **1875**, vol. i. p. 27.) And see the case of the civil servants dismissed in Victoria, in 1878, and the rebuke addressed by the imperial government to Governor Bowen, for sanctioning these dismissals. (*Post*, p. 507.)

[t] Despatch of the Duke of Newcastle to Governor Gordon, of Feb. 22, 1862. (New Brunswick Assembly Journals, **1862**, p. 192.)

would constitute a sufficient offence to justify the removal of any public officer.[u]

Governor and council.

In colonies wherein responsible government is established, the administration of public affairs is conducted, as elsewhere, through the agency of a governor and an executive council. But, while the outward organization remains unchanged, effect is usually given to the system of ministerial responsibility, when it is introduced into any colony, by means of special instructions, authorizing the same, which are transmitted to the governor by her Majesty's colonial secretary.[v]

As a practical result of such instructions, it is customary to provide that, under the new polity, when formally introduced into a colony, the executive council shall not be assembled, as under the old system, for the purpose of consultation and discussion with the governor, but that ministers shall be at liberty to deliberate on all questions of ministerial policy in private, after the example of the cabinet council in England; and that the executive council, privy council, or by whatsoever name the official council of ministers is known, shall only be convened for purposes required by law, or when it may be necessary to hold consultations unconnected with party politics.[w]

The practice in Canada, for a number of years, has been that the business in council is done in the absence of the governor. On very exceptional occasions, the

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[u] Earl Grey's despatch to the governor of Nova Scotia, of Nov. 13, 1848; and Duke of Newcastle's despatch, in 1860, in the case of Mr. P. S. Hamilton, of Nova Scotia, cited in Todd, Parl. Govt. vol. i. p. 391, *n*. In South Australia, officers of the civil service are expressly enjoined, by regulation, under the Civil Service Act, to take no part in political affairs beyond the exercise of the elective franchise. (S. Austral. Assembly Votes and Proc. **1877**, p. 59.)

[v] See *ante*, p. 26.

[w] Commons Papers, **1860**, vol. xlvi. p. 244. In the early days of responsible government in Canada, the governor used to debate with his ministers in council; but this irregular proceeding was soon abandoned. (Walrond's Letters of Lord Elgin, p. 116.)

governor may preside; but these would occur only at intervals of years, and would probably be for the purpose of taking a formal decision on some extraordinary matter, and not for deliberation thereon. The mode in which business is done is by report to the governor of the recommendations of the council sitting as a committee, sent to the governor for his consideration, discussed, when necessary, between the governor and the premier, and made operative by being marked "approved" by the governor. This system is in accordance with constitutional principles.[x] But every governor is invested by the royal instructions with ample powers that "if, in any case," he should "see sufficient cause to dissent from the opinion of the major part or of the whole" of his executive council, or privy council, as the case may be," it shall be competent" for him to execute the functions and authorities vested in him by his commission from the Crown, and by his instructions, as aforesaid, "in opposition to such their opinion;" provided only that it shall be always competent to any member of his council to record at length, on the council minutes, "the grounds and reasons of any advice or opinion he may give upon any question brought under the consideration of such council."[y]

Responsible government.

The result of the great constitutional reform in colonial government which was effected by the introduction of "responsible government," is briefly this: that, while the governor of a colony under the parliamentary system remains, as formerly, personally responsible to the Crown, through the secretary of state, for the faithful and efficient discharge of his

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[x] Report of Mr. Edward Blake, minister of justice for Canada, Sept. 5, 1876, in Canada Sess. Papers, **1877**, no. 13, p. 8.

[y] See the ordinary commissions and instructions to governors, cited *post*, p. 85.

high trust, in obedience to the instructions conveyed to him for his guidance, the members of his executive council, who are his constitutional advisers, now share — and, so far as the colony is concerned, entirely assume — the responsibility, which previously devolved upon the governor exclusively, of framing the policy of the local government; of embodying the same in measures for the sanction of the legislature; of making appointments to office; and of superintending and controlling all public affairs through the appropriate departments of state in the colony.

The responsibility of the local administration for all acts of government is absolute and unqualified. But it is essentially a responsibility to the legislature, — and especially to the popular chamber thereof, — whilst the responsibility of the governor is solely to the Crown. It is indispensable to the welfare and good government of the colony that these separate responsibilities should never be permitted to clash; and the best guarantee against the possible occurrence of such an event is to be found in the continued existence of the most cordial and unreserved harmony and co-operation between the governor and his advisers.[z]

It is undoubtedly incumbent upon a constitutional governor to co-operate honourably, though in no partisan spirit, with his ministers for the time being, and to accept their advice on all public matters, unless he should see sufficient cause to justify him in refusing to concur in their recommendations. On the other hand, every objection raised by the governor to a policy or proceeding submitted for his approval, should be considered by his ministers with the deference and respect due to his office. In the free interchange of opinion

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[z] See New South Wales Leg. Assembly Votes and Proceed. 1859–60, vol. i. p. 1130.

between those who are equally concerned in the endeavour to promote the public good, it is reasonable to suppose that a unity of sentiment would ultimately prevail.

Reserved powers of a constitutional governor.

But, if it should prove otherwise, it must be always remembered that the governor is not bound to comply with the advice of his ministers. In the event of a recommendation being submitted to him that involved a breach of the law, or that was contrary to express instructions received from the Crown, he would be obliged to refuse to sanction it. For no violation of the law could be excused on the plea that it was advised by others; the governor must be held personally answerable for the same to the imperial authority, or to a court of competent jurisdiction, taking cognizance thereof; unless, indeed, the case should have been one of such urgent and imperative necessity as would warrant a departure from the laws of the land, and would justify a subsequent application to Parliament for an act of indemnity.

In the ordinary exercise of his constitutional discretion, a governor is unquestionably competent to reject the advice of his ministers, whenever that advice should seem to him to be adverse to the public welfare, or of an injurious tendency. In such a contingency, if no compromise be possible, either the resignation or the dismissal of ministers must ensue. The governor must then seek for other advisers. If he succeeds in obtaining a new ministry, who are willing to become responsible for his act which led to the retirement of their predecessors, and if the new administration is sustained by the popular chamber, there is no further difficulty. But if the local assembly refuse to give their confidence to the incoming ministry, and if a dissolution of parliament (should that take place) fails to give them adequate support, the governor

must either recede from the position he had taken in the first instance or retire from office.[a]

The governor.

Under certain circumstances, — as where the point in dispute involved a question of imperial policy, — the governor would be entitled to invoke the interposition of her Majesty's secretary of state for the colonies, before surrendering the contest. It is, in fact, his duty invariably to communicate to the secretary of state any difference of opinion between himself and his ministers which involves the question of his responsibility to the Crown, in connection with the responsibility of his ministers to the local parliament. If the Crown should decide against the governor, he must yield the point in dispute or resign. If the Crown upholds him, the contest is immediately transferred from the agent to the principal; from the governor to the imperial authority, from whence his powers are derived. In no case is a governor to be held personally responsible to a local parliament for his policy or conduct in office.[b]

Constitutional usage will not permit of any attempt to affix upon the governor of a colony, by either branch of the colonial legislature, a direct personal responsibility for public acts of government: all such responsibility should be assumed by his ministers.[c] Neither is it constitutional for a local legislature to pass a resolution of censure upon a governor for his conduct in office, "unless as preliminary to an address to the Crown to remove an obnoxious representative."[d]

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[a] See *post*, c. 4, pt. 3; and especially *post*, p. 439.

[b] See despatches between the Marquis of Normanby (governor of New Zealand), and the secretary of state for the colonies, in New Zealand Gazette, 1878, pp. 909, 920. And see Hearn, Government of England, p. 128.

[c] See *post*, p. (c. 4, pt. 3, p. 20.)

[d] Governor Frere, in Commons Papers, **1878**, C. 2079, p. 241; New South Wales Leg. Assembly Votes, **1876-77**, vol. i. pp. 25, 273. For the form of a vote of censure upon a governor, in conjunction with a proposed address for his recall, see *ibid.* p. 517.

On 29th of May, 1878, in the House of Assembly of the Cape of Good Hope, the Speaker called attention to certain paragraphs in a motion submitted for the consideration of the House, and ruled that they could not be put from the chair, as they involved a direct censure upon his Excellency the Governor. The motion was accordingly withdrawn.[e]

The executive council, or cabinet.

Authority to appoint, and to remove from office, an unlimited number of members of the executive council, — "with reference to the exigencies of representative government," — is vested in the governor of every colony wherein responsible government has been established, without the necessity for obtaining the concurrence of the home government; and it is understood that councillors who have lost the confidence of the local legislature will tender their resignation to the governor, or discontinue the practical exercise of their functions, in analogy with the usage prevailing in the United Kingdom.[f]

As a rule, all outgoing ministers should resign their seats in the executive council, or be formally removed from that body. Hitherto, it has not been deemed expedient to retain ex-cabinet ministers on the list of colonial executive councils, merely as honorary members and in analogy to imperial practice. An organization resembling the imperial privy council, and liable to be convened on special occasions, or for ceremonial purposes, is not ordinarily required in colonial institutions, which, at the outset at least, should be as simple and practical as possible.[g] But, in the Dominion of Canada, the practice prevails that "the queen's privy council for Canada" — the members of which are appointed by the governor-general, "to aid and advise the government," and are removed at his discretion

[e] See *post*, p. 289.

[f] Col. Reg. 1879, secs. 4, 57.

[g] Colonial Secretary's (Labouchere) despatches in 1857–58 to the governor of New South Wales. N. S. Wales Votes and Proc. **1859–60**, vol. i. pp. 1135, 1137.

— are nevertheless permitted to retain an honorary position in the council after their retirement from the cabinet. By command of the queen, "members of the privy council, not of the cabinet" have a special precedence within the Dominion, and are permitted to be styled "Honourable" for life.[h]

Cabinet ministers in parliament.

It is of the essence of responsible government that the governor should choose, as his constitutional advisers, persons who already possess, or who can readily obtain, a seat in one or other of the legislative chambers of the colony, in order that they may be the authorized exponents therein of the opinions of government, as well as of the well-understood wishes of the people. It is usual to assign to each of these responsible ministers the charge of a separate department of the state; so as to place the entire public service under the superintendence and control of responsible administrative heads, who possess the confidence of the representative assembly. Nevertheless, pursuant to well-established constitutional practice, it has been everywhere regarded as allowable to strengthen the executive council, or ministry, by the occasional introduction therein of non-official members, holding no portfolios, or departmental office, but who serve as active members in council, and share equally in the responsibility of their colleagues in the cabinet, provided only that they must possess a seat in parliament.[i]

It may be of interest to note a few details in regard to the numbers and composition of the various responsible ministries which are now in operation in the principal colonies of Great Britain.

In New South Wales, the cabinet originally consisted

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[h] See *post*, p. 231.

[i] Leg. Assembly, New South Wales, Votes and Proc. 1859-60, vol. i. pp. 1130, 1137. And see Todd, Parl. Govt. vol. ii. p. 154.

Composition of colonial ministries.

of five members; it has since been increased to eight. Certain offices — viz., the auditor-general, the attorney-general, and the solicitor-general — have been made non-political; but, in lieu of the two latter, a minister of justice has been added to the cabinet.[j]

In Victoria, the ministry is composed of nine members, including an attorney-general, as well as a minister of justice.[k]

In South Australia, there are six ministers, including an attorney-general.[l]

In Tasmania, there are five cabinet ministers holding office, and two others without portfolios.[m]

In New Zealand, the cabinet, since 1870, may consist of seven official members, and of two others of the Maori race. It now comprises seven members, including an attorney-general and a minister of justice. Though provision was made in 1873 to add to the cabinet two Maori ministers, — and they have been included in preceding cabinets, without portfolios, — they are not to be found in the last official return.[n]

In Queensland, there are usually six responsible ministers, including the attorney-general. Sometimes an additional minister is appointed, but without office or salary.[o]

In the Cape of Good Hope, there are five cabinet ministers, including the attorney-general.[p]

In the Dominion of Canada, at the time of confederation in 1867, there were thirteen cabinet ministers. This large number is explained by the fact that it is customary to choose members of the cabinet from

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[j] Trollope, Australia, vol. i. p. 245. Reid, Essay on New South Wales, in 1876, p. 14. Colonial Office List, 1879, p. 127.

[k] Vict. Stats. 23 Vict. No. 91. C. O. List, 1879, p. 169.

[l] Trollope, vol. ii. p. 247. C. O. List, 1879, p. 146.

[m] C. O. List, 1879, p. 159.

[n] *Ibid.* p. 133. N. Zealand Official Papers, **1872**, A. No. 1, p. 44. N. Z. Stats. **1876**, No. 70. *Ibid*, **1878**, No. 30, sec. 5.

[o] Trollope, vol. i. p. 157. C. O. List, 1879, p. 139.

[p] *Ibid.* p. 54.

the principal provinces included in the confederation, in proportion to their relative extent and importance. Upon a change of ministry in 1873, the number of ministers was increased to fourteen, but two of them were then without portfolios. There are now fourteen ministers, all holding office. One is styled the minister of justice and attorney-general of Canada.[q]

Should the attorney-general sit in the cabinet?

Particular mention has been made of the office of attorney-general, in the foregoing enumerations, because in various Australian colonies there have been repeated attempts to render this office non-political.[r] The main reasons alleged for this endeavour are briefly these: that it is contrary to imperial practice for the law officers of the Crown to sit in the cabinet; although they form part of the government, and invariably retire upon a change of ministry;[s] — that the representative of the Crown should not be obliged to seek for legal advice from law officers who, after advice given, are able, it may be, by a casting-vote in council to insist upon the same being accepted and carried out; — and that, in the conduct of state prosecutions, the interests of justice would be jeopardized by the combination of

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[q] Trollope, vol. i. p. 40. Can. Stats. **1868**, c. 39; *ibid.* **1879**, c. 7.

[r] In 1873, the Legislative Assembly of New South Wales agreed to resolutions to render the offices of attorney-general and of solicitor-general non-political. But in March, 1878, the assembly reversed their decision, so far as the office of attorney-general was concerned. That functionary, however, is not included in the list of ministers in the last returns. In New Zealand, by an act passed in 1876, no. 71, the attorney-general may be either a permanent and non-political officer, or a member of the cabinet, with a seat in parliament, at the discretion of the governor in council. See the South Australia House of Representatives' Votes, **1871**, p. 202, a resolution to the same effect. In Canada, so far back as in 1850, the exclusion of the crown law officers *from the cabinet, in conformity* with imperial usage, and in order that they might be able to devote more time to their official duties, was advocated by men of special experience and ability; viz., by Mr. J. Hillyard Cameron, Chief Justice Draper, and Mr. J. E. Small. See Leg. Assembly Journals, **1850**, Apx. B. B.

[s] Todd, Parl. Govt. vol. ii. p. 162.

policy and law in the persons who conduct crown prosecutions.[t]

As a set-off against these objections, it may be observed that in practice it has been customary, at least in Canada, for the attorney-general to fill the office of premier, in most instances since the establishment of responsible government, and that no great difficulty has resulted therefrom at any time. The knowledge of law and of the Constitution necessarily possessed by one qualified to fill this responsible office has usually led to his selection for the most prominent position in the ministry. When this has been the case, the conduct of crown business in the courts is generally assigned to professional men, otherwise disconnected with the government.

Upon the nicer question as to the discretion of a governor who applies for legal advice to law officers who are also cabinet ministers, and has reason to believe that their legal judgment has been unconsciously biassed by political considerations, so that he cannot accept their interpretation of the law, it should be remembered that a governor is not bound by opinions given under such circumstances, but is free to ask further assistance from elsewhere, to aid him in his judgment: with this proviso, however, that, in questions of purely local concern, the governor must finally decide upon his personal responsibility; and whomsoever he may consult, and from whatever source his opinion may be enlightened, he cannot shelter himself behind advice received from any persons outside his own ministers.[u]

In the colonies of Great Britain under responsible government, members of the popular chamber, upon

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[t] Judge Boothby's Memorandum; Com. Papers, **1862**, vol. xxxvii. p. 166. Forster's South Australia, pp. 182, 208. New Zealand Acts, 30 Vict. no. 63. New Zealand Assembly Journals, **1870**, app. D. no. 32.

[u] See *ante*, pp. 8–10, and *post*, p. 134.

accepting office, as a rule vacate their seats and require to be re-elected. In South Australia and in New Zealand only, does a different usage prevail. In both these colonies, from the first, members of elective houses have been permitted to accept political office without thereby vacating their seats. This peculiarity in the constitution of these colonies was avowedly introduced in order to save the community from the cost and excitement entailed by frequent elections, and to facilitate the speedy re-adjustment of offices upon a change of ministry. But the experiment has not succeeded. By removing an obvious impediment to frequent ministerial changes, it has fostered the element of instability, which is one of the most serious evils incident to parliamentary government. There are indications, however, that public opinion in these colonies is becoming favourable to the abolition of this doubtful and exceptional advantage to provincial statesmen, and desirous of introducing therein the usage of the mother country in this particular.[v]

Vacation of seats by ministers.

The instability of colonial administrations, and the frequent changes of government and consequent vacillations of policy, have been very lamentable, in the various Australian colonies; not merely in the colonies above-mentioned, but likewise in others, as the following statistics will show: In South Australia, from 1856 to 1876, there were no less than twenty-nine successive administrations.[w] In New Zealand, from 1856 to 1876, there were seventeen ministries in succession. In the brief period of seven months, ending April 8, 1873, five distinct administrations were formed, of whom the premiers were successively Messrs. Fox, Stafford,

Brief duration of colonial ministries.

[v] Todd, Parl. Govt. vol. ii. p. 277. South Australia Parl. Proc. 1869-70, vol. i. p. 146. New Zealand Parl. Deb. (in 1876) vol. xxii. p. 162.

[w] Blue Book of S. Australia, 1876, p. 7.

Waterhouse, Fox, and Vogel.[x] In Victoria, from 1855 to 1877, there were eighteen different administrations.[y] In Tasmania, from 1856 to 1877, there were twelve successive administrations.[z] And, in New South Wales, from 1856 to September, 1877, there were seventeen different ministries.[a] The Dominion of Canada has presented a marked contrast to this unstable political condition. Upon the confederation of the British North-American provinces in 1867, Sir John A. Macdonald was appointed premier (his ministry having been already in existence, in the province of Canada, for three years); and he continued prime minister until November 5, 1873, when the Mackenzie administration was formed. This ministry lasted for five years. In 1878, Sir J. A. Macdonald returned to power, bringing with him most of his former colleagues.[b]

Except in Canada.

Ministers in the upper house.

In another matter of special constitutional importance, the Dominion of Canada has presented a commendable example to the sister colonies in Australia. Following the practice previously observed, from the first introduction of responsible government into the old province of Canada, it has been customary that two members of the cabinet should have seats in the upper house, to take charge of public business therein, and generally to represent the administration in the Legislative Council, or, as it is now termed, the Senate. It is understood that less than two members would not suffice for this purpose; and, upon the formation of the present administration, in November, 1878,

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[x] New Zealand Papers, **1873**, A, 1 *a*. New Zealand Statistics, **1876**, p. 6.

[y] Vict. Year Book, p. 1.

[z] Col. Statistics, **1877**, p. 8.

[a] Official Papers, N. S. W. **1878**.

[b] Can. Parl. Companion, **1879**, p. 188. The first responsible ministry in the Cape of Good Hope, likewise had a long tenure of office. It existed from December, 1872, until February, 1878. See *post*, p. 73.

the number was increased to three, — the speaker of the Senate being, for the first time since confederation, made a cabinet minister.

Cabinet ministers in the Upper House.

In Australia, it appears always to have been the rule hitherto to assign but one cabinet minister to the upper chamber. This has repeatedly occasioned difficulty, and has sometimes led to formal complaint.

Thus, in Victoria, during the contentions between the two houses, upon the relative rights of each in matters of supply and taxation, — which will be fully considered in a subsequent part of this work, — the only representative of the ministry in the legislative council (the postmaster-general) resigned his office, because he could not agree with his colleagues in the ministry, respecting their proposed bill for the reform of the constitution of that chamber. This led to much inconvenience. For although, in Victoria, there has never been more than one departmental minister in the Legislative Council, and he has rarely filled a very prominent office, yet sometimes a cabinet minister without a portfolio has sat in the council. At this time, however, the resignation of the postmaster-general deprived the council of any representative of the government. This circumstance had a natural tendency to identify the council, as a body, with the opposition in the assembly; whereas a patriotic statesman, filling the honourable position of premier, will readily apprehend that it is "the interest, not to say the paramount duty, of every minister so to shape his course as, if possible, to keep the two houses of Parliament in harmony, and not to throw himself absolutely and entirely into the hands of one branch of the legislature, regardless of the wishes and feelings of the other." [c]

[c] Earl of Derby, Hans. Deb. vol. 134, p. 840.

A committee of the Legislative Council of Victoria, in conference with a committee of the Assembly on constitutional reform, pointed out the necessity that existed for the constant presence of at least two — and, if possible, more — responsible ministers in the Legislative Council. They believed "that such a rule, if it were habitually observed, would, as it has done in England, promote the harmonious working of the two houses, would facilitate legislation, and divide its labours; and would tend to prevent the danger of collision between the houses, by transferring to the cabinet, in conformity with constitutional theory and usage, the most numerous and the most serious causes of dispute." [d]

In New Zealand, up to the passing of the new disqualification act of 1876, it had been customary to have two official ministers — or, at least, one minister holding office, and another without a portfolio — to represent the government in the Legislative Council. But, by the operation of the act aforesaid, the ministry considered themselves debarred from assigning to more than one legislative councillor a cabinet seat. Whereupon the Legislative Council, on October 10, 1876, resolved, "that it is desirable that the government of the colony should be represented in this council by *at least* two responsible ministers." No effect having been given to this resolution, a bill was brought into the Legislative Council, on behalf of the government, on Aug. 16, 1878, to authorize the appointment of a second minister, not being a salaried officer, expressly to assist the government in the Legislative Council. This bill passed the Council, but was laid aside in the House of Representatives.[e]

In South Australia, for about three months in the session of 1877, the Legislative Council, because they

[d] Commons Papers, **1878–79**, C. 2217, pp. 4, 40, 56.
[e] New Zealand Parl. Debates, vol. xxviii. p. 294; vol. xxx. p. 699.

disapproved of the public conduct of the chief secretary, who was the only minister sitting in that chamber, resolved that the control of public business should be taken out of his hands, and entrusted to a member of the opposition.[f] This extraordinary proceeding was protested against by ministers, and also by the governor, as being an infringement upon the prerogative of the Crown. The council, however, adhered to their determination; and this unprecedented state of affairs continued until the downfall of the ministry; when the opposition, succeeding to power, assigned the position of leader of the government in the Legislative Council to the man who had been chosen by the Council themselves to fill that office.[f]

Extraordinary proceeding in South Australia.

Further points of interest concerning legislative councils in the colonies, and their relation to the representative assemblies, will come before us, in a subsequent chapter, descriptive of the constitution and powers of colonial parliaments.

Wherever parliamentary government has been established, the determination of all political and party questions, and the adjudication upon complaints against the existing administration, should be reserved for the consideration of legislature, in parliament assembled. A defeated minority is not entitled, after a prorogation or dissolution of parliament, to appeal either to the governor of the colony or to the imperial government to interpose, for the purpose of giving immediate effect to an assumed change in public sentiment, and to place the reins of government in the hands of other leaders, on the plea that their party have obtained a majority at the polls, or that the remonstrants do, in fact, constitute a majority of the popular chamber. Addresses or petitions, for such a purpose, although they may ema-

Political complain to be disposed of in parliament.

[f] See the particulars of this case, *post*, p. 482.

nate from members of the legislature in their individual capacity, are highly irregular, and objectionable in principle. Complaints against ministers of the Crown, on matters affecting the performance of their public duty, ought not to be pressed upon the attention of the governor or of the imperial authorities, during a parliamentary recess; but should be formulated in conformity with the ordinary rules of parliamentary procedure, and submitted to the consideration of the local parliament, at the first available opportunity, when they can be regularly investigated and decided upon, in accordance with the usages of the Constitution.[g]

Modern constitutional practice has, however, sanctioned one deviation from the rule which forbids an appeal to any other tribunal than that of Parliament itself to decide upon the fate of ministries. Up to the year 1868, "the general current of precedent" was decidedly "in favour of a minister, beaten at a general election, accepting his defeat only at the hands of Parliament; and this custom was grounded on the salutary doctrine that it is only through Parliament that the nation can speak." [h]

Resignation of a ministry after defeat at the hustings.

But, in 1868, the Disraeli administration, and again, in 1874, the Gladstone administration, respectively resigned office, soon after the adverse result of their appeal to the constituencies was apparent. Their speedy resignation — in anticipation of a result which must have inevitably followed, as soon as it had

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[g] See Correspondence of Governor Mulgrave with the colonial secretary, in 1859, Nova Scotia Leg. Council Journals, **1860**, appx. p. 59; Queensland Leg. Assembly Votes and Proc. 2d Sess. **1867**, vol. i. p. 628; and the answer of Earl Dufferin, governor-general of Canada, to a deputation of members of the Canadian Parliament, on Aug. 13, 1873: in Canada Com. Journals, 2d Sess. **1873**, p. 30, and in the Imperial Commons Papers, **1874**, vol. xlv. pp. 25–30, and *ibid.* p. 265.

[h] Fortnightly Review, August, 1878, p. 265; Todd, Parl. Govt. vol. ii. p. 414.

been possible for Parliament to give formal expression to the popular will — was unquestionably productive of much public advantage and private convenience, in the orderly conduct of state affairs.[i] Mr. E. A. Freeman views these precedents as introducing a new principle into the unwritten Constitution of England, by means of which the direct action of the electors at their polling-booths is capable of effecting a change of ministers, without the intervention of the House of Commons. While deprecating this novel departure from ancient constitutional usage, he considers these recent cases as indicating the course which in all probability will be generally followed hereafter, upon similar occasions; subject, of course, to the discretion of ministers, who must retain a liberty of choice in a matter of such grave importance, which involves serious consequences to themselves, to their party, and to the nation.[j]

The effect of adverse votes in Parliament upon the fate of a ministry, and the constitutional practice which regulates the granting or withholding by the governor of an appeal by a defeated administration to the constituencies, will be considered in a later part of this treatise.

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[i] Hans. Deb. vol. cxcv. p. 739. So likewise, in Victoria, upon the defeat of the McCulloch ministry at the general election on May 11, 1877, the administration resigned on May 21, the day previous to the meeting of the new parliament. And in Canada, — shortly after the general election, held in September, 1878, and which resulted in the defeat of the Reform party at the hustings, — the Mackenzie administration resigned, and were replaced by the conservative administration of Sir John A. Macdonald. The new parliament met, at about the usual period, in February, 1879.

[j] International Review, vol. ii. p. 374.

CHAPTER III.

HISTORICAL ACCOUNT OF THE INTRODUCTION OF PARLIAMENTARY GOVERNMENT INTO THE COLONIES OF GREAT BRITAIN.

Origin of colonial parliamentary government.

HAVING investigated the general principles of parliamentary government, in their application to colonial rule, we will proceed to inquire into the particular circumstances which gave rise to the establishment of that system in the more important colonies of the empire.

The first colony of Great Britain wherein this great measure of colonial administrative reform was introduced, was Canada.

Both in Lower and in Upper Canada — which were then separate provinces, with distinct governments — political grievances had for several years existed, and begun to assume a threatening aspect, tending to the overthrow of the authority of the British Crown, and the assertion of independence under republican institutions. These grievances were mainly attributable to the lack of a spirit of harmony and co-operation between the legislative and executive authorities. Similar complaints found expression in the maritime colonies of British America; although the orderly and loyal spirit prevailing therein kept back the spirit of disaffection, which had manifested itself in overt acts of rebellion in both Canadian provinces.

The insurrection in Canada was, however, promptly

suppressed by the strong arm of military power; aided, at least in the upper province, by the awakened loyalty of the great bulk of the population. At this juncture, the Earl of Durham was deputed to proceed to Canada, as governor-general and lord high commissioner to investigate the affairs of British North America. In 1839, the year after his appointment, Lord Durham presented to the queen an elaborate report on the result of his inquiries. In this report, his lordship recommended, as a panacea for all existing political complaints, the introduction into the several British North American colonies of the principle of local self-government; thereby rendering our colonial polity, so far as was consistent with the maintenance of British connection, and of imperial supremacy, "an image and transcript of the British Constitution."[a]

Lord Durham's report.

Mr. Poulett Thomson (afterwards Lord Sydenham) was sent to Canada, in the autumn of 1839, as governor-general; and he was instructed to give effect to the principles set forth in Lord Durham's report. Lord John Russell (then colonial secretary) officially notified Mr. Thomson of the system under which he was to administer the government, in a despatch dated Sept. 7, 1839, which embodied her Majesty's instructions upon his assumption of the government of British North America; and subsequently in two despatches dated Oct. 14 and 16, 1839. These despatches deprecated any attempt to apply the principle of ministerial responsibility to a provincial assembly, to acts of the governor which were performed by him in obedience

Lord J. Russell's despatches.

[a] This phrase was first employed by Lieutenant Governor Simcoe, in his speech from the throne, at the close of the first session of the first provincial parliament of Upper Canada, in 1792. It expressed the intentions of the imperial government in reference to the establishment of representative institutions in that province; although these intentions did not apparently contemplate, at that early period, the introduction of "responsible government." See Commons Papers, **1839**, vol. xxxiii. p. 166.

to the royal instructions, or to questions of an imperial nature; as being at variance with the allegiance due to the British Crown. But the application of this principle to questions of local concern was approved; and directions were given to change the tenure of office of the heads of public departments in the province, so as to admit of such offices being held by executive councillors who should possess the confidence of the assembly, and of the removal of such persons from office "as often as any sufficient motives of public policy might suggest the expediency" thereof. Lord Sydenham took an early opportunity of giving effect to these instructions, by publicly announcing that henceforth the government of Canada should be conducted in harmony with the well-understood wishes of the people, and that the attempt to govern by a minority would no longer be resorted to; a declaration which was received with satisfaction, by all moderate men, throughout the province.[b]

Canadian resolutions on responsible government.

Accordingly, on Sept. 3, 1841, resolutions were submitted to the Legislative Assembly of Canada by Mr. Secretary Harrison (in amendment to a series proposed by Mr. Robert Baldwin), which were unanimously agreed to, and which constitute, in fact, articles of agreement, upon the momentous question of responsible government, between the executive authority of the Crown and the Canadian people.

It was resolved, (1) that "the head of the executive government of the province being, within the limits of his government, the representative of the sovereign, is responsible to the imperial authority alone; but that, nevertheless, the management of our local affairs can only be conducted by him, by and with the assistance, counsel, and information of subordinate officers in the

[b] Scrope, Life of Lord Sydenham, 2d ed. pp. 257–268; Canada Leg. Assembly Journals, **1841**, p. 390 and appx. B. B.

province." (2.) "That in order to preserve, between the different branches of the provincial parliament, that harmony which is essential to the peace, welfare, and good government of the province, the chief advisers of the representative of the sovereign, constituting a provincial administration under him, ought to be men possessed of the confidence of the representatives of the people; thus affording a guarantee that the well-understood wishes and interests of the people, which our Gracious Sovereign has declared shall be the rule of the provincial government, will, on all occasions, be faithfully represented and advocated." (3.) "That the people of this province have, moreover, a right to expect from such provincial administration the exertion of their best endeavours that the imperial authority, within its constitutional limits, shall be exercised in the manner most consistent with their well-understood wishes and interests."

Resolutions on responsible government.

A further resolution was proposed, by Mr. Baldwin, to assert the constitutional right of the Assembly to hold the provincial administration responsible for using their best exertions to procure, from the imperial authorities, that their rightful action, in matters affecting Canadian interests, should be exercised with a similar regard to the wishes and interests of the Canadian people. But this resolution, being presumably opposed to the principle of non-interference, by colonial ministers, in matters of imperial concern, — as maintained in Lord John Russell's despatch of 14th October, 1839, — was, after debate, unanimously rejected.

Lord Sydenham died, unexpectedly, from injury sustained by a fall from his horse, a few days after the passing of these memorable resolutions. Sir Charles Bagot and Sir Charles Metcalfe, who severally succeeded him as governors of Canada in 1842 and in 1844, emphatically declared their acceptance of respon-

sible government, as embodied in the foregoing resolutions. But, during their term of office, the system itself was imperfectly understood, and mistakes were made, on all sides, in the application of this hitherto untried experiment in colonial government to the practical administration of local affairs.[c]

After a brief interval, during which Lord Cathcart (a military officer) was appointed governor-general, in view of the threatening aspect of our relations with the United States, the imperial government were impressed with the necessity for entrusting the management of affairs in Canada to a person who should possess an intimate knowledge of the principles and practice of the British Constitution, some experience of the House of Commons, and a familiarity with the political questions of the day. Such an one was happily found in Lord Elgin, who was accordingly selected by the government of which Lord John Russell was premier, and Earl Grey the colonial secretary.

Lord Elgin's administration.

Previous to his departure for Canada, in January, 1847, Earl Grey carefully instructed the new governor-general as to the line of conduct he should pursue, and the means he should adopt, in order to bring into full and beneficial operation, in British North America, the novel machinery of constitutional government.

In Earl Grey's History of the Colonial Policy of Great Britain, during Lord John Russell's ministry, we are informed of the general tenor of the instructions given to Lord Elgin, and of the successful result of his policy and conduct.[d]

Lord Elgin's private letters to Earl Grey (written from Canada, and posthumously published) afford us some interesting details and valuable suggestions as to his

[c] Grey, Colonial Policy, vol. i. p. 205. Adderley, Colonial Policy, p. 27. See also Fennings Taylor's, Are Legislatures Parliaments? c. 6.

[d] See Grey, Colonial Policy, vol. i. pp. 206–234. Adderley, p. 31.

methods of administration. He says therein: "I give to my ministers all constitutional support, frankly and without reserve, and the benefit of the best advice that I can afford them in their difficulties. In return for this, I expect that they will, as far as possible, carry out my views for the maintenance of the connection with Great Britain, and the advancement of the interests of the province." "But," he adds, "I have never concealed from them that I intend to do nothing which may prevent me from working cordially with their opponents, if they are forced upon me;" shewing my "confidence in the loyalty of all the influential parties with which I have to deal," and being devoid of "personal antipathies." "A governor-general, by acting on these views, with tact and firmness, may hope to establish a moral influence in the province, which will go far to compensate for the loss of power consequent on the surrender of patronage to an executive responsible to the local parliament." But "incessant watchfulness and some dexterity are requisite to prevent him from falling, on the one side, into the *néant* of mock sovereignty, or on the other into the dirt and confusion of local factions."[e]

Lord Elgin on responsible government.

To the question, "whether the theory of the responsibility of provincial ministers to the provincial parliament, and of the consequent duty of the governor to remain absolutely neutral in the strife of political parties, had not a necessary tendency to degrade his office into that of a mere *roi fainéant?*" Lord Elgin gave an unqualified negative. "I have tried," he said, "both systems. In Jamaica, there was no responsible government; but I had not half the power I have here, with my constitutional and changing cabinet." Even on the viceregal throne of India, he missed, at first, something of the authority and influence which he had

[e] Walrond's Letters of Lord Elgin, pp. 40, 41.

exercised, as constitutional governor, in Canada. This influence, however, was "wholly moral, — an influence of suasion, sympathy, and moderation, which softens the temper while it elevates the aims of local politics." [f]

The success of responsible government in Canada, under the presidency of Lord Elgin, led to its gradual introduction into the maritime colonies of British North America, and subsequently into the several colonies of Australia wherein representative institutions had been established; and into New Zealand, Tasmania, and the Cape of Good Hope.

Ultimately, upon the confederation of the provinces of Upper and Lower Canada, Nova Scotia, and New Brunswick, into one dominion, under the Crown of Great Britain and Ireland, in 1867, it was provided, in the imperial act of union that the constitution of the new dominion should be "similar in principle to that of the United Kingdom." [g]

Responsible government in the maritime provinces.

Responsible government was introduced into Nova Scotia and into New Brunswick in 1848, whilst Earl Grey, an experienced statesman, and an able writer upon constitutional government, held the seals of the colonial office. [h]

At the outset, a difficulty arose in Nova Scotia, in regard to the application of the new tenure of appointments to office, which serves to explain the extent to which the imperial government was prepared to concede the principle of non-interference in matters of local concern, and at the same time to show the legitimate extent of the powers of a governor.

In a despatch to Governor Harvey, of Nova Scotia,

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[f] Walrond's Letters of Lord Elgin, pp. 125, 126.

[g] British North America Act, 1867, 31 Vict. c. 3, preamble.

[h] See the correspondence between the governors of the British North American provinces and the secretary of state, relative to the introduction of responsible government therein. Commons Papers, **1847–48**, vol. xlii. pp. 51–88.

dated March 31, 1847, Earl Grey adverted to certain necessary qualifications and restrictions in the application of parliamentary institutions to the colonies. He dwelt with much emphasis upon the importance of "abstaining from going further than can be avoided, without giving up the principle of executive responsibility, in making the tenure of offices in the public service dependent upon the result of party contests;" and he advised that, with the exception of a very few prominent and necessarily political offices, the remaining appointments to public employ should be held independently of party, and be virtually irremovable, except for obvious misconduct or unfitness. The colonial secretary likewise pointed out the necessity, on the part of the people of Nova Scotia, of refraining to effect any reform in their institutions, however just or desirable, at the cost of injustice to individuals. And therefore, that, in replacing, by political heads of departments, men who had served faithfully under a non-political tenure, it would be most unfair not to compensate those who had been removed from office, on this account, by ensuring them a provision that would make up for the loss of official income.[1]

Responsible government in Nova Scotia.

Nevertheless, the first administration formed in Nova Scotia, under responsible government, ignored the wise and considerate counsels of Earl Grey in this particular, and insisted upon the removal of an old public officer, who filled the position of colonial treasurer (and whose office it was proposed to divide into two political departments, — that of a receiver-general and of a financial secretary), — without making any compensation to him for his loss of office. The governor demurred to this proceeding; but his objections were overruled. He then, at the suggestion of Earl Grey, directed that the whole correspondence on the sub-

[1] Commons Papers, **1847–48**, vol. xlii. p. 77.

ject should be submitted to the colonial legislature. This was done; but the Legislative Council and the House of Assembly upheld the ministry, and passed an act for the division of the office, as above-mentioned, without making any provision for the existing incumbent, who was accordingly left without redress.

The non-intervention of the imperial government to prevent such an act of personal injustice was regarded by many inhabitants of Nova Scotia with alarm; and they petitioned the Imperial Parliament, representing the injury sustained by the province in the loss of the supervision of imperial authority as a safeguard against oppression or abuse of power by the local government. This petition gave rise to a long debate in the House of Lords, on March 26, 1849, wherein leading statesmen of both parties expressed themselves freely upon the question, but without any motion being proposed thereon.

Earl Grey defended the course taken by himself and by Governor Harvey, upon this occasion. He showed that, as a general rule, the advice given to the local authorities, upon the introduction of responsible government, had been favourably received, and frankly adopted; that, in the present instance, there were circumstances (which he explained) that rendered the action of the local government less objectionable than would at first appear; and that, for the governor to have insisted upon compensation to the ex-treasurer, would have led to the resignation of his ministers, would have caused "the affairs of the colony to be thrown into confusion," and "would have been an overstraining of the powers of the Crown." On the other hand, the secretary of state felt "bound to assert that the power and influence of the Crown are by no means to be ineffective or unimportant." Doubtless, that power "should be used, not resolutely to

resist and oppose, but judiciously to check and guide, the public opinion of the colonies into proper channels."

His advice to Sir John Harvey had been: "Act strictly upon the principle of not identifying yourself with any one party; but, instead of this, making yourself both a mediator and a moderator between the influential of all parties. In giving, therefore, all fair and proper support to your council for the time being, you will carefully avoid any acts which can possibly be supposed to imply the slightest personal objection to their opponents, and also refuse to assent to any measures which may be proposed to you by your council which may appear to you to involve an improper exercise of the authority of the Crown for party rather than for public objects.

"In exercising, however, this power of refusing to sanction measures which may be submitted to you by your council, you must recollect that this power of opposing a check upon extreme measures, proposed by the party for the time in the government, depends entirely for its efficacy upon its being used sparingly, and with the greatest possible discretion. A refusal to accept advice tendered to you by your council is a legitimate ground for its members to tender to you their resignation; a course they would doubtless adopt, should they feel that the subject on which a difference has arisen between you and themselves was one upon which public opinion would be in their favour. Should it prove to be so, concession to their views must sooner or later become inevitable; since it cannot be too distinctly acknowledged that it is neither possible nor desirable to carry on the government of any of the British provinces in North America in opposition to the opinion of the inhabitants."[j]

[j] Commons Papers, **1847–48**, vol. xlii. p. 56; Hans. Deb. vol. ciii. pp. 1262–1289.

Responsible government in Australia.

Particulars in regard to the events which led to the introduction of responsible government into the Australian colonies, and of the circumstances attending the same, will be found in the sessional papers of the House of Commons, for the years 1849 to 1856 inclusive.

General authority to effect the changes in the constitutions of the several Australian colonies necessary for the establishment of local self-government therein, was conferred by the Imperial Act 13 and 14 Vict. c. 59. Under this statute, or under the subsequent Acts of the 18 and 19 Vict. cc. 54 and 55, parliamentary institutions were introduced into Australasia at the undermentioned periods; viz., into Tasmania and Victoria, in 1855; into New South Wales and South Australia, in 1856; into New Zealand, by special enactment, in 1856; into Queensland, upon its being set apart as a separate colony, in 1860; and into Western Australia in March, 1875.

In New Zealand.

In regard to New Zealand: so early as in 1852, a representative constitution had been granted, by the Imperial Act 15 and 16 Vict. c. 72.[k] But various causes contributed to delay the accomplishment of the beneficent intentions of the mother country towards this colony; and it was not until September, 1855, that the governor, Colonel Gore Browne, communicated to the General Assembly the desire of her Majesty's government that the colony should enjoy "the fullest measure of self-government which is consistent with its allegiance to the British Crown," and that, accordingly, he would, as speedily as possible, "carry out in its integrity the principle of ministerial responsibility; being convinced that any other arrangements would be ineffective to preserve that harmony between the legislative and the executive branches of the government, which

[k] For the origin and history of this new constitution, see Sir C. B. Adderley (Lord Norton), Colonial Policy, pp. 133-162.

is so essential to the successful conduct of public affairs."[1]

A new parliament was first convened; and in April, 1856, the governor commenced negotiations with a gentleman who was in the confidence of a majority in the Assembly on the formation of a responsible ministry.

At the outset, the governor declared his determination to maintain "a perfect neutrality in all party questions." He then addressed a minute, to the gentleman above referred to, with an explanatory memorandum, defining his own views as to the relation which should subsist between himself and his responsible advisers.

This minute states: "(1.) In all matters under the control of the Assembly, the governor should be guided by the advice of gentlemen responsible to that body, whether it is or is not in accordance with his own opinion on the subject in question." But, in explanation of this general proposition, it is added, that "the governor of course reserves to himself the same constitutional rights, in relation to his ministers, as are in England practically exercised by the sovereign;" and that he does not include in the category of subjects under the control of the Assembly any matters affecting the queen's prerogative, and imperial interests in general. (2.) Upon all such matters, "the governor will be happy to receive the advice of his executive council; but, when he differs from them in opinion, he will (if they desire it) submit their views to the consideration of her Majesty's secretary of state; adhering to his own until an answer is received."

Other questions, of purely local concern, are discussed in this minute; which concludes by stating that, "in approving appointments to vacant offices, the governor will require to be assured that the gentlemen recom-

[1] Commons Papers, **1860**, vol.xlvi. p. 169.

mended are fit and eligible for their respective situations."

These terms and conditions were severally accepted and agreed to by the incoming ministers, with the understanding that they were open to alteration by the colonial secretary.[m]

In due course, the secretary of state for the colonies intimated to Governor Browne that, "after the best consideration which they could give to the subject, her Majesty's government approve of the principles" upon which he proposed to administer the government of New Zealand, as the same were defined in the minute and memorandum aforesaid.[n]

Responsible government in Queensland.

Queensland, which previously formed part of the province of New South Wales, was set apart as a separate colony, by an order in council, issued in 1859, under the authority of the Imperial Act 18 and 19 Vict. c. 54.

Sir George F. Bowen was chosen as the first governor of the new colony, with instructions to inaugurate representative institutions therein in combination with local self-government.

He met with an enthusiastic reception in the colony, and in reporting to the secretary of the state (the Duke of Newcastle) his proceedings, Sir G. Bowen, in a despatch dated April 7, 1860, remarks as follows: "There cannot, in my opinion, be a greater mistake than the view which some public writers in England appear to hold; namely, that the governor of a colony, under the system of responsible government, should be, in a certain sense, a *roi fainéant*. So far as my observation extends, nothing can be more opposed than this theory to the wishes of the Anglo-Australians themselves. The governor of each of the colonies in this

[m] Commons Papers, **1860**, vol. xlvi. pp. 228, 229.
[n] *Ibid.* p. 481.

group is expected not only to act as the head of society; to encourage literature, science, and art; to keep alive, by personal visits to every district under his jurisdiction, the feelings of loyalty to the queen, and of attachment to the mother country, and so to cherish what may be termed the imperial sentiment: but he is also expected, as head of the administration, to maintain, with the assistance of his council, a vigilant control and supervision over every department of the public service. In short, he is in a position in which he can exercise an influence over the whole course of affairs, exactly proportionate to the strength of his character, the activity of his mind and body, the capacity of his understanding and the extent of his knowledge." [o]

Sir G. Bowen on a governor's functions.

In replies to addresses presented to him when upon official tours through Queensland, Sir G. F. Bowen gave expression to his idea of the duties and responsibilities of a governor. His views met with general acceptance, and the people everywhere appeared to vie with each other in testifying their loyalty to the queen, their cordial respect for her representative, and their attachment to the mother country.[p]

In further explanation of his sense of the obligations entailed upon him as a constitutional governor, Sir G. F. Bowen mentions in a subsequent despatch, dated Aug. 11, 1860 that the impression had gone abroad that "certain very unfit persons" had been raised to the bench in Australia "for political reasons, by the various local ministries which have succeeded each other so rapidly in this quarter of the world." Whilst unwilling to reflect in the slightest degree on other governors, who, he was aware, had had to contend with great difficulties, Sir G. Bowen adds, "I, for one, cannot bring myself to assent to the doctrine (if it be any-

[o] Commons Papers, **1861**, vol. xl. p. 607.
[p] *Ibid.* pp. 607, 613.

where held) that the establishment of parliamentary government absolves the representative of the Crown from all responsibility as to the appointments to public offices. It is his undoubted right and duty to disallow ill-advised acts of the colonial legislature, and I venture to think that he is *a fortiori* bound to refuse his sanction to the employment in the queen's colonial service of individuals of dubious character, and especially to the nomination of such persons to offices like those of judges and magistrates who hold her Majesty's commission. In accordance with this view, I carefully examined, name by name, with my executive council, the new commission of the peace, admitting only those gentlemen whose character, acquirements, and social position render them worthy of so honourable and important a trust. . . . My present ministers cordially concur with the principles which I have thus attempted to explain; and I am confident that I shall at all times be supported by the public opinion of this colony in acting on them firmly and consistently. It is my intention so to act, with the approval of her Majesty's government." [q]

Commenting upon the constitutional question mooted in the despatch above cited, — as to the amount of influence to be exercised by the governor of a colony in which representative institutions are established, — the secretary of state, in a despatch dated Nov. 26, 1860, observes that the position defined by Sir G. F. Bowen "is one which may be occupied by a governor, with great propriety, and with the utmost advantage to the colony over which he presides; its rights and duties being at once sustained and limited by the necessity of finding support in an enlightened public opinion, and the services of ministers capable of carrying on the

[q] Commons Papers, **1861**, vol. xl. p. 630.

government of the colony with the concurrence of the legislature."[r]

Cape of Good Hope.

The latest of the British colonies admitted to the privileges of local self-government, was the Cape of Good Hope.

By letters-patent dated May 23, 1850, representative institutions were authorized to be established in this colony; and three years later the new constitution was introduced. It consists of a governor, holding his commission from the Crown; a legislative council and a house of assembly, both elected by the people.

Until recently the Legislative Council was composed of eleven members for the western and ten members for the eastern province, chosen by the whole body of electors. But in 1874 the country was divided into seven electoral provinces, each of which returns three members to the upper chamber. This change went into operation at the dissolution of parliament, on September 12, 1878. The council is elected for ten years, one moiety retiring every five years.

The House of Assembly consists of sixty-eight members, elected for five years. The governor may dissolve both houses, or he may dissolve the Assembly without dissolving the other house.[s]

The introduction of "responsible government" into this colony was first suggested by the imperial government in 1869, but the proposal was objected to by the governor (Sir P. E. Wodehouse), and was regarded with disfavour at the Cape. But no other plan appearing to promise a successful administration of government, her Majesty's secretary of state for the colonies again urged upon the colony the adoption of parliamentary institutions. Accordingly, in 1871, a bill to amend the constitution by incorporating therein the system of

[r] Commons Papers, **1861**, vol. xl. p. 671.
[s] C. O. List, 1879, p. 54; Encyc. Britannica, 9th ed. p. 47.

ministerial responsibility was submitted to the consideration of the local parliament by the governor. It passed the House of Assembly, but was rejected by the upper house. The bill was again introduced in the following year, when it was agreed to by both chambers. It was necessarily reserved for the signification of the queen's pleasure; but the royal assent was announced by proclamation on August 28, 1872.[t]

Consequent upon this change in the constitution, a new commission was sent to the governor of Cape Colony with fresh instructions, similar to those furnished to other colonies possessing local self-government.

Responsible government in Cape Colony.

By these instructions, the governor was enjoined, in the execution of the powers intrusted to him by his commission, in all cases to consult with his executive council, "excepting only in cases which may be of such a nature that, in your judgment, our service would sustain material prejudice by consulting our council thereupon, or when the matters to be decided shall be too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it may be necessary for you to act in respect of any such matters: Provided that, in all such urgent cases, you do subsequently, and at the earliest practicable period, communicate to the said council the measures which you may so have adopted, with the reasons thereof. And we do authorize you, in your discretion, and if it shall in any case appear right, to act in the exercise of the power committed to you by our said commission in opposition to the advice which may in any such case be given to you by the members of our

[t] Commons Papers, **1870**, vol. xlix. p. 369; *Ibid.* **1873**, vol. xlix. p. 267. The reasons which actuated the home government, in pressing upon the Cape colony the adoption of the system of responsible government, are ably stated by Lord Blachford, who (as Sir Frederic Rogers) was permanent under-secretary of state for the colonies when this question was first mooted. See the Nineteenth Century, for August, 1879, p. 271.

said executive council: Provided, nevertheless, that in any such case you do fully report to us, by the first convenient opportunity, any such proceeding, with the grounds and reasons thereof." [u]

Power reserved to the Crown.

These provisions in the revised instructions to the governor of the Cape of Good Hope, issued after the concession of parliamentary institutions to that colony, exhibit the reserved power expressly retained by the British government in order to prevent the grant of local self-government from tending, under any circumstances, to the degradation of the rights inherent in the Crown in the English political system; and as a constitutional barrier against the possible encroachment upon those rights by the usurpation of power on the part of a local administration.

Similar provisions to guard against the evils of democratic ascendancy, under the pretext of "responsible government," will be found in the commission and instructions issued to Sir James Fergusson, upon his appointment, in 1873, as governor of New Zealand; [v] in the more recent instructions issued in April, 1877, to the governor of South Australia, accompanying the permanent letters-patent constituting the office of governor in that colony; [w] and likewise in the instructions issued to Sir Bartle Frere, upon his appointment in February, 1877, to succeed Sir Henry Barkley as governor of the Cape of Good Hope, in connection with the new letters-patent for the permanent establishment of that office. [x]

As the result proved, this constitutional restriction upon the undue assumption of power by a colonial ministry under responsible government was — so far at

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[u] Commons Papers, **1873**, vol. xlix. p. 338.

[v] New Zealand Assembly Papers, **1873**, A. 6.

[w] South Australia Parl. Proc. **1877**, no. 109.

[x] Cape of Good Hope Assembly Papers, **1878**, A. 8.

Dismissal of his ministers by Governor Frere.

least as respects the Cape colony — a most necessary act. It enabled the governor to uphold and maintain the rights of the Crown upon a grave political emergency, when those rights were assailed by the first ministry which was formed under the new constitution. In February, 1878, the governor of the Cape was compelled in vindication of his office to assert the lawful supremacy of the Crown by the dismissal of his ministers, at a time when they were in full possession of the confidence of the local parliament, and able to command a majority in the House of Assembly. Further particulars of this case will be found in another part of this volume. It may suffice to add, in this place, that Sir Bartle Frere's conduct upon this trying occasion was warmly approved by her Majesty's government, and that the new administration which he formed, after dismissing the Molteno ministry, was sustained (without a previous dissolution of parliament) by a decisive vote in the local assembly.[y]

Queen's commissioner for South Africa.

In addition to his ordinary commission as governor of the colony, a further commission was granted to the governor of the Cape of Good Hope, appointing him to be her Majesty's high commissioner for the territories of South Africa adjacent to the said colony. This commission is issued for the purpose of enabling the governor to act in the name and on behalf of the queen, and to represent her crown and authority in respect of the native tribes in South Africa; and, further, to empower him to hold communication with the authorities of the two republics established in South Africa, and with the representative of any foreign power. In the exercise of this trust, the high commissioner is required

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[y] Despatches of colonial secretary (Sir M. Hicks-Beach) to Governor Frere, dated March 21 and July 25, 1878; Commons Papers, **1878**, C. 2079, p. 124; *Ibid.* C. 2144, p. 243. And see the Nineteenth Century, for December, 1878, p. 1069.

to invite and obtain the co-operation of the foreign powers aforesaid, towards the preservation of peace and safety in South Africa, and the general welfare and advancement of its territories and peoples.[z]

By the terms of this commission, the governor is required, in his capacity of queen's high commissioner, to do whatever may be lawfully and discreetly done to prevent the recurrence of any irruption into the British possessions of the tribes inhabiting the territories aforesaid; and all persons in the said British possessions are commanded to aid and assist him to this end. In the performance of this duty the governor's functions are clearly defined in his separate commission; and they are not subject to the limitations imposed upon his authority in civil matters, lying entirely within the Cape colony, by responsible government as established at the Cape. On the occurrence of any difference of opinion between the governor and his ministers for the time being, as to the conduct of a war with the native tribes in South Africa, it is clear that the local administration, whilst affording to the governor the benefit of their advice and co-operation, should not hesitate to subordinate their opinions to his; it being obvious that the successful and speedy repression of any such outbreak "concerns, either directly or indirectly, the interests of large numbers of her Majesty's subjects in South Africa, living altogether beyond the jurisdiction of any single colonial administration."[a]

Benefits of responsible government at the Cape.

The first ministry under "responsible government" in the Cape colony, took office in December, 1872. This change in the colonial administration had the

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[z] See the commission in Cape Assembly Votes, **1878**, Annexures, A. 8, no. 4.

[a] Colonial Secretary (Sir M. Hicks-Beach) to Governor Frere, March 21, 1878; Com. Papers, **1878**, c. 2079, p. 125.

immediate effect of substituting "a single strong governing power . . . for the dual forces of the executive and legislature, which were before, as often as not, exerted in opposite directions."[b] And at the close of the session of 1873, the governor was able to declare that "in no previous session does it appear that such harmonious action has prevailed between the executive and both branches of the legislature, nor has the business of legislation ever been carried on so satisfactorily and at the same time so expeditiously."[c]

This administration continued in office until February, 1878, when, as has been already intimated, its career of usefulness was brought to an abrupt close, under circumstances which will receive due consideration in a subsequent chapter.

Abandonment of responsible government in the West Indies.

In closing our brief summary of the circumstances attending the introduction of parliamentary government into the principal colonies of Great Britain, it merely remains to add that, in some of the smaller and less progressive colonies, an attempt to establish local self-government was made, which proved to be a failure. After a fruitless endeavour to work the system successfully, it was abandoned, and a simpler and more effective method of administration resorted to. This was notably the case in regard to Jamaica, which for nearly two centuries had possessed a representative constitution, and had been latterly intrusted with a responsible government.[d] In 1866, the local legislature, at the instance of Governor Eyre, unanimously agreed to abrogate all the existing machinery of legislation, and to accept in lieu thereof any form of government that might be approved by the Crown. Accordingly by an imperial act, passed in the same

[b] Commons Papers, **1874**, vol. xliv. p. 145.
[c] Votes and Proceedings, Cape Assembly, **1873**, p. 406.
[d] See Lords Papers, **1864**, vol. xiii. p. 205.

year, a new constitution was conferred upon the island, which is still in operation. It consists of a legislative council composed of an equal number of official and of non-official members, together with a privy council, whose advice the governor is free to accept or to reject at his discretion.[e]

The example of Jamaica, in surrendering her free institutions and becoming a crown colony, was subsequently followed by the Virgin Islands and by Montserrat, which were afterwards, with other islands adjacent, constituted into a single federal colony, termed the Leeward Islands, by the Imperial Act 34 and 35 Vict. c. 107, passed in 1871. In 1876, the separate governments of the islands of St. Vincent, Tobago, and Grenada, passed acts to repeal their existing constitutions, and to vest the government in the queen, leaving it to her Majesty to erect such a form of government therein as should be deemed most suitable for their future welfare. Whereupon a new legislative council was established, to assist the governor, and composed of not less than three persons, to be appointed by royal warrant. The persons already nominated are the colonial secretary, the attorney-general, and the treasurer.[f]

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[e] Adderley, Colonial Policy, pp. 227–234.

[f] *Ibid.* pp. 262, 271; Imp. Act 39 and 40 Vict. c. 47; Hans. Deb. vol. ccxxx. p. 1039; C. O. List, 1879, p. 186.

A. R. GHOSE.

CHAPTER IV.

PRACTICAL OPERATION OF PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES.

PART I.

IMPERIAL DOMINION EXERCISABLE OVER SELF-GOVERNING COLONIES.

a. *In the appointment and control of Governors.*

Secretary of state for the colonies.

THE authority of the Crown over the colonies of Great Britain is directly administered through the secretary of state for the colonies. This officer is primarily and personally responsible, both to the sovereign and to the imperial parliament, for all official acts of any colonial governor,[a] notwithstanding the operation of the rule of collective responsibility, which renders the whole administration liable for the acts of the several members of which the governing body is composed. For the ancient maxim still holds good, that "the Constitution of this country always selects for responsibility the individual minister who does any particular act."[b]

The supremacy of the Crown over colonies which possess representative institutions, and have been further intrusted with the privileges of local self-government, by the incorporation into their political system of the principle of "responsible government," is ordinarily exercised only in the appointment and control

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[a] Todd, Parl. Govt. vol. ii. pp. 520, 522.
[b] *Ibid.* p. 376.

of the governor as an imperial officer; and in the allowance or disallowance in certain cases of the enactments of the local legislature.

Appointment of governors.

The secretary of state for the colonies has the privilege of recommending, for the sanction of the sovereign, suitable persons to fill the office of governor: subject, however, to the approval of the prime minister, whose opinion, especially in the case of the more important governorships, would have much weight.

Their commission and instructions.

Colonial governors are appointed by letters-patent under the great seal. As the preparation and issue of these formal and authoritative instruments usually takes considerable time, it became the practice, prior to the year 1875, to issue a minor commission, under the royal sign-manual and signet, to a newly appointed governor, empowering him, meanwhile, to act under the commission and instructions given to his predecessor in office. But doubts having been raised in certain cases, whether these minor commissions effectually authorized the holder to perform all the duties and functions appertaining to his office, it was in 1875 deemed expedient by her Majesty's government, under the advice of the law officers of the Crown, to issue, on behalf of each colony of the empire, letters-patent constituting permanently the office of governor therein; and providing that all future incumbents of this office should be appointed by special commission under the royal sign-manual and signet to fulfil the duties of the same, under the general authority and directions of the letters-patent aforesaid, and of the permanent instructions to be issued in connection therewith.

But, before introducing this change, a circular despatch, dated Oct. 20, 1875, was addressed to all colonial governors, enclosing a copy of the proposed new forms, and inviting suggestions to be submitted by the governor, after consultation with his responsible minis-

ters, for such alterations as might appear to them to be specially advisable in the case of the particular colony.

New instruments for governors of Canada.

Upon the receipt of this despatch by the Earl of Dufferin (governor-general of Canada), he referred it to a committee of the privy council for consideration. And on April 6, 1876, his lordship forwarded to the Earl of Carnarvon (colonial secretary) a memorandum, drawn up by Mr. Edward Blake (minister of justice), and by a sub-committee of the privy council, which embodied various important suggestions in regard to the proper form of a permanent commission and instructions for the office of governor-general of Canada.

Approving of the idea of a revised and permanent form for these instruments, Mr. Blake nevertheless submitted that the peculiar position of Canada, in relation to the mother country, entitled her to special consideration, and that the existing forms, while they might be eminently suited to other colonies, were inapplicable and objectionable in her case. For Canada is not merely a colony or province of the empire, she is also a dominion, composed of seven provinces federally united under an imperial charter or act of Parliament, which expressly recites that her constitution is to be similar in principle to that of the United Kingdom. In addition to large powers of legislation and government over the confederated provinces, this dominion has been intrusted with absolute powers of legislation and administration over the people and territories of the northwest, out of which she has already created, and is empowered further to create at discretion, new provinces with representative institutions, to be hereafter admitted to share in the privileges now assigned to the older provinces. Canada, therefore, is undoubtedly entitled to "the fullest freedom of political government;" and her rights, in this respect,

should be recognized and embodied in the authoritative documents of the commission and instructions from the Crown to the governor-general.

Changes proposed therein.

In conformity with this idea, — the correctness of which could not be disputed, and which was frankly admitted by her Majesty's government, — Mr. Blake suggested numerous alterations from the forms heretofore in use, and submitted reasons in favour of the amendments proposed.

As a foundation principle, necessary to be asserted and maintained, in any instrument which might be issued for the purpose of defining the powers of a governor-general in Canada, Mr. Blake contended that it ought to be clearly understood that, "as a rule, the governor does and must act through the agency (and upon the advice) of ministers; and ministers must be responsible for such action," — save "only in the rare instances in which, owing to the existence of substantial imperial as distinguished from Canadian interests, it is considered that full freedom of action is not vested in the Canadian people."

In a despatch dated May 22, 1876, Lord Carnarvon thanks the governor-general for the above-mentioned memorandum, and promises that the suggestions contained therein shall receive due consideration, when the charter to incorporate the office of governor-general of Canada is being prepared.

About this period, Lord Carnarvon had expressed a desire to have a personal conference with the Canadian minister of justice, in reference not only to the amended forms of the royal instructions and commission to the governor-general, but also on certain other public questions of importance, which had arisen out of the relations between Canada and the mother country.

Accordingly, upon a report of a committee of the privy council, approved by his excellency the gover-

nor-general in council, on May 29, 1876, Mr. Blake was deputed to visit England, for this purpose. His report of his official action and intercourse with the colonial secretary was submitted to the Canadian government, and in the following year was laid before Parliament. So far as the governor's commission and instructions were concerned, the expression of Mr. Blake's views on this subject elicited from Lord Carnarvon the observation that these suggestions appeared to his lordship to be of much importance, not only with reference to the Dominion, but as applicable also to the circumstances of some other colonies. Ere long, Lord Carnarvon hoped to be in a position to inform Lord Dufferin that he was prepared to advise an amendment of the existing commission and instructions, in general accordance with Mr. Blake's representations.[c]

On Feb. 10, 1877, Lord Carnarvon transmitted to Lord Dufferin drafts of letters-patent, constituting the office of governor-general of the Dominion of Canada; of the royal instructions to accompany the same; and of a commission appointing a governor-general. His lordship intimated that these instruments had been expressly framed, so as to meet the views of the Canadian ministers; and he invited their opinion upon the result. No time was lost, by Lord Dufferin, in replying to this communication. On March 8, his Excellency forwarded to the colonial secretary a minute of council, and a report from the minister of justice (Mr. Blake), expressing a general approval of the terms of these drafts; but suggesting certain alterations therein, which, if carried out, would render them entirely acceptable.

Lord Carnarvon, in his reply to this despatch, dated April 9, 1877, expresses his pleasure at the approbation

[c] For Mr. Blake's Report, and the correspondence connected therewith, see Canada Sess. Papers, **1877**, no. 13.

with which the drafts had been received, and his belief that there would be no difficulty in arriving at a mutually satisfactory settlement of the few points still in debate. To this end, he forwarded amended drafts, which were substantially in agreement with the changes suggested by Mr. Blake. He had, however, retained in a modified form the clause in the commission which indicates the independent action to be taken by the governor-general, in the exercise of the prerogative of pardon, in cases of an imperial nature; because, "when interests outside of the Dominion are directly affected, there is no authority except the imperial authority which is in a position to decide."

In answer to the foregoing despatch, Lord Dufferin, on June 14, 1877, transmitted to Lord Carnarvon a minute of council and memorandum from Mr. Blake, representing that the specified changes in the draft commission and instructions were for the most part quite satisfactory; but yet submitting the expediency of transferring the clause concerning the administration of the prerogative of pardon from the commission of the governor to his instructions, so as to admit of occasional modifications of the rule in exceptional cases; also, suggesting the omission of a word in this clause, which involved no material principle.

New drafts agreed upon for Canada.

On Nov. 8, 1877, Lord Carnarvon writes to Lord Dufferin, accepting unreservedly the amendments proposed in the preceding communication. Whereupon, on December 13, Lord Dufferin forwards another minute of council, recommending that the new drafts should be promulgated previous to the approaching session of the Canadian Parliament. Lord Carnarvon, however, in a despatch dated Jan. 10, 1878, replies that, in conformity with established practice, her Majesty's government consider that it would be better to postpone the issue and promulgation of the revised

and permanent letters-patent, commission, and instructions until a new appointment to the office of governor-general of Canada shall be made.[d]

New instruments for South Australia.

Meanwhile, the intentions of her Majesty's government, as hereinbefore explained, to make permanent provision for the discharge of the office of governor, in the various dependencies of the British Crown, were being carried out, in other parts of the empire.

In April, 1877, upon the appointment of Sir W. F. D. Jervois to be governor and commander-in-chief of South Australia, the imperial government took occasion to revise the customary form of the governor's commission, and of the royal instructions accompanying the same. Letters-patent were issued, under the great seal of the United Kingdom, and by warrant under the queen's sign-manual, constituting the office of governor and commander-in-chief in and for this colony. This instrument was accompanied by a draft of instructions passed under the royal sign-manual and signet, to the governor for the time being of South Australia, or, in his absence, to the lieutenant-governor, or officer administering the government of the said colony. By these official documents, permanent provision was made for the execution of the office of governor in South Australia, and the commission afterwards issued, nominating Sir W. F. D. Jervois to fill this post, merely recites the letters-patent, and appoints him, during the royal pleasure, to be governor in and over the colony, "with all and singular the powers and authorities granted to the governor of our said colony, in our letters-patent" aforementioned; and authorizes him to exercise and perform the same, "according to such orders and instructions as our said governor for the time being hath already, or may here-

[d] For this correspondence, see Canada Sess. Papers, **1879**, no. 181.

after receive from us." The commission thus concludes: "and we do hereby command all and singular our officers, ministers, and loving subjects in our said colony and its dependencies, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly."[e]

The instructions, accompanying the South Australian letters-patent, and intended to be of general application to future incumbents of the office of governor in that colony, are in the main an embodiment of the instructions heretofore issued for the guidance of governors in and over all colonies in the enjoyment of local self-government. They express the mind and will of the imperial government, in regard to the proper duties of a governor and his relation to his ministers, as the same have been authoritatively declared in similar instruments, issued since the introduction of responsible government into our colonial system.

But these instructions are necessarily more restrictive in their character than those which were afterwards framed in reference to Canada. Mr. Blake's contention, "that there is no dependency of the British Crown which is entitled to so full an application of the principles of constitutional freedom as the Dominion of

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[e] For the revised letters-patent, instructions, and new commission, see South Australia Parl. Proc. **1877**, no. 109. Similar letters-patent, constituting the office of governor and commander-in-chief of the colony of the Cape of Good Hope, together with instructions to the said governor, were issued under the royal sign-manual and signet, on Feb. 26, 1877; and on the following day a royal commission was issued appointing Sir H. Bartle Frere to be the governor of the said colony. (Cape of Good Hope Assembly Votes, **1878**, Annexures A. 8.) Similar letters-patent, making permanent provision for the office of governor and commander-in-chief in and over the colony of New Zealand and its dependencies, were issued on Feb. 21, 1879, and the following day a commission passed under the royal sign-manual and signet appointing Sir Hercules Robinson governor of the colony, in succession to the Marquis of Normanby. (New Zealand Parl. Papers, **1879**.)

Commission and instructions to the Marquis of Lorne.

Canada," was admitted to be correct by her Majesty's government; and the official instruments made use of, in the appointment, on the 7th October, 1878, of the Marquis of Lorne to be governor-general of Canada, clearly indicate, in their substantial omissions, as well as in their positive directions, the larger measure of self-government thenceforth conceded to the new dominion. This increase of power, to be exercised by the government and parliament of Canada, was not merely relatively greater than that now enjoyed by other colonies of the empire, but absolutely more than had been previously intrusted to Canada itself, during the administration of any former governor-general.

This will be obvious, upon a perusal of the correspondence between Lord Dufferin and the secretary of state, from April 6, 1876, to Jan. 10, 1878, above referred to, together with the report submitted by Mr. Blake to the governor-general in council, on the same subject, on Sept. 5, 1876.[f]

A brief mention of the chief points of difference between the commission and instructions issued to the Marquis of Lorne, and those furnished to his predecessors in the office of governor-general, will suffice to establish this proposition.

In his suggestions for the revision and improvement of these authoritative documents, Mr. Blake had dwelt at considerable length upon the necessity of modifying the royal instructions in regard to the exercise of the prerogative of mercy. This subject, however, will specially call for consideration in a subsequent part of this treatise; suffice it here to say that Mr. Blake's arguments for a change of constitutional practice, in this particular, substantially prevailed, and are embodied in the new instructions.

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[f] Canada Sess. Papers, **1877**, no. 13; *Ibid.* **1879**, no. 181.

Other portions of the governor's commission and instructions, heretofore invariably inserted in documents of this description were omitted from the revised draft agreed upon for use in Canada, on the ground that they were obsolete or superfluous and unnecessary. Of this character we may refer to the directions concerning the meetings of the executive, or privy council, and the transaction of business by that body; the clause which authorized the governor, in certain contingencies, to act in opposition to the advice of his ministers; the clause which prescribes the classes of bills to be reserved by the governor-general for imperial consideration; and certain clauses dealing with matters which now come within the purview of the provincial governments, and are dealt with by local legislation, over which the governor-general and his advisers practically exercise no control.

Alterations in the revised formularies.

All such questions, it was wisely contended by Mr. Blake, should be left to be determined by the application to them, as they might arise, of the constitutional principles involved in the establishment in Canada of parliamentary government. The authority of the Crown in every colony is suitably and undeniably vested in the governor. He possesses "the full constitutional powers which her Majesty, if she were ruling personally instead of through his agency, could exercise." "The governor-general has an undoubted right to refuse compliance with the advice of his ministers; whereupon the latter must either adopt and become responsible for his views, or leave their places to be filled by others prepared to take that course."

Even in respect to questions which may involve imperial as distinct from Canadian interests, it appeared to Mr. Blake unadvisable, if not impossible, to formulate any rule of limitation for the conduct of the governor-general. "The truth is," he observes, "that imperial

interests are, under our present system of government, to be secured in matters of Canadian executive policy, not by any such clause in a governor's instructions (which would be practically inoperative, and if it can be supposed to be operative would be mischievous), but by mutual good feeling, and by proper consideration for imperial interests on the part of her Majesty's Canadian advisers; the Crown necessarily retaining all its constitutional rights and powers, which would be exercisable in any emergency in which the indicated securities might be found to fail." He therefore suggested the omission of all clauses, in the royal instructions to governors of Canada, which were of this nature. The sections of the British North America Act, defining and regulating the exercise of the powers which appertain to the office of governor-general in a system of government expressly declared by that statute to be "similar in principle to that of the United Kingdom," were in Mr. Blake's judgment amply sufficient to determine the constitutional status and authority of that officer; subject, of course, "to any further instructions, special or general, which the Crown may lawfully give, should circumstances render that course desirable." [g]

These propositions, advanced by Mr. Blake, were for the most part accepted and approved by her Majesty's government, and led, as we have seen, to the introduction of material alterations in the form and substance of the commission and instructions to colonial governors, particularly in reference to the dominion of Canada.

But while the revised and amended formularies, since promulgated for the regulation of the office of governor in Canada, in South Australia, and in other colonies, have been framed more in accordance with

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[g] Canada Sess. Papers, **1877**, no. 13, p 8.

the actual political relation of these several colonies to the mother country, it is important to observe that they do not abate or relinquish one iota of the rightful supremacy of the Crown, as the same may be constitutionally exercised in any part of the queen's dominions, upon the advice of responsible ministers.[h]

Revised formularies maintain supremacy of the Crown.

Any further comment that may be necessary, in regard to the changes effected by the new drafts of these authoritative instruments, may be suitably reserved for consideration in connection with the special points in question, to be hereafter examined.

We will now briefly indicate the contents of the letters-patent constituting the office of the governor-general of Canada, of the royal instructions accompanying the same, and of the commission appointing the Marquis of Lorne to fill this office; as the same were transmitted to the Senate and Commons of Canada, on Feb. 19, 1879.[i]

Power of governor-general of Canada.

By his letters-patent, the governor-general of the dominion of Canada, for the time being, is authorized and commanded by the queen, "to do and execute, in due manner, all things that shall belong to his said command, and to the trust we have reposed in him, according to the several powers and authorities granted or appointed him by virtue of 'The British North America Act, 1867,' and of these present letters-patent, and of such commission as may be issued to him under our sign-manual and signet, and according to such instructions as may, from time to time, be given to him, under our sign-manual and signet, or by our order in our privy council, or by us through one of our principal secretaries of state; and to such laws as are or shall hereafter be in force in our said dominion."

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[h] Sir M. Hicks-Beach (colonial secretary) in Hans. Deb. vol. ccxliv. p. 1312.

[i] Canada Sess. Papers, **1879**, no. 14.

He is also authorized and empowered to keep and use the great seal of Canada, "for sealing all things whatsoever that shall pass the said great seal."

And to constitute and appoint, in the name and behalf of the sovereign, "all such judges, commissioners, justices of the peace, and other necessary officers and ministers of our said dominion, as may be lawfully constituted or appointed by us."

And "upon sufficient cause to him appearing," to remove or suspend from office any person holding any office under the Crown in Canada, so far as the same may lawfully be done.

And "to exercise all powers lawfully belonging to us in respect of the summoning, proroguing, or dissolving the parliament" of Canada.

And under the authority of the British North America Act, aforesaid, to appoint any person or persons, jointly or severally, to be his deputy or deputies within any part of Canada, to exercise such of the powers or functions of the governor-general, as he may please to assign to him or them.

And "in the event of the death, incapacity, removal or absence" out of Canada of the governor-general, all his powers shall be vested in a lieutenant-governor, or administrator, to be appointed by the queen, under her sign-manual and signet, or if none such have been appointed, "then in the senior officer for the time being in command of our regular troops" in Canada; after such person shall have duly taken the oaths prescribed to be taken by the governor-general.

"All our officers and ministers, civil and military, and all other the inhabitants of our said dominion," are required "to be obedient, aiding and assisting unto our said governor-general," or the administrator, &c., in his absence.

By the last clauses of the letters-patent, full power is

reserved to revoke, alter, or amend the same, at any time; and provision made to ensure that they shall have due publicity in Canada.

General instructions to governor-general of Canada.

The royal instructions for the execution of the office of governor-general of Canada begin by reciting the letters-patent, aforesaid, and enjoin the governor-general for the time being, to cause his commission to be read and published in the presence of the chief-justice or other judge of the supreme court, and of the members of the dominion privy council, and require him to be duly sworn upon entering upon the duties of his office.

They also require him to administer, or cause to be administered, the necessary oaths to all persons who shall hold any office or place of trust in the dominion.

To communicate these and any other instructions he may receive to the dominion privy council.

To transmit to the imperial government copies of all laws assented to by him in the queen's name, or reserved for the signification of the royal pleasure; with suitable explanatory observations and copies of the journals and proceedings of the parliament of the dominion.

The only other clauses contained in these instructions concern the exercise by the governor-general, of the prerogative of pardon, — which (it has been already remarked) will receive due consideration in an appropriate part of this treatise, — and forbid his quitting the dominion, "without having first obtained leave from us for so doing, under our sign-manual and signet, or through one of our principal secretaries of state."

Commission appointing governor-general.

The royal commission appointing the Marquis of Lorne to be governor-general of the dominion of Canada, is dated Oct. 7, 1878. It simply recites the letters-patent aforesaid, and confers upon Lord Lorne this office, with the powers and authorities belonging to it, according to such orders and instructions as have

already been, or may hereafter be, communicated to him from the sovereign; and commands "all and singular our officers, ministers, and loving subjects in our said dominion, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly."

Special instructions to governors.

Every colonial governor, after his appointment to office, is subject to the control of the Crown, as an imperial officer. In addition to the permanent and general instructions which he receives in connection with his commission, he may, from time to time, be charged with any further instructions, special or general, which the Crown may lawfully communicate to him, under particular circumstances. The medium of communication between the sovereign and her representative, in any British colony, is the secretary of state.

Their term of service.

Colonial governors invariably hold office during the pleasure of the Crown; but their period of service in a colony is usually limited to six years, from the assumption of their duties therein;[j] although, at the discretion of the Crown, a governor may be re-appointed for a further term.

The rule which limits the term of service of a governor to six years was established principally for the purpose of ensuring in governors the utmost impartiality of conduct, by disconnecting them from fixed relations with the colony over which they are appointed to preside. It was first made applicable to all British colonies by a circular despatch from Mr. Secretary Huskisson, issued in May, 1828, as follows: "It shall for the future be understood that, at the expiration of six years, a governor of a colony shall, as a matter of course, retire from his government, unless there should be some special reasons for retaining him there; and that

[j] Col. Reg. 1879, sec. 7.

the way should thus be opened for the employment of others, who may have claims to the notice of his Majesty's government." [k]

Provision for absence of a governor.

During the temporary absence of a governor from his colony, it was formerly the general practice for the Crown, by a dormant commission under the sign-manual, to empower the chief-justice or senior judge therein to act as administrator of the government. But difficulties having sometimes arisen in carrying out an arrangement of this kind, it is not now invariably resorted to, at least, in the first instance. Instead of this provision to supply the place of an absent governor, it is now customary either to appoint a lieutenant-governor, or administrator of the government, under the royal sign-manual; or else that the senior officer for the time being of her Majesty's regular troops in the colony shall be empowered to act in this capacity. But where no such provision has been made, it is usual and appropriate for the chief-justice or senior judge to be authorized to act as administrator of the government, in the event of the death, incapacity, removal or departure from the government of the governor and (if there be such an officer) of the lieutenant-governor of the colony.[l]

Communications to a governor from imperial government.

In matters of imperial concern, or which may affect the well-being of the colony as a part of the empire, it is the duty of the secretary of state, as the constitutional mouthpiece of the sovereign, to correspond with colonial governors, — communicating the opinions of her Majesty's government, and making whatever re-

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[k] Commons Papers, **1836**, vol. xxxix. p. 633. Todd, vol. ii. p. 524.

[l] Col. Reg. 1879, secs. 6 and 7: the Marquis of Lorne's letters-patent, as governor-general of Canada, in 1878. See also the correspondence in New South Wales Votes and Proc. **1874**, pp. 95–108. *Ibid.* **1875–76**, vol. ii. p. 19. South Australia Parl. Proc. **1875**, vol. iii. no. 35. *Ibid.* **1877**, p. 1, and appx. nos. 48 and 109.

commendations or suggestions he may deem to be expedient, either for the instruction of the governor, for the information of his ministers, or for the welfare of the colonial subjects of the Crown. Opportunities for such advice or interposition will naturally become less frequent and imperative, in proportion as the institutions of government in any colony become settled and in harmonious operation. In matters of local concern, within the legitimate jurisdiction of a self-governing community, the opinion of the imperial government is seldom obtruded, and never insisted upon. And in well-established colonies, in possession of the full measure of local responsibility, despatches from her Majesty's colonial secretary, in reply to communications from the governor, narrating the progress of events under his administration, are usually confined to a brief acknowledgment of the receipt of such intelligence, and to the expression in general terms of the opinion entertained by her Majesty's government of the governor's proceedings.

Conveyed by the secretary of state.

It is likewise incumbent upon the secretary of state to be the medium of conveying to all governors of colonies and other dependencies of the Crown specific instructions for their guidance in the fulfilment of their respective charges. These instructions are issued by the sovereign, under the royal sign-manual. They are, as has been already observed, primarily of a general nature, and are addressed to the governor, upon his first assumption of office.[m] Subsequent instructions are transmitted to the governor, from time to time, as may

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[m] See the royal instructions to the Duke of Richmond, upon his appointment, in 1818, to be governor-in-chief in and over Upper and Lower Canada. (Commons Papers, **1837–38**, vol. xxxix. p. 794.) Royal Instructions to the Earl of Dufferin, as governor-general of the Dominion of Canada, dated May 22, 1872. (Canada Com. Journals, **1873**, p. 85.) Royal Instructions to the governor of South Australia, dated April 28, 1877. (South Australia Parl. Proc. **1877**, no. 109.)

be necessary; or are embodied in "circular despatches," which are addressed to governors generally, although sent to each one individually.[n]

Ample directions in regard to the order and method of correspondence between the governor of a colony and the colonial office will be found in chapter VII. of the "Rules and Regulations for her Majesty's Colonial Service," issued in 1879.

Official despatches.

By the royal instructions, governors are forbidden to give to any person copies of despatches they may receive from the secretary of state, — or to allow copies to be taken of them, — unless under a general or special authority from that officer. But where responsible government is established, the governor is considered to be at liberty to communicate to his advisers all despatches not marked "Confidential." And by a circular, dated July 10, 1871, despatches are reclassified, as follows: (1.) *Numbered* despatches, which a governor may publish, unless directed not to do so. (2.) *Secret*, which he may, if he thinks fit, communicate, under the obligation of secrecy, to his ministers, and may even make public, if he thinks it necessary. (3.) *Confidential*, which are addressed to a governor personally, and which he is forbidden to make known, without express authority from the secretary of state.[o]

Presentation of despatches to local parliament.

In laying despatches and other papers before the legislature, the governor of a colony is bound by constitutional practice. In general, the governor in colonies with responsible ministries takes no personal action, in this matter, in the case of "numbered" despatches

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[n] For example see the "circular despatch," of June 28, 1843, in regard to the imposition of differential duties by colonial legislatures; and that on martial law, which was laid before Parliament in 1867; and that on the exercise of the prerogative of mercy, presented to Parliament in 1877. See also the circular despatch of March 8, 1870, on the transmission of despatches, in Col. Reg. 1879, sec. 177.

[o] Col. Reg. 1879, sec. 188.

and ordinary papers, and is rarely even consulted. The ministers lay before the legislature any such documents, on their own discretion and responsibility.[p] But it is a general and reasonable rule of the public service that despatches and other documents forwarded to the imperial government should not be published until they shall have been received and acknowledged by the secretary of state; and that no confidential memorandums passing between ministers and the governor should be laid before the colonial parliament, except on the advice of the ministers concerned.[q]

When advised to do so by his ministers, the governor should lay "any numbered and not confidential despatch" addressed by him to or received by him from the secretary of state before the local Parliament; unless there be some strong reason to the contrary,—such as a pending reference to the secretary of state.[r]

Ministerial responsibility.

But the governor must first be advised by his ministers before taking such a step; and they must be prepared to defend his action if it be impugned.

Ministers cannot relieve themselves from the responsibility of advising as executive councillors; nor is a governor free to act without or against ministerial advice, in cases not involving the rights or prerogatives of the Crown or imperial interests: though such responsibility on the part of ministers does not oblige them to defend particular views or statements contained in a governor's despatches or confidential memorandums.[s]

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[p] New Zealand House of Rep. Journals, **1871**, appx. vol. i. p. 14. New Zealand Parl. Deb. vol. viii. p. 140.

[q] Governor Bowen's answer to an address of Leg. Council of Victoria, dated Jan. 24, 1878; Commons Papers, **1878**, C. 2173, pp. 8, 54, 63. And see Todd, Parl. Govt. vol. i. pp. 279, 603; and Lord Ellenborough's case, *ibid.* vol. ii. p. 383.

[r] Colonial secretary (Lord Carnarvon's) despatch, Jan. 26, 1878; Tasmania Leg. Council Journals, **1878**, appx. no. 36, p. 11.

[s] Governor Weld, Memo. for his ministers, of Oct. 29, 1877. Tasmania Leg. Council Journals, **1877**, Sess. 4, appx. no. 35, p. 6; approved by Lord Carnarvon, in despatch of Jan. 26, 1878. Thus, on Feb. 10, 1879, the governor of Tas-

Confidential despatches.

It rests with the secretary of state in every instance, to decide whether "confidential" despatches may or may not be made public.[t]

Sir E. Bulwer-Lytton, when colonial secretary, in notifying Sir George Bowen of his appointment as the first governor of Queensland, gave the following summary of the foregoing rules: "The communications from a government should be fourfold: (1.) *Public* despatches. (2.) *Confidential*—intended for publication, if at all required. (3.) *Confidential*—not to be published unless *absolutely necessary* for defence of *measures by yourself and the home department.* (4.) *Letters strictly private;* and these, if frank to a minister or to an under-secretary like Mr. Merivale, should be guarded to *friends;* and touch as little as possible upon names and parties in the colony. A government may rely on the discretion of a department, never on that of private correspondents."[u]

On May 16, 1867, a motion was made in the Legislative

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mania, having requested that certain numbered despatches received by him from the secretary of state might be immediately laid before the colonial parliament, was informed by his ministers "that they are unable to discover any grounds of public policy requiring the publication of these despatches, and after due consideration are unanimously of opinion that it is undesirable to accede to his Excellency's request." (Tasmania Leg. Council Papers, **1878–79**, no. 114.) Upon this occasion, the views of his Excellency the governor, upon the particular question, were in accord with his ministers; though, for the sake of avoiding further unnecessary discussion of a controverted case, he objected to lay the despatches before parliament. Subsequently, however, the Legislative Council having specially applied for the production of all the papers in the case, ministers advised their publication. In concurring with this request, "the governor points out to ministers, as he did to their predecessors, that, whatever may be his personal views, he (in matters not involving imperial interests, or the prerogatives of the Crown, directly or indirectly) considers his responsible advisers to be answerable to parliament for advising the production of despatches, and for the policy of such production, but does not consider that such responsibility renders it incumbent on them to defend any view or statement therein expressed by the governor." (*Ibid.* Leg. Council Papers, **1878**, no. 117.)

[t] Col. Reg. 1878, no. 184.

[u] Lord Lytton's Speeches, &c., vol. i. p. cxxiii. See further, in regard to private correspondence between public functionaries, Todd, Parl. Govt. vol. ii. p. 506.

When communicated to parliament.

Assembly of Queensland for an address to the governor asking for a copy of his despatch to the secretary of state for the colonies, transmitting a petition from certain residents in the colony requesting the governor's recall, — in consequence of his interposition to prevent certain proceedings on the part of his ministers which were at variance with the royal instructions, and which interposition led to the resignation of ministers, — and also for a copy of the reply to this despatch. Whereupon the premier pointed out that, by the royal instructions, all governors are prohibited from giving copies of their despatches, unless with the sanction of the secretary of state. The despatches in question were "confidential," and had not even been perused by the premier. Nevertheless, he assumed the responsibility of advising the governor that, in his opinion, it was unnecessary to produce them. The motion was accordingly negatived on a division.[v]

On Aug. 19, 1873, Governor Fergusson of New Zealand, transmitted a message to the Legislative Council of the colony, declining to lay before that body "all correspondence" which had passed between himself and the secretary of state, on a particular question, as such a proceeding would establish a practice hitherto unprecedented.[w]

Governor Robinson's confidential minute to ministers.

On Nov. 25, 1874, a motion was made in the Legislative Assembly of New South Wales, condemnatory of the conduct of ministers in laying before the house Governor Robinson's minute, to themselves, upon the exercise of the prerogative of mercy in a certain case, and also reflecting upon the tenor of the minute itself, — which, it was alleged, contained an implied censure upon the Legislative Assembly. This motion was negatived by the casting-vote of the speaker.[x] Shortly after parliament was dissolved. The new parliament was convened in January, 1875. In the debate upon the address in answer to the speech from the throne, an amendment, similar to the motion above mentioned, was carried against ministers. Whereupon they resigned. In reply to the address, the governor (in the interval between the resignation of his ministers and the appointment of their successors), transmitted

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[v] Queensland, Parl. Deb. **1867**, p. 164.

[w] New Zealand Leg. Council Journals, **1873**, appx. no. 4.

[x] New South Wales, Leg. Assembly Votes and Proc. **1874**, p. 54.

a message to the assembly, dated February 2, wherein he defended his conduct in this matter, and asserted the constitutional rights of his office, whilst expressing due respect and consideration for the opinions of the Legislative Assembly, and a readiness to accept their decision, so far as it affected his late ministers. Unable to succeed in the endeavour to form a new administration of different material, the governor was obliged to send for Mr. Robertson, who, as leader of the opposition in the Assembly had induced the house to agree to the aforesaid amendment to the address. But in his memorandum to Mr. Robertson, the governor, — while admitting the right of the house to condemn the ex-ministry for their own act, in laying his Excellency's minute upon the table, — protested against the rest of the amendment, as being "not only a personal imputation upon himself, but an invasion of the constitutional rights of his office." Mr. Robertson accepted the position offered to him, and became premier of a new ministry. The governor duly reported his own proceedings to the secretary of state (Earl Carnarvon), who, in a despatch dated April 26, 1875, expressed his approval of his Excellency's conduct; including the terms of the message of the 2d February, when he was without constitutional advisers. The colonial secretary had previously, in a despatch dated March 20, 1875, freely accepted the governor's explanations in regard to his minute, above mentioned, and his assurance that he had not intentionally reflected therein upon the Legislative Assembly.[y]

Confidential despatches on Victoria "deadlock."

During the continuance of the "dead-lock" between the legislative chambers in the colony of Victoria, in 1877–78, arising out of differences in regard to the powers of the two houses in the appropriation of public money, the governor (Sir G. Bowen), on Jan. 31, 1878, telegraphed the secretary of state (Earl Carnarvon) as follows: "It would do much good if I might, in compliance with advice of ministers and address from Legislative Assembly, present to parliament the confidential despatches written in 1867 and 1868 by Lord Canterbury, or extracts from them, which bear upon the present crisis. Please telegraph your answer." In reply, dated February 9, the colonial secretary expressed his wish

[y] Commons Papers, **1875**, vol. liii. pp. 682–696.

to delay deciding on this application until he had received further information on the subject. On February 22, he sent a message to the governor, "telegraph your reasons for desiring to publish . . . despatches which, being confidential, I am disposed to think had better be withheld." Accordingly, on March 1, Governor Bowen replied, "Lord Canterbury's despatches during the last dead-lock, specially those referred to in my confidential despatch of September 28, define the position and mutual relations of the Council and Assembly, and their presentation to parliament here would now do good." Whereupon, on March 6, the colonial secretary (Sir M. Hicks-Beach) answered: "I will not refuse consent to publication, under advice of ministers, of any public despatches on Darling case, and of confidential reports mentioned in your despatch of September 28, — except despatch of April 26, 1868, and paragraph referring to it in despatch of May 23, 1868, which I think better withheld. But ministers must be responsible if any matter so published gives offence or causes difficulties."[z]

On the same day, March 6, 1878, the Legislative Assembly of Victoria addressed the governor, praying him to present to parliament any hitherto unpublished despatches of Lord Canterbury, written during the parliamentary dead-lock of 1866–68. On March 19, Governor Bowen informed the Assembly by message, "that having asked and received permission accordingly from the secretary of state, he now transmits herewith copies of the despatches referred to."[a]

Confidential communications between ministers and the governor.

In January, 1878, the Legislative Council of Victoria passed an address to the governor (Sir G. Bowen) asking for a copy of a ministerial memorandum, upon the position of affairs arising out of the parliamentary crisis in the colony, which had been communicated by the premier to the governor, and transmitted by him to the secretary of state for the colonies. The governor declined to present this memorandum, on the ground that "it is a general and reasonable rule of the public service that documents forwarded to the imperial government should not be published until they shall have been received

[z] Commons Papers, **1878**, C. 1982, pp. 32, 34, 41, 42.

[a] Victoria Leg. Assembly Votes and Proc. **1877–78**, vol. i. pp. 296, 301, appx. B. no. 15. For a summary of the contents of these despatches, see *post*, pp. 491, 492.

and acknowledged by the secretary of state." On March 6, the governor (having been notified by telegram that the secretary of state had received and considered this paper) caused a copy of it to be laid before both houses. Whereupon the Legislative Council addressed the governor on the points urged in the memorandum, and found fault with the course taken by his Excellency in respect to the same. This address was referred to the ministry for their consideration and advice. They characterized the reflection therein upon the governor as "unfounded and gratuitous." They regarded the memorandum as a confidential communication sent by ministers to the governor, which, without their consent, ought not to be communicated to either house of parliament. They had advised the withholding of that document in the first instance from the council; being of opinion "that it would be impossible to carry on the executive government if either house of parliament had the right to insist on the immediate production of any documents of a confidential character placed by them in the hands of the governor." The council, in asking for a copy of the memorandum, were "actuated, doubtless, by a desire to produce disunion between the governor and the ministry." "Had their application been granted, ministers would have considered that a breach of confidence had been committed," that their advice had been disregarded, and they would have at once resigned.[b]

Removal or transfer of governors.

Governors of colonies, holding office during the pleasure of the Crown, are removable at any time before the expiration of their ordinary term of office, if it should appear advisable to the imperial government to recall them. Sometimes colonial governors are transferred to other colonies, on personal considerations of fitness, or ability to cope with circumstances of peculiar difficulty.

Sir Bartle Frere.

On March 19, 1879, the secretary of state for the colonies addressed a despatch to Sir Bartle Frere, governor of the Cape of Good Hope, reproving him for entering upon a war with the Zulus, without the previous sanction and authority of her Majesty's government. But while it was

[b] Commons Papers, **1878**, C. 2173, pp. 8, 54, 58, 63.

thought necessary to animadvert with some severity upon the conduct of Sir Bartle Frere in this instance, the government mindful of his eminent public services, were unwilling to supersede him; being convinced that his continued retention in office was, upon the whole, most desirable, notwithstanding his presumed error of judgment on this occasion. The policy of the government, in still retaining the government of South Africa in the hands of Sir Bartle Frere, after their condemnation of his proceedings in the despatch of March 19, 1879, gave rise to a motion of censure in the House of Lords, on March 25, which was directed alike against Sir Bartle Frere and her Majesty's government. After a long debate, however, the motion was negatived by a large majority.

In further illustration of the control which is exercised by her Majesty's secretary of state over colonial governors as imperial officers, the following precedents are given: —

Sir W. Denison.

In 1848, Sir William Denison, governor of Van Diemen's Land (now known as Tasmania), addressed a formal complaint to the secretary of state against Sir John Pedder, chief-justice of the superior court in that colony, for alleged neglect of duty, in not having examined and certified the validity of certain acts passed by the governor in council, thereby giving occasion to much confusion and litigation. The governor had previously caused the chief-justice to be tried on this charge, before himself and the Executive Council, under the imperial act of the 22 Geo. III. c. 75. But, at this trial, the judge had been acquitted. Whereupon, a number of residents in the colony petitioned the queen, complaining of the conduct of the governor, in invading the independence of the bench, and for other arbitrary proceedings, and soliciting redress. This petition was forwarded to the colonial secretary through the governor, pursuant to the royal instructions in such cases.[c] In reply, the secretary of state directed the governor to inform the memorialists that their petition had been laid before the queen, but that her Majesty was not pleased to make any order thereon.[d] And, upon a motion in the House of Commons to censure the governor for his con-

[c] Col. Reg. 1879, nos. 217–223.

[d] Commons Papers, **1847–48**, vol. xliii. p. 681; *ibid.* **1849**, vol. xxxv. p. 77.

duct in this case, the secretary of state defended him.[e] Nevertheless, in a confidential despatch, he reprimanded Sir W. Denison, for having "acted rashly and unadvisedly," in this matter, — a reproof which the governor understood "as a sort of hint to him not for the future to meddle with judges, except in case of absolute necessity."[f]

Sir George Grey.

During the progress of the Maori war in New Zealand, in 1865 and 1866, certain allegations of inhumanity in dealing with the Maoris were reported to the secretary of state for war, by a gentleman in England, upon the authority of a private letter received by him from a colonel commanding one of the regiments on active service in New Zealand. These charges tended to implicate not only the military authorities, but also the governor of the colony (Sir George Grey) and his executive council, in suggesting or approving the alleged acts of inhumanity. Upon being made acquainted with the circumstances, the secretary of state for the colonies wrote confidentially to the governor for explanations. In reply, Sir George Grey addressed an indignant disclaimer of the truth of the charges, and enclosed a minute he had laid before his executive council on the subject, wherein he denounced the statement made to the secretary for war as a "base and wicked calumny." The minute concludes by stating that he should transmit a copy of it to the colonial secretary, and demand as his right that copies of the letters in which the charge was preferred should be communicated to him, with the name of the accuser, "and that a full inquiry be instituted into the whole matter; and he declines to receive the communication as a confidential one." Upon the receipt of this despatch and minute, the secretary of state for the colonies wrote to Sir G. Grey that he could "be hardly unaware that this is not the tone or manner in which the officer representing the queen ought to communicate with the minister from whom he receives her Majesty's commands;" and that he hoped, upon reflection, the governor would see the propriety of recalling the objectionable minutes and despatch he had written on this painful question. Whereupon, the governor, without receding from the position he had taken in regard to these

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[e] Hans. Deb. vol. civ. p 378.

[f] Commons Papers, **1847-48**, vol. xliii. pp. 624–670. Denison's Viceregal Life, vol. i. pp. 74, 97.

unfounded charges against himself and his ministers, expressed "the fullest and most unreserved apology" for the passages in his despatch which were considered to have been couched in improper language. This retractation was received with satisfaction by the colonial secretary.[g]

Meanwhile, the writer of the letter upon which the complaint against the New Zealand government was based had ascertained that his censures were unfounded; and he wrote to the war office, desiring to withdraw his hasty and ill-considered charges. But Governor Grey was of opinion that stricter regulations were necessary, in order to prevent vexatious and unjustifiable complaints from being received and entertained by the imperial authorities, without the knowledge of the governor, and without his being afforded previous opportunity of refuting them. He therefore accompanied his apology by a separate despatch of the same date (Feb. 1, 1867), wherein he called the attention of the colonial secretary to the evasion of the spirit of the rule of her Majesty's colonial service, which prohibits complaints against a governor to be made otherwise than through the governor himself. He also pointed out the irregularity of permitting military officers on active service in a colony to report to the secretary of state for war direct upon matters which concern the local government, and without their knowledge. On Aug. 2, 1867, the Legislative Council of New Zealand voted a resolution of thanks to the governor, "for the prompt and able manner in which he has vindicated the honour of the government of New Zealand from the unfounded charges made against it," on this occasion; and at the same time, they resolved, that "the mode of correspondence which has been adopted, and the course generally which has been pursued," by the imperial government in this matter, were calculated to impair the authority of the governor, and to act prejudicially as well to her Majesty's service as to her New Zealand subjects. These resolutions were duly forwarded to the secretary of state, to be laid before the queen. The House of Representatives of the colony agreed to similar resolutions, and to an address to the queen, which emphatically complained of a practice that had grown up in some of the imperial departments of state,

[g] Commons Papers, **1867–68**, vol. xlviii. pp. 495–500.

of receiving letters from imperial officers in the colony, impugning the conduct of the governor and his advisers, all knowledge of which had been withheld from the governor himself, and which made further representations, that were humbly submitted to her Majesty's consideration. In reply, the colonial secretary acknowledged the receipt of these papers, but stated that her Majesty had not thought fit to give any directions concerning them.[h] Subsequently, however, clear and satisfactory regulations were established, in regard to military and naval correspondence in the colonies, which will prevent the recurrence of the evils complained of by the New Zealand government and legislature, and will at all times suffice to uphold the dignity and authority of the governor, as representing the sovereign, in every colony of the empire.[i] During the progress of the Kaffir insurrection, at the Cape of Good Hope, in 1878, these new regulations were duly observed by the imperial military authorities employed therein, with the most gratifying results.[j]

Sir Charles Darling.

In 1865, the Assembly of the colony of Victoria endeavoured to pass a new customs tariff, which embodied the principle of protection to native industry, to which it was known that a majority in the Legislative Council was opposed, by tacking the same to the annual appropriation bill. The Legislative Council, being debarred by the Constitutional Act from amending a bill of supply, rejected, by "laying aside" the whole measure; previously endeavouring, though unsuccessfully, by means of a conference, to obtain an opportunity of expressing an unfettered judgment on the tariff question. Accordingly, the legislature was prorogued, without either the grant of supplies or the enactment of the tariff. The difficulties which arose out of these proceedings were undoubtedly brought on by an overstrained exercise of their powers, on the part of both the deliberative chambers, and should have been met by earnest endeavours on the part of the governor (Sir Charles Darling) to induce both sides to agree to such concessions as might be in accordance with the true spirit of the constitution, and by a resolute determination on his part to sanction no step which was not strictly authorized by law.

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[h] Commons Papers, **1867-68**, vol. xlviii. 500–520.

[i] Col. Reg. 1879, nos. 197–210. For these regulations, see *post*, p. 276.

[j] Commons Papers, **1878**, C. 2079, p. 111, C. 2100, p. 19. And see *post*, p. 288.

But, instead of adhering to this constitutional course, the governor — with no desire to favour any particular party or set of men, but from lack of firmness and discretion — yielded to the pressure put upon him by his ministers, on whose advice the Assembly had acted; sanctioned the levy of the new duties, upon the mere resolution of the Assembly; permitted his ministers to contract a loan with a bank to obtain money for public purposes; and approved of the payment of official salaries without the authority of an act of legislature. In justification of these proceedings, he pleaded the usage of the Imperial Parliament, and the extreme necessity of the case. But the secretary of state for the colonies (Mr. Cardwell), in a despatch dated Nov. 27, 1865, severely reprimanded the governor for these doings. He showed that he had misunderstood the imperial practice; that immediate effect was given to resolutions of the House of Commons, in matters of supply and taxation, only when there was a fair presumption that the House of Lords would approve of the same; and that if they should afterwards disapprove, by rejecting a bill based on the resolutions in question, the duties collected in anticipation of their agreement were returned, and ceased to be levied. He pointed out the irregularity of permitting extraneous provisions to be included in a supply bill; and of government incurring pecuniary obligations, or expending any public money (except under circumstances of extreme public necessity), without the previous authority of Parliament. Finally, the colonial secretary declared "that in these three respects, — in collecting duties without sanction of law; in contracting a loan without sanction of law; and in paying salaries without sanction of law, — the governor had departed from the principle of conduct announced by himself and approved by the colonial secretary, — the principle of rigid adherence to the law. I deeply regret this. The queen's representative is justified in deferring very largely to his constitutional advisers in matters of policy, and even of equity; but he is imperatively bound to withhold the queen's authority from all or any of those manifestly unlawful proceedings by which one political party, or one member of the body-politic, is occasionally tempted to endeavour to establish its preponderance over another. I am quite sure that all honest and intelligent colonists will concur with me in thinking that the powers of

the Crown ought never to be used to authorize or facilitate any act which is required for an immediate political purpose, but is forbidden by law." In conclusion, the secretary says: "I have to instruct you in this, as in every other case, to conform yourself strictly to the line of conduct which the law prescribes."[k]

In a later despatch, dated Feb. 26, 1866, the colonial secretary comments upon subsequent acts of Governor Darling, wherein he identified himself so completely with his ministers in their illegal acts, as to denounce the conduct of their opponents; viz., of certain ex-members of the executive council who had petitioned the queen, complaining of the conduct of the governor in sanctioning the illegal proceedings of his ministers in a most unwarrantable manner. He observes that "it is one of the first duties of the queen's representative to keep himself as far as possible aloof from and above all personal conflicts. He should always so conduct himself as not to be precluded from acting freely with those whom the course of parliamentary proceedings might present to him as his confidential advisers. While, on the one hand, it is his duty to afford to his actual advisers all fair and just support, consistently with the observance of the law, he ought, on the other hand, to be perfectly free to give the same support to any other ministers whom it may be necessary for him at any future time to call to his counsels." He adds that inasmuch as the governor, by his own act, had placed himself in "a position of personal antagonism towards almost all those whose antecedents point them out as most likely to be available in the event of any change of ministry," it is impossible that he could with advantage continue to conduct the government of the colony. "As soon, therefore, as your convenience will admit of your leaving the colony, I should wish you to place the government in the hands of General Carey, whose duty it will be to administer it until your successor shall be appointed. I trust that no occasion will arise in which it will be clear to his judgment that the advice of his ministers for the time being would involve a

Dismissal of Governor Darling.

[k] Commons Papers, **1866**, vol. l. p. 695, and see p. 697 for another despatch, on the same subject, dated Jan. 26, 1866. For an instance of the firmness of Sir William Denison, when governor of New South Wales, in 1860, in resisting similar unlawful conduct recommended by his ministers, see his Vice-regal Life, vol. i. p. 497.

violation of the law. In such a case, it would doubtless be his duty to refuse compliance and to endeavour to obtain the aid of other ministers. Her Majesty's government have no wish to interfere in any questions of purely colonial policy, and only desire that the colony shall be governed in conformity with the principles of responsible and constitutional government, subject always to the paramount authority of the law."[1]

At this juncture, upon the advice of ministers a dissolution of the parliament of Victoria took place. The new House of Assembly gave a large majority to ministers, thereby justifying the opinion frequently expressed by Governor Darling to the secretary of state during the progress of this painful controversy, that an appeal to the constituencies would not tend to the solution of the difficulty which had arisen between the two houses, or warrant him in taking steps which might lead to the removal of the existing ministry from power.[m]

After his receipt of the despatch of Nov. 27, 1865, above cited, Governor Darling endeavoured, as far as possible, to retrace his steps, and to conform to the instructions of her Majesty's government. But matters had gone too far. His ministers took to themselves the censure officially laid upon the governor, and resented the action of the colonial secretary. They resigned office; not, indeed, with special reference to the interference of the imperial government, but on account of the continued resistance of the Legislative Council to their financial measures. But the efforts to form a new ministry, which should bring about harmonious relations between the two houses, proved impracticable, and the late ministers were reinstated in office.[n] A better understanding, however, was at length arrived at, by mutual concessions on the part of both houses, and before the departure of Sir C. Darling he had the satisfaction of knowing that the long-continued struggle was, for a time at least, at an end.[o]

On May 25, 1866, "the officer administering the government of Victoria" was notified of the appointment of the Hon. H. Manners Sutton (afterwards Lord Canterbury) to succeed

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[1] Commons Papers, **1866**, vol. l. p. 701.

[m] *Ibid.* pp. 740, 749.

[n] *Ibid.* pp. 709–793.

[o] *Ibid.* p. 796. And see *ibid.* **1867-68**, vol. xlviii. p. 635.

Sir C. Darling, as governor of the colony. Mr. Secretary Cardwell took this opportunity to reiterate the points wherein Sir C. Darling had failed to fulfil the trust committed to him to the satisfaction of the imperial government, and to impress upon his successor the necessity of carefully abstaining from any illegitimate use of the powers conferred upon the governor by the Crown. Before his departure from England, Mr. Manners Sutton would have an opportunity of learning full particulars of the past controversy in Victoria, and of applying for all needful instructions for his future guidance from her Majesty's government. "But in this, as in every case in which the working of representative institutions is in issue, the ultimate result must rest upon the forbearance, the judgment, and the public spirit of the inhabitants of the colony, — and more especially upon the wisdom and temper of those by whom the deliberations of the colony are guided."[p]

Governor Darling protests against his dismissal.

On April 18 and 25, 1866, on the eve of his retirement from Victoria, Governor Darling addressed despatches to the secretary of state, containing an energetic protest against the injury to his public character involved in the reasons assigned for his removal from office, and expressing his intention of appealing for redress to the House of Commons. At the same time he forwarded to his executive council a lengthy official minute protesting against the decision of her Majesty's government. This objectionable proceeding was noticed in a despatch from the colonial secretary to Governor Manners Sutton, dated June 25, 1866, as inconsistent with Sir C. Darling's duty while still holding the queen's commission as governor.[q]

On March 20, 1866, a debate occurred in the House of Commons upon a motion for papers in reference to the "deadlock" in Victoria, wherein frequent reference was made to the despatches written by Mr. Secretary Cardwell during the progress of this protracted struggle, and to the reasons which occasioned the recall of Governor Darling. The result

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[p] Commons Papers, **1866**, vol. l. p. 779.

[q] *Ibid.* pp. 795–828; *Ibid.* **1867**, vol. xlix. p. 557. In a letter, addressed to the Earl of Carnarvon (Mr. Cardwell's successor as colonial secretary), dated Hampton Court, Sept. 12, 1866, Sir C. Darling explains why he had taken the step complained of, and declares that he had no intention to contravene established rules. (*Ibid.* p. 617.)

of this discussion was "to draw forth, from every quarter of the house, the warmest encomiums on the course pursued" by the colonial secretary, as having been "moderate, wise, and well considered." In this, and in several other questions of difficulty, the policy of the secretary of state "had been such as to strengthen the influence of this country in her colonies, and to increase the confidence of the colonies in the mother country."[r]

The last act of Sir Charles Darling, previous to his departure from Victoria, was to transmit, to the secretary of state for the colonies, on May 7, 1866, numerous petitions from inhabitants of Victoria, expressive of their high sense of the tact and wisdom displayed by Governor Darling in his conduct during the continuance of the crisis occasioned by the unhappy differences which prevailed between the two legislative chambers; deeply regretting his recall; and deprecating, in the strongest terms, "the unnecessary interference of the secretary of state in the internal affairs of the colony." The receipt of these petitions was acknowledged, in a despatch to Governor Manners Sutton, without observation or comment.[s]

On May 16, 1866, when at Sydney, New South Wales, — after having transferred the government of Victoria to the hands of Brigadier-General Carey, pending the arrival of the new governor, Mr. Manners Sutton, — Sir C. Darling addressed a letter to the secretary of state, enclosing, for presentation to the queen, a humble petition that her Majesty would be graciously pleased to appoint a tribunal before which the whole of his conduct as governor of Victoria, but especially that part of it upon which the alleged reasons for his recall were based, might be subjected to the strictest investigation. Upon his arrival in England, Sir C. Darling, in various letters to the newly appointed colonial secretary,

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[r] Hans. Deb. vol. clxxxii. p. 621. See Sir C. Darling's letter to Lord Carnarvon, of Sept. 11, 1866, in reply to certain statements made by Mr. Secretary Cardwell, in the course of this debate. Commons Papers, **1867**, vol xlix. p. 611. But in a later debate, in the House of Lords, on May 8, 1868, the Duke of Argyll stated that Sir C. Darling's recall, by Mr. Secretary Cardwell, "was assented to, not only by his own party, but by all parties in both Houses of Parliament." Hans. Deb. vol. cxci. p. 1976.

[s] Commons Papers, **1867**, vol. xlix. pp. 560, 591.

(Earl Carnarvon) reiterated this request. In reply thereto, Sir C. Darling was repeatedly informed that his recall having been sanctioned by her Majesty, on the advice of the late government, Lord Carnarvon could not entertain the present appeal, or advise a compliance therewith. "As to the effect which such a sustained decision may have upon your eligibility for a future appointment, or upon your retiring pension, his lordship will be ready, whenever these questions arise, to take that view of your long services to the Crown, and your general qualifications, which may best combine a due regard for the public service with your private interests."[t]

Governors not to accept presents from the colony.

A review of the further proceedings arising out of the recall of Sir Charles Darling from the government of Victoria will lead us to the consideration of another important principle which has been established by her Majesty's government in reference to colonial governors; viz., the rule which forbids them to accept, for themselves or their family, any pecuniary or valuable Present from the colony over which they have presided.

On May 3, 1866, a select committee of the Legislative Assembly of Victoria, appointed to prepare a farewell address to his Excellency Sir C. Darling, and to report in reference to his removal from office, agreed to recommend that a parliamentary grant of twenty thousand pounds be made to Lady Darling, for her separate use, in consideration of the services which his Excellency had rendered in the administration of the government of the colony, "from which he has been recalled for political reasons only, and seeing that his removal will entail upon his family very heavy pecuniary loss." Immediately upon being informed of this recommendation, Governor Darling sent a message to the Assembly, to intimate that his fa-

[t] Commons Papers, **1867**, vol. xlix. pp. 597, 610, 651, 664. Subsequently, Sir C. Darling claimed the right of appealing to the imperial parliament for redress. Ministers declined to pledge themselves not to oppose the appeal; but agreed to an address for papers on the case. Neither house took action on the papers. (*Ibid.* pp. 665, 667.) See also the case of Lord Torrington, governor of Ceylon, discussed in Parliament in 1849 and 1850. And the inquiry into conduct of ex-governor Hincks in British Guiana. *Ibid.* **1871**, vol. xx. p. 487; **1872**, vol. xliii. p. 3.

mily would not feel at liberty to accept the bounty of the parliament and people of Victoria until it shall be known whether her Majesty has any commands to signify therein, and until the governor shall have petitioned the queen for an investigation into his conduct in office. The Assembly, however, proceeded at once to vote an address to the queen, praying her to sanction the acceptance of the proposed grant to Lady Darling; and the same was duly forwarded after Sir C. Darling's departure, through the officer administering the government of the colony. [u]

On Sept. 12 and 15, and on Oct. 15, 17, and 20, 1866, Sir C. Darling, having learnt that the Victoria Assembly had voted the aforesaid address, made application to the secretary of state urgently soliciting that no official obstacle might be interposed to prevent his wife from accepting the proposed grant; as the result of his recall had been to reduce him almost to a state of poverty. In reply, Sir Charles was informed that the Crown could not be advised to sanction the literal or substantial violation of the rule which declares that a governor should not receive pecuniary or valuable presents from the inhabitants of the colony over which he presides, either during the continuance of his service, or on leaving it; and which rule has always been rigidly enforced. "It is plain that such a rule would be merely nugatory if it were held that what the governor was precluded from receiving might properly be given to his wife." It is impossible that the acceptance of the proposed gift should be regarded otherwise than as a final relinquishment by Sir C. Darling of her Majesty's service, and of all the emoluments or expectations attaching to it. An answer, to the same effect, was sent through the governor, in reply to the aforesaid address of the Legislative Assembly. [v]

The rule in question first appears in the revised edition of the Colonial Regulations, issued in 1843, (no. 18), in the following words: A colonial governor "is prohibited from receiving or giving presents on his own account." In the new edition of the Regulations,

[u] Commons Papers, **1867**, vol. xlix. pp. 559, 585.
[v] *Ibid.* pp. 593, 619–623, 639–651.

issued in 1856 (no. 33), this rule is thus enlarged: "He is prohibited from receiving presents, pecuniary or valuable, from the inhabitants of the colony, or any class of them, *during the continuance of his office*; and from giving such presents; and this rule is to be equally observed on leaving his office."[w] Following it, in that and all subsequent editions, is another, which provides that "in cases where money has been subscribed, with a view of marking public approbation of the governor's conduct, it may be dedicated to objects of general utility, and connected with the name of the person who has merited such a proof of the general esteem."

Governors, and their family, not to receive or give presents from or to colonists.

"The principle is, that no governor shall be allowed to expose himself to the temptation which may arise from expecting beneficial donations from the colonists, or any section of them, or to the suspicions which arise from his acceptance of such donations. Whether they are made directly to himself, or in trust for him, or to some member of his family, so that he may have the enjoyment of them, is obviously immaterial." But, while the reasons for this prohibition are self-evident, it has been officially explained "that they rest on no considerations affecting the honour of gentlemen selected by the Crown to fill situations of this high importance, but on the necessity of preserving them, in the eyes of the public, free from all suspicion. These reasons apply to the receipt of presents of the same description by a governor on leaving his office with scarcely less force than during its continuance. And, although her Majesty's government cannot exer-

Ex-governors likewise.

[w] This revised rule was stated, in a colonial office circular, dated May 26, 1855, as having been then "for some time established," though "not universally known." Prior to the issue of the new Regulations, in 1856, there had been some laxity in the observance of this rule, but since then "it has always been rigidly enforced." Commons Papers, **1867**, vol. xlix. p. 663.

cise any direct control over the actions of gentlemen on the point of leaving the public service, they feel it their duty to record this opinion, and to express their hope that it may be acted on as a general rule." [x]

Proposed grant to Lady Darling, from Victoria Assembly.

On April 17, 1867, Sir C. Darling wrote the secretary of state for the colonies (the Duke of Buckingham) that, compelled by the increasing pressure of painful circumstances, Lady Darling had decided to accept the proposed grant from the Legislative Assembly of Victoria, and that, therefore, in accordance with the requirements of his Grace's predecessor in office, Sir C. Darling finally relinquished the colonial service, and all the emoluments or expectations attaching to it. This determination was, at his request, made known to the governor of Victoria.[y]

Whereupon his responsible advisers — who had hitherto refrained from urging any steps to give effect to the known desire of the Legislative Assembly to indemnify Sir C. Darling through his wife, for his losses, in being recalled from the government of the colony, without receiving a pension or other compensation for past services — recommended Governor Manners Sutton to authorize, by message, the initiation of a grant of twenty thousand pounds to Lady Darling, in accordance with the address of the Assembly, dated May 9, 1866. Deeming his consent to this recommendation to be merely "a formal act," necessary in order to afford to the Assembly a constitutional opportunity of discussing the expediency of the grant, and not to be regarded as implying any personal opinion with respect to the policy of the proposal, the governor at once acted upon this advice; and on July 23, 1867, additional estimates, including the proposed vote to Lady Darling, were transmitted to the Assembly, agreed to by that house, and included in the appropriation bill.[z]

The Legislative Council, however, took exception to this vote, and on account of it they rejected the appropriation bill. This renewal of the embarrassments of previous years was regarded by ministers as an attempt, on the part of the Legis-

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[x] Commons Papers, **1867**, vol. xlix. pp. 620, 663.
[y] *Ibid.* **1867-68**, vol. xlviii. p. 682.
[z] *Ibid.* p. 630.

lative Council, to obtain, by indirect means, co-ordinate power with the Assembly in dealing with the finances of the country. They did not, under existing circumstances, consider it advisable to recommend an appeal to the people by a dissolution of parliament, but agreed to advise an early prorogation, for a short period, so that at the re-assembling of parliament, another opportunity might be afforded to the Legislative Council of considering the appropriation bill. The governor was unwilling to accede to this proposal. He intimated that he would rather, at once, place himself constitutionally in communication with those who had induced the Legislative Council to take this step. Acting upon this suggestion, the ministry resigned. The governor then applied first to one, and afterwards to another, prominent member of the Legislative Council, to assist him with their advice under the unusual circumstances which had arisen. He did not invite either of these gentlemen to become "a minister;" neither did he adopt this "unusual course," "because he desired to give to one political party a victory over the other, or to imply official or personal favour or disfavour for either, but because his advisers were admittedly and confessedly disabled, by the rejection of the appropriation bill, from conducting the administration of public affairs, as regards the satisfaction of pecuniary claims upon the government, in the usual and strictly constitutional manner." Moreover, the governor was not prepared to commission any gentleman to form a new government until he was previously satisfied that that step would remove, or mitigate, existing embarrassments, as well as afford a prospect of restoring harmonious action in the legislature. The first member of the Legislative Council who was thus invited to advise with the governor in this emergency declined to act, because he considered that he was thereby asked to act as the governor's "legal" and not as his "constitutional" adviser. The other legislative councillor with greater propriety, and with a higher appreciation of the constitutional rights of a governor in a public emergency,[a] agreed to put himself into communication with leading members of both houses, with a view to a settlement of existing embarrassments; but his efforts proved unsuccessful. Where-

Legislative Council object to this grant.

[a] See Todd, Parl. Govt. vol. i. p. 226.

upon his Excellency reinstated in their former position, as his responsible advisers, the administration whose resignations were still in his hands, but who, at his request, had continued to hold office until their successors should be appointed.[b]

Agreeably to the advice tendered to him before their resignation, and repeated upon their resumption of office, the governor prorogued the legislature for eight days; temporary arrangements being agreed to meanwhile, to meet pressing current expenditure. The governor's course in this crisis, though it was not universally approved, was actuated by a desire "to combine with strict obedience to the law, and an abstinence from any act which might be regarded as evincing personal or political favour or disfavour of a particular political party, a moderating influence with both." This line of conduct in the difficult position in which he was placed was regarded by the colonial secretary as evincing a sound discretion, and he was encouraged to persevere in the course of entire neutrality which he had hitherto observed; "not taking part with one side or the other in a controversy which must be locally decided. It is for the colonial legislature to discover, by common consent, some mode by which the present state of things can be put an end to," before it "results in discredit to the colony and injury to the public interest."[c]

Parliament was re-assembled on the 18th September. Ministers, however, would not consent to abate the claims of the Assembly to include the proposed grant to Lady Darling as an item in the appropriation bill; and the governor did not hesitate to recommend the concurrence of the Legislative Council to this grant in a special message to that house. Otherwise, he refrained from interference in a matter which ought to be settled between the two chambers, and which it did not belong to the governor to determine. But the Council, on the other hand, adhered to their own opinions, and again rejected the appropriation bill, because the obnoxious grant was inserted therein. This left ministers no alternative but to advise a dissolution of parliament with a view to a final decision of the people upon the question at issue between the two houses.

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[b] Commons Papers, **1867–68**, vol. xlviii. pp. 632–654.
[c] *Ibid.* pp. 633, 653, 675.

The governor accepted this advice. Had it been possible instead to try the experiment of a change of ministry, with any prospect of success, he would not have hesitated to adopt this course in preference. "But the displacement of ministers, supported continuously by a majority of the lower house, is a step which could not properly be taken by the governor without a fair prospect at least of that success by which alone, as is admitted by all constitutional authorities, such an exceptional exercise of the prerogative can alone be justified." But, under existing circumstances, the governor had no reason to believe that a change of ministry would have produced harmony or co-operation between the two legislative chambers.[d]

The prorogation took place on November 8. It would have been immediately followed by the dissolution, but for the exceptional circumstance of the impending arrival in the colony, of his Royal Highness the Duke of Edinburgh, which made it undesirable to disturb, by an election contest, the joyful welcome and unanimous gratification of the people in such an auspicious event. The dissolution of parliament occurred on December 30. It resulted in the return of a large majority of members in support of the administration.[e]

And here it should be stated, that the Legislative Council based their repeated rejection of the appropriation bill, which included the objectionable grant to Lady Darling, not merely on the ground that it was an attempt, on the part of the Assembly, to coerce them to agree to an extraordinary expenditure of which they disapproved, but also because, in their opinion, no such grant should have been submitted to the colonial parliament, as it was an attempt to reward an imperial officer who had been recalled by the Crown from his government, and thereby a substantial evasion of the imperial regulations affecting public servants. This view was an implied condemnation of the action of the governor in recommending the proposed grant to the consideration of parliament. The colonial secretary, however, though of opinion that the regulation in question ought to be upheld in its full meaning, and that its breach must be injurious, did not con-

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[d] Commons Papers, **1867-68**, vol. xlviii. pp. 666, 689.
[e] *Ibid.* pp. 665, 691.

sider that the proposed grant, whatever might be thought of its policy or propriety, was "so clear and unmistakable a violation of the existing rule as to call for the extreme measure of forbidding the governor to be party, under the advice of his responsible ministers, to those *formal acts* which are necessary to bring the grant under the consideration of the local parliament."[f]

Quarrel between the Two Houses on Lady Darling's case.

The new parliament was summoned to meet on March 13, 1868; and ministers were prepared to recommend the inclusion, in the estimates to be submitted by message from the governor, of the proposed grant to Lady Darling; and there could be no doubt that this vote when passed would have been included in the appropriation bill, and thus sent up for the concurrence of the other house. But, at this juncture, the governor received a despatch from the secretary of state, dated January 1, which, while it expressed no disapproval of the course hitherto taken by the governor, under the very embarrassing circumstances wherein he was placed, regretted that the Legislative Assembly should have thought it advisable to include in the appropriation bill a grant exceptional in its character, and notoriously obnoxious to a majority of the upper house, instead of sending up that grant in a form in which it might have been fully and freely discussed. And, without positively directing the governor to adopt in future a different course, the despatch conveyed "the opinion of her Majesty's government that the queen's representative ought not to be made the instrument of enabling one branch of the legislature to coerce the other; and, therefore, that [he] ought not again to recommend the vote to the acceptance of the legislature, under the fifty-seventh article of the Constitution Act, except on a clear understanding that it will be brought before the Legislative Council, in a manner which will enable them to exercise their discretion respecting it, without the necessity of throwing the colony into confusion."[g]

The receipt of this despatch, and its communication to the governor's constitutional advisers, introduced a new element

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[f] Commons Papers, **1867–68**, vol. xlviii. pp. 663, 678. And see *Ibid.* **1878**, C. 1982.

[g] *Ibid.* **1867–68**, vol. xlviii. p. 677. And see, to the same effect, the despatch of Feb. 1, 1868 (*Ibid.* p. 678), and the debate in the House of Lords, of May 8, 1868.

Proposed grant to Lady Darling.

of difficulty into the question at issue. Ministers had pledged themselves to their constituents to insist on the exclusive rights of the Assembly, in matters of finance; and they resented any attempt, on the part of the imperial government, to abridge the discretion of the Assembly as to the form of its grants to the Crown as a departure from the previous understanding, "that the controversy must be locally decided." While ministers were prepared to admit that no course coercive of the other house "should be taken by the Assembly which is not necessary for the maintenance of its rightful control over all matters of public finance, and which would not be taken by the House of Commons in the like case, they are bound to declare that the interference of the Crown, in a matter so completely within the discretion of the Assembly as the form of a bill of supply, cannot be justified by precedent, and threatens the existence of responsible government in this country." And, inasmuch as it appeared that the governor would not feel it consistent with his duty to the Crown to accept the advice of his ministers upon the subject of the grant to Lady Darling, without an understanding that, if the appropriation bill be rejected, it shall not again be submitted in that form to the Council, ministers decided to resign. His Excellency accepted their resignation, and then put himself into communication successively with various gentlemen, — all of the opposite political party. These negotiations failed, because the governor would not pledge himself beforehand to grant them a dissolution, under certain hypothetical conditions. The governor then sought the help of a former supporter of the retiring administration, who undertook to construct a new ministry.[h] This attempt likewise failed. But afterwards, Mr. Sladen was induced to accept the trust; and he succeeded. He took office with the understanding that the views entertained by the secretary of state, with respect to the form in which the proposed grant should be submitted for the approbation of the Legislative Council, should be carried out, and that the grant should be embodied in a separate bill, and not included in the appropriation act.

The policy of the Sladen administration was exemplified in

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[h] Commons Papers, **1867–68**, vol. xlviii. 695.

the tenor of the speech from the throne upon the opening of parliament on May 29, 1868, wherein ministers had refrained from advising any recommendation in regard to the grant to Lady Darling to be included. But the supporters of the late administration determined at once to take the sense of the Assembly upon the constitutional question involved in this new policy, by moving an amendment to the address in answer to the speech, which, after recapitulating the facts of the case, declared that the proposal of her Majesty's imperial advisers, above-mentioned, upon a question which they had admitted "must be locally decided," was a violation of the constitutional rights of the Legislative Assembly, and a dangerous infringement of the fundamental principles of responsible government; and, furthermore, asserting that the Assembly reserved for its own determination the question of the form of the grant to Lady Darling, and would withhold its confidence from any ministry that would not give full and immediate effect to its decision in respect to that grant. This amendment was agreed to, and embodied in the address to the governor. In reply, his Excellency pointed out that he was bound to adhere to his instructions from the Crown; but that he had not been required, and had no desire, to interfere with the constitutional right of the Assembly to choose the form in which they would submit to the Council the result of their deliberations in any matter of supply. Recognizing that this question ought to be locally decided, and in pursuance of his instructions to observe a neutral position in this controversy between the two houses, the governor was prepared to acquiesce in any settlement of the question that could receive the concurrence of the three branches of the legislature.

Accepting this assurance from the governor, the Assembly, nevertheless, on June 9, 1868, voted a want of confidence in the new ministry, — because they had not as yet informed the house that they were prepared to advise an immediate grant to Lady Darling, and because they had refused to support the inclusion of such a grant in the appropriation bill. This vote caused the resignation of the Sladen ministry, and the return to power of Mr. McCulloch.

Fortunately, at this juncture, this protracted controversy was terminated by the act of Sir C. Darling himself, who sought and obtained permission from the secretary of state to

withdraw his relinquishment of the colonial service of the Crown, on the ground that he had been under a misapprehension as to the views entertained by her Majesty's government, in regard to the acceptance by Lady Darling of the proposed grant, after he should have retired from the public service. This unqualified and unconditional withdrawal of his previous decision justified the imperial government in conferring upon Sir C. Darling a retiring allowance as an ex-governor. But, as a condition upon the acceptance of this withdrawal, Sir C. Darling was required to write, for the information of the Victoria government, a letter intimating his inability, under these circumstances, to accept either for himself or his wife the proposed grant of twenty thousand pounds. This correspondence was laid before the Victoria Parliament; whereupon, the long-continued dead-lock between the two houses came to an end.[1]

End of the dead-lock.

In a debate in the House of Lords upon this question, which took place on May 8, 1868, just before it was brought to a happy termination, the secretary of state was blamed, by some eminent statesmen, for not having interposed to prevent the governor from allowing the vote to be submitted to the legislature; at any rate, as a part of the bill of supply. But, practically, the governor would have been powerless to enforce such a restriction, in the face of the great preponderance of opinion in favour of the grant, both in the Assembly and in the country generally. The first stage in the proceedings at which the governor could have suitably interposed to prevent any such grant, in a question of this kind, was after the bill, which he formally initiated, had passed both houses. He might then, under his instructions, have reserved the bill for the consideration of the Crown, as it involved a principle affecting one who had served as an imperial officer, and in that capacity had ingratiated himself with the supporters of the measure. But if, in the first instance,

Governor's conduct questioned in Imperial Parliament.

[1] Commons' Papers, **1867–68**, vol. xlviii. pp. 695-704. Victoria Leg. Council Journals, **1868**, p. 105, appx. A. 1. Leg. Assembly Votes and Proc. **1868**, vol. i. appx. B. Sir C. Darling was afterwards allowed a civil service pension of £1,000 per annum, commencing from Oct. 24, 1866. But in January, 1870, he died. The Victoria parliament then, upon a message from the governor, passed an act, conferring a pension of £1,000 per annum upon his widow, and making provision for his four orphan children. Acts **1870**, no. 362.

the governor had resorted to his extreme right of forbidding the initiation of the vote, he would have turned the dispute from a constitutional issue raised between the legislative chambers, as to the appropriate limits of their respective powers and privileges, — which shape it finally assumed, — into a deplorable contest between the colony and the Crown.[j]

In the Commons, early in May, 1868, Sir Roundell Palmer gave notice of a vote of censure upon the government for permitting the governor, notwithstanding Sir C. Darling's retirement from the service, to sanction the initiation of a pecuniary grant in his favour. The principle intended to be asserted in this motion was, that grants of money to retiring governors of colonies, by colonial assemblies (unless proposed with the spontaneous approval of the Crown, on grounds of public service, recognized as exceptional and meritorious by the Crown as well as by the Assembly), are not only inconsistent with the regulations of the service, but are subversive of the true relations between the colonies and the empire, and ought under no circumstances whatever to be allowed. This motion was postponed for a time, and, after the settlement of the case affecting Sir C. Darling, was dropped. But the principle is obviously sound, and being advocated by so eminent a constitutional authority as Sir Roundell Palmer, quite independently of the personal question affecting Sir C. Darling, would doubtless have been endorsed by the House of Commons.[k]

Confidential despatches on this case.

In conclusion, it may be observed that further light has been recently thrown upon this case, so important and instructive in many points of view, by the publication, specially authorized by government, of certain confidential despatches from Governor Manners Sutton to the secretary of state, written between July 26, 1867, and Aug. 16, 1868.[l]

From these despatches, it appears that the governor — in the absence of definite instructions as to the course he ought to pursue with respect to the proposed grant to Lady Darling — succeeded in inducing the McCulloch ministry to post-

[j] See Adderley, Colonial Policy, p. 112.

[k] Commons Papers, **1867-68**, vol. xlviii. p. 701.

[l] See Victoria Leg. Assembly Votes and Proc. **1878**, vol. i. appx. B. no. 15; and Commons Papers, **1878**, C. 2173, pp. 103-113.

pone the tender to him of any advice thereupon, so long as Sir Charles Darling remained in the colonial service. But ministers yielded this point very reluctantly, fearing their inability to hold their supporters — the majority in the Assembly — in check. When Sir Charles formally relinquished the service of the Crown, ministers insisted upon proposing a measure to reward him (through his wife) for his past services. The governor was aware that the Legislative Council disapproved of the proposal, but he knew that it was very popular with the Assembly and in the country; and that if he appealed from his ministers and from the Assembly, as he was entitled to do, such an act would be the signal for an overpowering manifestation of popular feeling in favour of ministers, if not of the grant; and the result of a general election would have been to leave him powerless in the hands of a majority, who would consider him as an aggressor, and as a beaten foe.

Moreover, the governor could not but confess that, without undervaluing the status of the Legislative Council, they were, in their persistent opposition to this grant, asserting a claim which the House of Lords, under similar circumstances, would not have preferred. The legitimate exercise of the legal rights of a Legislative Council should be defined by the practice, rather than by the abstract claims or undefined powers, of the House of Lords. Admitting that the Legislative Council was justified, by their opinion of the abstract demerits of the grant to Lady Darling, to oppose it, so long as they could do so consistently with a due regard to the maintenance of law and order, yet it was of the highest importance that they should not over-estimate or miscalculate their power of resistance. The governor believed that their continued resistance to the grant would lead to a popular demand to supersede or ignore their authority, as an independent branch of the legislature, to which ministers would be apt to yield, and which would involve the governor, and ultimately the imperial government, in a conflict; and probably endanger the relations of the colony with the mother country. He therefore eagerly availed himself of every opportunity — by inculcating moderation between the contending parties, and by enforcing delay — to mitigate the pressure of the Assembly on the Legislative Council, and to afford to the latter an opening

for a dignified retreat. He even made full inquiries (not limited to members of his ministry), as to whether a change of ministry could induce the house to pass the proposed grant in a separate bill, instead of including it in the supply bill. But he found such a course to be impracticable. He had accordingly agreed — as the most considerate step yet open toward the Legislative Council — to the grant being inserted in the appropriation act. Both Houses were undoubtedly disposed, on this occasion, to press their respective rights and privileges to extremity. But the Assembly were sustained by the constituent body, who, as was unmistakably shown by the result of the general election in 1868, were decidedly adverse to any concession to the Legislative Council upon this question. If, under these circumstances, the Council had proved stubborn and impracticable, the prolongation of the controversy between the two houses would undoubtedly have strengthened the extreme democratic party, and led to disastrous results.

We are therefore free to admit that, under circumstances of unparalleled difficulty, Governor Manners Sutton acted in a most exemplary and statesmanlike manner, combining firmness with moderation, and evincing a thoughtful regard for the interests of all who were concerned in the issue of the struggle.

Rule concerning Presents further considered.

We must now revert to the further consideration of the rule forbidding the acceptance of Presents by governors from the inhabitants of the colony over which they preside.

Sir W. Denison's case.

In January, 1855, upon the retirement of Sir William Denison from the governorship of Van Diemen's Land, and his promotion to be governor of New South Wales, the sum of two thousand pounds was subscribed by the people of the colony, to purchase a large silver centre-piece for a dining-table, to be presented, as a testimonial of regard for his public services, to Sir William. Upon his reporting this circumstance to the secretary of state, objections were made to the receipt, by an out-going governor, of any testimonial from the people; and it was with considerable difficulty that the colonial secretary was induced to permit Sir W. Denison to

accept this gift. But his Excellency called attention to the fact that, within his own knowledge, other governors had received testimonials under similar circumstances; and inasmuch as they had not thought it needful to report the same to the colonial secretary, the transaction had passed without observation.[m] Since the date of this occurrence, as we have already noticed, a stricter rule has been enforced in regard to such matters.[n]

Moreover, by chapter xvii of the Rules and Regulations for her Majesty's Colonial Service (ed. 1879), governors, lieutenant-governors, and all other servants of the Crown in a colony, are prohibited from receiving presents offered for their personal acceptance by kings, chiefs, or other members of the native population, in or neighbouring to such colony. When such presents cannot be absolutely refused without giving offence, they are to be delivered up to the government. No exception to this rule is allowed, unless with the express sanction of the secretary of state. Presents received in exchange, in ceremonial intercourse with native chiefs, &c., must be credited to the government, and such return presents as may be sanctioned by the secretary of state will be given at the government expense.

Sir G. Bowen's case.

In 1871, Sir George F. Bowen, who was then governor of New Zealand, whilst on a tour of observation through the colony, was proffered, as a memento of his visit to the province of Otago, a beautiful work of art, carved in stone, by a native artist. It represented "the Moka bird, mourning the death of the Wax-eye," and was adorned with figures of ferns and creeping plants in the background. But his Excellency, though very sensible of the compliment to himself, refused to take the donation as a personal gift; deeming it to be "unusual and improper for governors of colonies to accept such valuable presents for their own use and advan-

[m] Denison, Vice-Regal Life, vol. i. p. 274.
[n] See *ante*, p. 111.

tage." Nevertheless, with the consent of the donor, he undertook that it should be deposited in the government house, as public property, and as a lasting memorial of interest to the colonists and to visitors from abroad. For it had always been his opinion that "the government house should illustrate the natural products and resources of the colony, and the advance of its inhabitants in the useful and ornamental arts." [o]

All British officials forbidden to receive Presents.

This wholesome rule, it may be observed, has been further extended and applied by the imperial government to subordinate officials throughout the British Empire, and especially in India, where, formerly, a laxity of practice in this particular had given rise to much abuse and corruption.[p] In 1793, a law was passed, which is still in force, to forbid the receiving by any governor, or other person in public employ in India, any present, either directly or indirectly, under any colour or pretext. Offences against this act are punishable, as extortions and misdemeanors, by severe penalties, and by the forfeiture to the Crown of the gift or its full pecuniary value.[q] It is a rule, in fact, of universal application to all state functionaries, of whatever grade or rank, in the service of the Crown.[r]

As to lieutenant governor of Canadian Provinces.

In regard to the application of this rule to lieutenant-governors of the provinces in the dominion of Canada, the secretary of state for the colonies, in a despatch dated May 8, 1869, observes that, "while the governor-general is not at liberty to sanction the passing of a law making any donation or gratuity to himself,[s] it

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[o] Commons Papers, **1872**, vol. xliii. p. 664.

[p] Mr. Disraeli, Hans. Deb. vol. ccxxv. p. 1146.

[q] Lord Chancellor Cairns, Hans. Deb. vol. cxci. p. 1988. Act 33, Geo. III. c. 52, secs. 62, 63.

[r] See Ashley, Life of Palmerston, vol. i. p. 130. Law Times, vol. lxii. p. 164, citing C. J. Cockburn, in Morison *v.* Thompson, Law Reports, 9 Q. B. 481.

[s] Royal Instructions to Lord Dufferin, as governor-general of Canada, no. 9.

would be for his ministers to consider whether they should advise him to consent to a donation by the province to the lieutenant-governor, and he would be at liberty to follow that advice."[t]

Imperial Dominion exercisable over Self-governing Colonies:
b. *In matters of local legislation.*

The right of the Crown, as the supreme executive authority of the empire, to control all legislation which is enacted in the name of the Crown, in any part of the queen's dominions, is self-evident and unquestionable.

Royal veto on legislation.

In the mother country, the personal and direct exercise of this prerogative has fallen into disuse. But eminent statesmen, irrespective of party, and who represent the ideas of our own day, have concurred in asserting that "it is a fundamental error to suppose that the power of the Crown to reject laws has consequently ceased to exist." The authority of the Crown, as a constituent part of the legislative body, still remains; although, since the establishment of parliamentary government, the prerogative has been constitutionally exercised in a different way.[u]

Its active exercise in the colonies.

But, in respect to the colonies, the royal veto upon legislation has always been an active and not a dormant power. The reason of this is obvious. A colony is but a part of the empire, occupying a subordinate position in the realm. No colonial legislative body is competent to pass a law which is at variance with, or repugnant to, any imperial statute which extends, in its operation, to the particular

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[t] Canada Sess. Papers, **1870**, no. 35, p. 26.

[u] See Todd, Parl. Govt. vol. ii. pp. 316–319, and Earl Granville's remarks, in Hans. Deb. vol. cxl. p. 284.

colony.[v] Neither may a colonial legislature exceed the bounds of its assigned jurisdiction, or limited powers. Should such an excess of authority be assumed, it becomes the duty of the Crown to veto, or disallow, the illegal or unconstitutional enactment. This duty should be fulfilled by the Crown without reference to the conclusions arrived at, in respect to the legality of a particular enactment, by any legal tribunal. It would be no adequate protection to the public, against erroneous and unlawful legislation on the part of a colonial legislature, that a decision of a court of law had pronounced the same to be *ultra vires*. An appeal might be taken against this decision, and the question carried to a higher court. Pending its ultimate determination, the public interests might suffer. Therefore, whenever it is clear to the advisers of the Crown that there has been an unlawful exercise of power by a legislative body, it becomes their duty to recommend that the royal prerogative should be invoked to annul the same.

The Crown, moreover, is the chief executive authority of the empire, and the instrument for giving effect to the national will, as the same has been embodied in acts of the Imperial Parliament, or sanctioned by Parliament, upon the advice of responsible ministers. It is the proper function of the Crown, therefore, to uphold and enforce the national policy throughout the realm; save only in so far as rights of local self-government may have been conceded to any portion thereof.

Furthermore, the Crown occupies, towards the colonial dependencies of the empire, a paternal relation; which, at least in the earlier stages of their political existence, justifies and requires that the mature expe-

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[v] See Merivale, Of the Colonies, p. 662. And see *post*, p. 138.

rience and enlarged political insight of the statesmen who guide public affairs in the mother country should be utilized to the benefit of their fellow-subjects in the colonies, while they are gradually attaining to a knowledge of the practical business of legislation in their limited sphere. This will oftentimes necessitate the directing hand of imperial statesmanship, to correct and regulate immature and unwise attempts at legislation, such as has occasionally proceeded from colonial legislatures before they had acquired the requisite knowledge and experience to enable them to discharge their responsible duties aright.

Beneficial effect of royal veto on colonial legislation.

Upon these grounds, it is impossible to gainsay the great public advantage which results from the possession by the Crown of the veto power. It is evident that the prerogative, by virtue of which the Crown is authorized to supervise and control the acts of all subordinate legislatures throughout the empire, is held for the especial benefit of the colonies, as well as for the security of the nation at large.

In the case of colonies having responsible government, this right of veto is, however, very sparingly exercised. Wherever that system has been introduced, her Majesty's government has, as a general rule, refrained from interfering with colonial legislation; except in cases specified in the royal instructions to the governors, which almost exclusively refer to matters of imperial relation, and not of mere local concern.[w] But,

Sparingly exercised under responsible government.

[w] See Hans. Deb. vol. cxxii. p. 914; vol. cxxiv. pp. 562, 575, 717. Canada, Session Papers, **1869**, no. 18. Lord Norton's paper, "How not to retain the Colonies," in the "Nineteenth Century" for July, 1879. The present writer has not been able to obtain precise information in respect to the exercise of the prerogative of disallowance, in the case of bills passed in the Australian colonies. Year by year, however, in New South Wales and adjacent colonies, bills are reserved for the signification of her Majesty's pleasure thereon. But it is not easy to trace the subsequent fate of these measures. The Index to the Tasmania statutes, printed in 1876, mentions three acts only of that colony as being disallowed, between 1863 and 1875: viz., the Offender's

if her Majesty's ministers should be of opinion that any constitutional principle, was infringed by a colonial enactment it would be their duty to advise that the royal veto should be put upon it; and they ought not to shrink from the performance of that duty for fear of possible consequences, in disturbing harmonious relations between the colony and the mother country.[x]

Since the concession of responsible government to the principal colonies of Great Britain, as well as formerly, the imperial government, while seldom resorting to the extreme measure of disallowing colonial acts, has repeatedly pointed out, in despatches from the secretary of state for the colonies to the governor of the colony, errors, defects, or omissions, in colonial laws, which required to be remedied by further legislation;[y] and has cautioned the colonial government as to the spirit in which certain exceptional powers, granted by a colonial act, which had been approved by the imperial government, should be made use of, so as to avoid abuse or oppression.[z] In this way, the paternal oversight of her Majesty's government has frequently been exercised, for the benefit of the colonies, without encroaching upon the rights of local self-government.

Subject, however, to the constitutional oversight and discretion of the Crown — by which all colonial legislation is liable to be controlled and annulled, if exercised unlawfully or to the prejudice of other parts of the

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Punishment Act, of 1863; the Governor's Salary Reduction Act, of 1868; and the Intercolonial Free Trade Act, of 1870. Full particulars in regard to the disallowance of Canadian statutes, since the establishment of responsible government in Canada, will be found in a later part of this section.

[x] Earl of Carnarvon, Hans. Deb. vol. cxci. p. 1983. And see his lordship's despatch to the governor of Queensland, of March 27, 1877, *post*, p. 155.

[y] See Canadian precedents, in Canada Assembly Journals, **1843**, p. 47. *Ibid.* **1847** (appx. W.); **1848**, p. 45; **1849** (appx. N.); and **1851** (appx. ZZ.). For precedents in other British North American colonies, see Commons Papers, **1864**, vol. xl. pp. 690–708.

[z] Canada Assembly Journals, **1866**, p. 292.

empire, — complete powers of legislation appertain to all duly constituted colonial governments. Every local legislature, — whether created by charter from the Crown, or by imperial statute — is clothed with supreme authority, within the limits of the colony, to provide for the peace, order, and good government of the inhabitants thereof.[a] This supreme legislative authority is subject, of course, to the paramount supremacy of the Imperial Parliament over all minor and subordinate legislatures within the empire. The functions of control exercisable by the imperial legislature are practically restrained, however, by the operation of certain constitutional principles hereafter to be considered. Meanwhile, it may suffice to observe that the right of local self-government conceded to all British colonies wherein representative institutions have been introduced, confers upon the local legislature, with the co-operation and consent of the Crown, as an integral part of such institutions, ample and unreserved powers to deliberate and determine absolutely in regard to all matters of local concern.

Limits of colonial legislative authority.

In the event of a colonial legislature assuming to exercise powers in excess of its lawful competence, and in case the Crown has not interposed to annul such unlawful acts, application could be made to the courts of law within the colony, to decide upon the proper limits of the jurisdiction belonging to the legislature in the particular instance.[b] Such occasions of judicial interference are, however, of rare occurrence, save only under the Canadian constitution. The dominion of Canada comprises a federal parliament, with minor provincial legislatures, the respective powers of which are limited and defined by the British North America act of

[a] See Baron Parke's judgment, in Kielley *v.* Carson, 4 Moore's Privy Coun. Rep. 85.

[b] See *post*, p. 375.

1867. In the working of this constitution, questions have frequently arisen as to the powers exclusively assigned either to the dominion or provincial authorities; and the determination of these questions has suitably devolved upon the courts of law. But this subject will be separately discussed in another part of this treatise.

To revert to the question immediately before us; namely, the exercise by the Crown of the veto power over colonial legislation.

A governor's duty in respect to bills.

Under the Rules and Regulations for the direction of her Majesty's Colonial Service, the governor in every colony has authority either to give or to withhold his assent to laws passed by the other branches of the legislature therein, and until that assent is given no such law is valid or binding.[c]

The royal instructions do not define the precise time and circumstances under which the royal assent shall be given to bills passed by colonial legislatures, neither do they limit the action of a governor, in the exercise of this prerogative, to the usage of the sovereign in the mother country. Ordinarily, it has been usual for the governor to proceed to the legislative buildings for such a purpose, and to declare the royal pleasure upon bills passed, in presence of the legislative bodies. But, sometimes, it has been deemed expedient, even during a session, that the royal assent should be made known by proclamation,[d] a course which is generally adopted in the case of bills reserved for the signification of the royal pleasure thereon.

Royal assent, how given.

Agreeably to imperial usage,[e] it has been customary

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[c] Colonial Rules, 1879, sec. 48.

[d] See the Newfoundland Assembly Journals, 1861, pp. 91, 92.

[e] "When bills have passed both houses, the king's royal assent is not to be given, but either by commission, or in person, in presence of both houses." This is a declaration of Sir Edward Coke, in 1621, quoted by Hatsell (vol. ii. p. 338), who shows "that the law of this realm is, and always has been," to this effect.

for the governor or governor-general in Canada to attend in state in the Legislative Council chamber for the purpose of giving the royal assent to bills, in the presence of members of both houses, specially summoned to appear before his Excellency for that purpose; but this practice is not essential.[f]

In several of the Australian colonies, a different practice has prevailed. In New South Wales, in New Zealand, and in Queensland, bills, other than bills of appropriation, are as a general rule, assented to by the governor at his official residence, or office, in the presence merely of the clerk of the parliaments; and both houses are subsequently notified thereof by message under the sign-manual.

In South Australia and in Victoria, it has been usual to follow the imperial practice. But the attorney-general of Victoria has advised that "the governor can legally and constitutionally give the royal assent at the government offices, or elsewhere, to all bills (except the appropriation bill) presented to his Excellency by the clerk of the parliaments for her Majesty's assent." "Such assent, however, should afterwards be notified by message to both houses of parliament, according to the practice in other colonies."[g]

Every colonial governor, excepting the governor-general of the dominion of Canada,[h] is directed by the

[f] See the British North America Act, 1867, sec. 55, which leaves this question an open one in Canada. And see an exceptional instance in Canada, of a contrary practice, proposed, — owing to the illness of the governor, — but eventually abandoned, because of his sudden decease, and the appointment of a deputy-governor, who assented to the bills in the customary way. Canada Assembly Journals, Sept. 17 and 18, 1841.

[g] Victoria Leg. Council Journal, 1877-8, p. 160. But on Oct. 10, 1877, the Assembly, by resolution, authorized their speaker to present the appropriation and loan bills to the governor, for the royal assent, at the government house. And this is the customary practice in Tasmania. The parliament of South Australia have adhered to English constitutional practice, in this particular. See a memorandum by the speaker of the Assembly on the presentation of money bills; ordered by the Assembly to be printed in July, 1873.

[h] As to this exception, see *ante*,

Bills reserved for consideration of the Crown.

royal instructions to reserve certain specified bills for the signification of her Majesty's pleasure thereon, or to give the royal assent to them only in the event of their containing a clause to suspend their operation until they have been confirmed by the Crown. Bills requiring to be thus dealt with are not defined alike in the instructions to all governors, but the instructions on this head refer generally to matters of imperial concern, such as bills affecting currency, the army and navy, differential duties, the operation and effect of treaties with foreign powers, and any enactments of an unusual nature touching the prerogative, or the rights of the queen's subjects not resident in the particular colony.[i]

In the most recent instructions issued to the governors of colonies, and especially in those accompanying the letters-patent constituting the office of governor of the Cape of Good Hope and of South Australia, these directions are defined in the following terms: —

The governor is forbidden to assent in the queen's name to any bills of the classes hereinafter specified: granting a divorce from the bonds of marriage; granting land, money, or other donation or gratuity, to himself; to make a legal tender of paper, or other currency except the coin of the realm, or other gold or silver coin; to impose differential duties (other than as allowed by the Australian Colonies duties act 1873); which may contain provisions apparently inconsistent with obligations imposed on the imperial crown by treaty; which may interfere with the discipline or control of the im-

p. 85. Pursuant to the change in the tenor of the royal instructions to governors of Canada, — first introduced in 1878, by the omission of any direction for the reservation of bills, — an act passed by the Canadian parliament in 1879, to effect the judicial separation of certain parties from the bonds of matrimony, was assented to by the governor-general (42 Vict. 79), which act previously must needs have been reserved for the signification of the royal pleasure thereon.

[i] Col. Reg. 1879, nos. 32, 33.

perial army or navy; which may contain provisions of an extraordinary nature and importance, whereby the royal prerogative, or the rights and property of British subjects not residing in the colony, or the trade and shipping of the United Kingdom and its dependencies, may be prejudiced; and any bill containing provisions to which the royal assent has been once refused, or which has been disallowed. Unless any such bill shall contain a clause suspending the operation of the same until the signification of the royal pleasure thereupon, or unless the governor shall have satisfied himself that an urgent necessity exists, requiring that such bill shall be brought into immediate operation, in which case the governor is authorized to assent thereto; except such bill shall be repugnant to the law of England, or inconsistent with any treaty obligations of the British Crown. But he is required to transmit any bill so assented to to the sovereign, by the earliest opportunity, together with his reasons for assenting to it.[j]

Assent given contrary to instructions.

By an imperial statute, passed in 1865, it is provided that no colonial law, which has been assented to by the governor, shall be deemed to have been void by reason only of its being inconsistent with the tenor of any instructions applicable to the same, which may have been given to the governor by or on behalf of the Crown.[k]

Acts repugnant to imperial legislation.

But it is not competent to the advisers of the Crown in England to recommend the sovereign to give her assent to any act passed by a colonial legislature, and reserved for the signification of the royal pleasure thereon, if the same should contain any provision repugnant to an existing imperial statute. Even if such

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[j] Instructions to Earl Dufferin, dated May 22, 1872, sec. 9. Instructions to the governor (for the time being) of the colony of the Cape of Good Hope, dated Feb. 26, 1877. Instructions to the governor of South Australia, dated April 28, 1877.

[k] 28 and 29 Vict. c. 63, sec. 4.

repugnancy be merely technical, an act of Parliament must first be obtained before the colonial act can be assented to.[1]

Legal advice taken by a governor before assenting to bills.

When the governor of a colony is advised by his ministers to give the royal assent to a bill passed by the colonial legislature, it is essential that he should be assured, upon proper authority, that the particular measure is within the competency of the legislature to enact; and that it is one which the royal instructions do not require that he should reserve for the signification of the pleasure of the Crown. Accordingly, it is customary, in every colony, for the governor to receive from the local minister of justice, or other law officers of the Crown, a report in reference to all bills to be submitted for his sanction, which specifies whether any legal objection existed to his assenting to them, or whether his duty and obligations, as representative of the Crown, would necessitate that he should withhold his assent from any one of such bills, or reserve the same for the consideration of the imperial government. If the governor should not be satisfied as to his duty upon receiving a written report from the colonial law officers, — which should be made, not in their capacity of political advisers, but as the authorized exponents of the law, — certifying that no legal impediment exists to his giving the sanction of the Crown to the bills presented to him, he is at liberty, in any matter which is not of purely local concern, to take further counsel, from the attorney and solicitor generals of England, by whom the Crown itself must ultimately be advised, in all doubtful cases of constitutional practice.[m] But if the question, as to the legality of which the governor is

[1] Case of the Canadian Copyright Act, Hans. Deb. vol. ccxxv. p. 426. Act 38 and 39 Vict. c. 53.

[m] New South Wales, Leg. Assembly Votes and Proc. **1859–60**, vol. iii. p. 911. *Ibid.* **1872–73**, vol. i. p. 527. Commons Papers, **1878**, C. 1982, p. 41; Queensland Gold Fields Act, of 1876: see *post*, p. 154.

desirous of being assured, be one of purely local concern, it would not be regular for the governor to take the formal and official advice of other judicial or legal authorities than those who occupy in the colony the position of crown law officers. As a general rule, a governor would be justified in accepting and acting upon statements of such functionaries, in local matters. Though if his own individual judgment does not coincide with their interpretation of the law, his responsibility to the Crown may require him to delay acting on the advice of his ministers. But whatever steps he may think fit to take upon such a grave emergency, and from whatever materials his opinion may be formed, he is individually responsible for his conduct, and cannot shelter himself behind advice obtained from outside his ministry.[n]

Advice of colonial crown law officers.

And here it may be well to state the rules which have been laid down by the imperial government in respect to applications from a colony for the opinion of the law officers of the Crown in England upon any important question of law which has arisen in the administration of the colony, especially questions of a legal or constitutional nature, affecting the exercise of the royal prerogative, or the relative and appropriate rights of either branch of the legislature therein.

Of imperial crown law officers;

If in any case a colonial government or legislature desire to obtain the opinion of the English law officers on any question of this description, it is necessary that the secretary of state should be furnished with a detailed statement, explaining precisely what doubts have arisen, and under what circumstances, enumerating the instruments or laws bearing on these doubts (of which complete copies should in all cases be annexed), setting forth *verbatim*, the particular provisions of the same

how taken;

[n] Secretary Sir M. Hicks-Beach to Governor Bowen, July 5, 1878. Commons Papers, **1878**, C. 2173, p. 81 And see *ante*, p. 8.

which appear relevant to the matter in hand, and in conclusion stating explicitly the particular questions to which answers are desired. All papers for the consideration of the attorney-general and solicitor-general should be sent in quadruplicate.[o]

on whose behalf;

The opinion of her Majesty's law advisers is occasionally obtained for the guidance of the governor, in the exercise of his personal discretion; and not unfrequently similar advice is requested by her Majesty's government on the application of a colonial ministry, who are prepared to guide themselves by the advice which they might receive. But the queen's ministers have never undertaken to obtain the official opinions of the attorney and solicitor generals for an assembly or association of private gentlemen, however respectable. "It would be peculiarly inconsistent for her Majesty's advisers in this country to call for such an opinion with the apparent object of guiding an opposition to the responsible advisers of her Majesty's representative in" any colony of the British Crown.[p]

when improperly sought.

In 1867, Sir George Grey, leader of the opposition in the New Zealand House of Representatives, applied for the opinion of the law officers of the Crown in England in reference to a ministerial measure for the abolition of the provincial governments, then pending in the colonial legislature, and which he was desirous of defeating. Sir G. Grey was especially anxious to know whether in the opinion of these eminent legal functionaries, the Imperial Parliament had or had not conferred upon the General Assembly of New Zealand, by the Constitution act, the power of abolishing the provinces without their consent. But the secretary of state had previously announced that her Majesty would not be advised to exercise her power of disallowing the act for the abolition of

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[o] C. O. Reg. **1879**, c. 15.

[p] Secretary of State for the Colonies, despatch of Oct. 22, 1867; Queensland Assembly Votes, Second Session, **1867**, vol. i. p. 633.

provinces; and no response was made to Sir George Grey's application. [q]

Governor's discretion in assenting to bills.

Whenever bills are tendered to the governor of a colony for the purpose of receiving the royal assent, he is bound to exercise his discretion in regard to the same; and to determine, upon his own responsibility as an imperial officer, unfettered by any consideration of the advice which he has received from his own ministers upon the subject, the course he ought to pursue in respect to such bills: whether to grant, or to withhold, the royal assent, or to reserve any particular bills for the signification of the royal pleasure thereon. It then becomes the duty of the governor to transmit to the secretary of state for the colonies all laws assented to by him in the name of the sovereign, or reserved for the consideration of the Crown; accompanied, whenever it may seem to him to be necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws for the final determination thereon of the queen in council.[r]

Second veto of the Crown.

For, although a governor as representing the Crown is empowered to give the royal assent to bills, this act is not final and conclusive; the Crown itself having, in point of fact, a second veto. All statutes assented to by the governor of a colony go into force immediately, unless they contain a clause suspending their operation until the issue of a proclamation of approval by the

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[q] New Zealand Gazette, 1878, pp. 918, 919; New Zealand Papers, **1878**, A. 1, pp. 24, 25.

[r] The Colonial Secretary (Earl Grey), Hans. Deb. vol. cv. p. 470. British North America Act 1867, sec. 55. Royal Instructions to Governors. Whenever any parties who may consider themselves aggrieved by an act passed by a colonial legislature forward to the governor, for transmission to the sovereign through the secretary of state, memorials for the disallowance of the act, the governor should furnish his ministers with copies of such representations or memorials, that they may append to the same whatever observations they may think fit. Case of the Act suspending a Grant to King's College; New Brunswick Assembly Journals, **1859**, pp. 111, 202.

queen in council,[s] or some other specific provision to the contrary; but the governor is required to transmit a copy thereof to the secretary of state for the colonies; and the queen in council may, within two years after the receipt of the same, disallow any such act.[t]

Revision of colonial bills by imperial government.

All colonial enactments are submitted to the scrutiny of counsel by the colonial department, and if they relate to commercial questions are referred to the consideration of the board of trade,[u] and when necessary to the law officers of the Crown to ascertain their legality, and to determine whether they contain any provision which interferes with the exercise of any prerogative of the Crown[v] or which is "repugnant" to the law of England. And any law to which objection could be taken on the ground of repugnancy is, to the extent wherein it is so repugnant to imperial legislation, "absolutely void and inoperative,"[w] and should be formally disallowed by the Crown.

It is also the duty of the law advisers of the colonial office to ascertain whether colonial laws have been framed so as to give adequate and complete effect to the intentions of the legislature.

In conformity with ancient usage, the assent of the Crown to colonial acts, or its disallowance of the same, is signified by the approval by her Majesty in council of reports advising the course to be pursued in particular cases. These reports nominally proceed as of old, from the committee of council for trade and plantations

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[s] As in the case of the Canada Currency Acts, passed in 1851, and in 1853; and of the Canadian Copyright Act of 31 Vict. c. 56.

[t] Clark, Colonial Law, p. 46; 31 Geo. III. c. 31. sec. 31; B. N. America Act, 1867, sec. 56; S. Africa Union Act, 1877, sec. 26.

[u] Todd, Parl. Govt. vol. ii. pp. 525, 663.

[v] See Commons Papers, **1864**, vol. xl. pp. 697, 698.

[w] 28 and 29 Vict. c. 63, secs. 2–4. As to what constitutes "repugnancy," and the method of determining the same, see Law Magazine (1854), N. S. vol. xx. p. 1. La Revue Critique, &c., du Canada, Janvier, 1872, p. 51; Hansard Deb. vol. ccxxv. pp. 282, 426.

(now called the board of trade), but they actually emanate from the colonial office. No colonial act can be disallowed, except upon the issue of an order of the queen in council. Otherwise, it is customary to notify the governor that the acts forwarded by him will be "left to their operation;" or, "that her Majesty will not be advised to exercise her power of disallowance with respect to" the same.[x]

Imperial supervision of colonial enactments.

The constitutional practice in regard to imperial control over bills passed by colonial legislatures, and the circumstances under which that control is now exercised, in the case of self-governing colonies, will be further exemplified by a series of illustrative precedents:—

These precedents, it should be observed, are principally taken from the political annals of Canada, as affording a wider and more instructive field of inquiry into the practical working of imperial supervision over colonial legislation than is obtainable from any other quarter. For the experiment of incorporating the principle of "responsible government" into the political institutions of a colony was first applied to Canada, before it was introduced elsewhere. And it is also important to notice the continued exercise of imperial ascendancy over legislation in Canada, when her boundaries were enlarged, her political importance increased, and her right to the fullest measure of political freedom consistent with the supreme authority of the empire was frankly acknowledged by the mother country, upon her elevation into the rank of a dominion with subordinate provinces subject to her rule. We will note, first, Canadian practice, from the time of the union between

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[x] First Report, West Indies Legal Commission; Commons Papers, **1825**, vol. xv. p. 233; Earl Grey, Hans. Deb. vol. cvi. p. 1120; *ibid.* vol. cxxii. pp. 1167, 1288. His paper in the Nineteenth Century for June, 1879, p. 953. Canada Sess. Papers, **1870**, no. 39.

In Canada before Confederation.

Upper and Lower Canada, and the consequent introduction of local self-government into the united province in 1841,[y] up to the period of the confederation of the British North American colonies in 1867.

At the close of the first session of the parliament of United Canada, — on Sept. 18, 1841, — no less than fifteen bills were reserved for the signification of the royal pleasure thereon. But all these bills afterwards received the royal assent, with the exception of a bill to provide for the freedom of elections. For some reason, which is not on record, the assent of the Crown was withholden from this measure. In the following session, a new bill on the subject was introduced, which was passed and assented to by the governor-general.

In 1842 and 1843, and also in subsequent sessions, up to 1878, various Canadian bills were reserved for the consideration of her Majesty's government. But this course was necessitated, in regard to certain descriptions of measures, by reason of their affecting the prerogative of the Crown, or being of a character that, under the royal instructions, rendered such a proceeding imperative.[z] It is not requisite, therefore, to make special reference to bills reserved under these circum-

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[y] For a return of the titles and dates of bills passed by the legislatures of Canada, Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island since 1836, and up to 1864, which were reserved — by the governor, or by the operation of a suspending clause in the particular acts — for reference to the imperial government, specifying those to which the royal assent was ultimately refused; with extracts from despatches assigning reasons for the same, see Commons Papers, **1864**, vol. xl. p. 665. Within this period, no less than three hundred and forty-one bills were reserved by the governors of these British North American colonies, or suspended in their operation, until her Majesty's pleasure should be made known; to forty-seven of which bills the royal assent was, for various reasons of law or of public policy, afterwards refused. Most of these cases, however, occurred prior to the concession of "responsible government;" since then the number of bills reserved has been considerably reduced, and gradually lessened to a minimum. (*Ibid.* p 709.)

[z] Canada Leg. Assembly Journals, **1843**, p. 210.

stances; as, in most instances, they afterwards received the royal assent. It will suffice to point out the bills which failed to receive the assent of the Crown; or which, notwithstanding that they had received the same through the governor-general, were afterwards disallowed by the queen in council.

Secret societies bill.

In 1843, Sir Charles Metcalfe being governor-general, and Messrs. Lafontaine and Baldwin leaders of the provincial administration, they obtained his Excellency's consent to submit to parliament a bill for the discouragement of secret societies. But the measure which they introduced included several clauses to which the governor repeatedly took exception, on the ground that they were arbitrary, oppressive, and unconstitutional. Nevertheless, the bill passed through both houses of the legislature. Whereupon, the governor declared his intention of reserving it for the consideration of the imperial government. Ministers objected to this proceeding. They also differed with the governor, in regard to the mode of exercising the patronage of the Crown in appointments to office. They accordingly resigned, — one only of their number remaining in office. At this juncture, parliament was prorogued; the secret societies bill, with some others of minor importance, being reserved for the signification of the queen's pleasure thereon. A new administration was then formed, and a dissolution of parliament ensued. In the new Assembly, the incoming ministers were sustained. The royal assent was withholden from the secret societies bill; because "the queen cannot be advised to concur in an enactment placing any class of her Majesty's subjects beyond the protection of the law, and depriving them, without a previous conviction for crime, of the privileges to which all British subjects have a common title." The governor-general was also notified that his conduct was approved by her Majesty's government.[a]

Legislative Council bill.

In 1844, a reserved bill, for better securing the independence of the Legislative Council, was not assented to, because the law officers of the Crown advised that it contained provisions

[a] Canada Leg. Assembly Journals, **1843**, pp. 181-210; **1844-5**, p. 66; Commons Papers, **1864**, vol. xl. p. 689; Hans. Deb. vol. lxxv. pp. 39-72.

that were "repugnant" to the imperial Act 3 and 4 Vict. c. 35.[b] In the same year, a bill to explain and amend an act of the previous session, vesting certain property in the officers of her Majesty's ordnance, was reserved, and not afterwards assented to, for reasons that were not made known to parliament.[c] But, in 1846, another act on this subject was passed, and assented to.

Ordnance bill.

Divorce bill.

In 1846, a reserved bill, to divorce one Mr. Harris from his wife, was refused the royal assent, on the report of the law officers of the Crown that, whereas the parties were not domiciled in Canada at the time of the passing of the act, the courts of law would not consider the act adequate to effect a valid divorce, even if it were to receive the sanction of the Crown.[d]

In the same year, the royal assent was withheld from a reserved bill to authorize the creditor of a public officer to attach a part of his official salary, in satisfaction of a judgment against him, — because this bill was liable to grave objections, on grounds of public policy, and because no similar law exists in England.[e]

Salary attachment bill

By order of the queen in council, dated July 18, 1849, a Canadian act, passed and assented to in 1847, for the incorporation of the town of Bytown, was disallowed.[f] Meanwhile, however, the Canadian parliament in 1849 had passed an act to repeal the act aforesaid from Jan. 1, 1850, and to substitute other provisions for the incorporation of Bytown. The grounds of objection taken by the imperial government to the act of 1847 do not appear, but it is evident that they were removed in the later act of 1849, inasmuch as that statute was allowed to go into operation.[g]

Bytown incorporation.

By order of the queen in council, dated April 14, 1851, a Canadian act, passed and assented to in 1850, in relation to the currency, was disallowed, for various reasons: (1) because the governor-general, by assenting to this act, and not referring it for the special consideration of the imperial government, acted in contravention of the royal instructions; (2) because the act proposed to confer upon the governor-general the right of coining, — a prerogative reserved by con-

Currency bills.

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[b] Canada Leg. Assembly Journals, **1844-5**, p. 65.
[c] *Ibid.* **1846**, p. 81.
[d] *Ibid.* p. 29.
[e] *Ibid.* p. 43.
[f] *Ibid.* **1850**, p. 7.
[g] See also, Canada Act 13 and 14 Vict. c. 82.

stitutional law to the sovereign; (3) because of the clause contained therein to alter the current rates of certain foreign coins, — which, being enacted without the previous assent of her Majesty in council, was an interference with imperial control over the value of current money in circulation throughout the realm. Previous to the formal disallowance of this act, much correspondence took place respecting it between the colonial and imperial governments.[h] Subsequently, in the years 1851 and 1853, new currency acts were passed by the Canadian parliament; but they were framed with due regard to the royal prerogative, and contained clauses to postpone their enforcement until after the issue of royal proclamations to declare the time when they should go into operation. These acts, moreover, were carefully considered between the respective governments, and the correspondence thereon communicated to the Canadian parliament.[i] And although, by the British North America act of 1867, the Imperial Parliament has specially empowered the parliament of Canada to exercise "exclusive legislative authority" in relation to "currency and coinage," the acts passed in Canada, upon the subject of the currency, in 1868 and in 1871, expressly conserve the prerogative of the Crown in the matter of coinage, and authorize her Majesty to affix by proclamation, from time to time, the rates at which coins in circulation in Canada, or struck off by order of her Majesty for use in Canada, shall pass current.[j]

By order of the queen in council, dated Sept. 23, 1859, a Canadian act, passed and assented to in that year, to impose a duty on vessels admitted to registry and to the Canadian coasting trade, and belonging to countries not admitting Canadian vessels to similar privileges, was disallowed.[k] Shipping bills.

By order of the queen in council, dated Jan. 6, 1862, a Canadian act, passed and assented to in 1861, to give jurisdiction to Canadian magistrates, in respect of certain offences committed in New Brunswick, by persons afterwards escaping to Canada, was disallowed, as being in excess of the jurisdic- Extra-territorial legislation.

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[h] Canada Leg. Assembly Journals, **1851**, appx. Y. Y.

[i] *Ibid.* **1852-3**, appx. P.

[j] Canada Acts 31 Vict. c. 45; 34 Vict. c. 4; and see the Queen's Proclamation, dated Dec. 9, 1876, in regard to bronze coins for circulation in Canada, prefixed to the Canada Stats. **1877**, p. 61. Also Canada Sess. Papers, **1870**, no. 40.

[k] Canada Leg. Assembly Journals, **1860**, p. 6.

tion belonging to the Canadian parliament, and only to be properly effected by imperial legislation; or by an arrangement, in the nature of an agreement of extradition between the two provinces, to be carried into effect by acts of the two provincial legislatures.[1]

Control of Crown over Canadian legislation, since Confederation.

Let us now briefly notice the instances wherein bills passed by the parliament of the dominion of Canada, after its establishment under the British North America act of 1867, have been disallowed by the Crown.

On May 22, 1868, at the close of the first session of parliament of the new dominion of Canada, an act passed by the senate and house of commons "to fix the salary of the governor-general" was reserved for the consideration of her Majesty's pleasure thereon. It was proposed, by this act, to reduce the salary of the governor-general from £10,000, at which rate it had been fixed by the imperial act of union, in 1867 (subject to alteration by the parliament of Canada), to £6,500.

Governor-general's salary bill.

But on July 30, 1868, the secretary of state for the colonies notified Lord Monck (the governor-general) that while it was "with reluctance, and only on serious occasions, that the queen's government can advise her Majesty to withhold the royal sanction from a bill which has passed two branches of the Canadian parliament," yet that a regard for the interests of Canada, and a well-founded apprehension that a reduction in the salary of the governor which would place the office, as far as salary is a standard of recognition, in the third class among colonial governments, obliged her Majesty's government to advise that this bill should not be permitted to become law.[m] In accordance with the opinions entertained by the imperial government on this subject, and with the right to legislate thereon which was expressly conferred upon the parliament of Canada by the 105th section of the British

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[1] Canada Leg. Assembly Journals, **1862**, p. 101. The law officers of the Crown gave an opinion in 1855, in reference to British Guiana. "We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits, — three miles from the shore, — or, at the utmost, can only do this over persons domiciled in the colony who may offend against its ordinances even beyond those limits, but not over other persons." (Forsyth, Constitutional Cases, p. 24.)

[m] Canada Sess. Papers, **1869**, no. 73.

North America act, the dominion parliament, in 1869, re-enacted, by their own authority, the clause of the imperial statute which fixed the salary of the governor-general, at £10,000 sterling, equal to $48,666.63; the same to be payable out of the consolidated revenue of Canada. This act was necessarily reserved, under the royal instructions; but it received the assent of her Majesty in council on August 7, 1869. From this date, no further attempt has been made to reduce the salary of the governor-general.

Criminal law statutes.

On Dec. 17, 1869, the secretary of state for the colonies notified the governor-general of Canada, in regard to certain acts passed by the dominion parliament in the previous session of parliament, that her Majesty would not be advised to exercise her power of disallowance with respect thereto; but that he observed that the third section of "an act respecting perjury" assumed to affix a criminal character to acts committed beyond the limits of the dominion. "As such a provision is beyond the legislative power of the Canadian parliament," the colonial secretary requested the governor-general to bring this point to the notice of his ministers, with a view to the amendment of the act in this particular.[n] Accordingly, in the ensuing session of the dominion parliament, an act was passed to correct this error.[o]

Provincial governments establishment.

On May 12, 1870, an act passed by the parliament of the dominion of Canada, "to establish and provide for the government of the province of Manitoba," was assented to by the governor-general in the queen's name. While this act was under consideration in parliament, doubts were expressed as to the competency of the dominion parliament, under the British North America act, 1867, to establish provincial governments in territories admitted, or which may hereafter be admitted, into the dominion, and to provide for the representation of such provinces in the Senate and House of Commons of the dominion. Accordingly, upon a report made to the privy council of Canada by the minister of justice upon this subject, and approved by the governor-general, application was made to the imperial government to submit a measure to the imperial parliament, at its next session, for the purpose of

[n] Canada Sess. Papers, 1870, no. 39.
[o] Act 33 Vict. c. 26.

quieting these doubts, and for preventing the necessity of repeated applications to the imperial parliament for additional powers to enable the dominion parliament to legislate for the admission of new provinces into the dominion, upon similar terms and conditions as apply to the provinces already forming part of the same; and also for the alteration of the boundaries of existing provinces, with the consent of the local government.

In compliance with the wishes of the Canadian government, the secretary of state for the colonies, on Jan. 26, 1871, transmitted to the governor-general a draft-bill for effecting the purposes above mentioned; which, being approved in Canada, was afterwards enacted by the imperial parliament.[p]

Oaths bill.

On May 3, 1873, the governor-general of Canada (the Earl of Dufferin) transmitted to her Majesty's secretary of state for the colonies a certified copy of a bill "to provide for the examination of witnesses on oath by committees of the senate and house of commons in certain cases," which had passed both houses of the Canadian parliament, and received the royal assent through the governor-general. In his despatch, accompanying this bill, Lord Dufferin explained the nature and necessity for the measure, and the reasons which had induced him to assent to it, notwithstanding the fact that doubts had been expressed whether, on technical grounds, this bill was within the competency or jurisdiction of the Canadian parliament. He enclosed a memorandum from the minister of justice (Sir John A. Macdonald), giving expression to these doubts and desiring that they might be considered by her Majesty's government.

On June 30, 1873, the secretary of state for the colonies notified the governor-general that, upon the advice of the law officers of the Crown, her Majesty had agreed to an order in council, disallowing the act in question, upon the ground that it was *ultra vires*, as being contrary to the express terms of the eighteenth section of the British North America act. He also pointed out that the Act 31 Vict. c. 24, passed by the Canadian parliament in 1868, for the purpose of conferring upon the senate the power of administering

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[p] Canada Sess. Papers, **1871**, no. 20, pp. 136–141; Imp. Act 34 and 35 Vict. c. 28.

oaths to witnesses at their bar, — though it appears to have escaped observation, and was not disallowed, — was nevertheless "void and inoperative as being repugnant to the provisions of the British North America act, and cannot be legally acted upon." [q]

By an act of the imperial parliament, passed in 1875, the eighteenth section of the British North America act, aforesaid, was repealed, and a new provision substituted, under which it was declared to be competent to the parliament of Canada to pass any act to define the privileges, immunities, and powers of either house, and of the members thereof, respectively; but so that the same shall not exceed those held and exercised by the imperial House of Commons at the time of the passing of such act. This statute, likewise, gave validity to the Canadian act of 1868, which was declared to have been invalid, because of its repugnancy to the imperial act of 1867. [r]

Copyright legislation.

In the session of the parliament of Canada held in 1872, a bill was passed, "to amend the act respecting copyrights," which was reserved for the signification of her Majesty's pleasure. On May 16, 1874, the governor-general transmitted to the secretary of state for the colonies copies of resolutions, adopted by the Senate and House of Commons, urging that the royal assent should be given to this bill; and representing that the two years, within which (under the fifty-seventh section of the British North America act, 1867) it would be competent for the assent of the queen in council to be signified to the same, would expire on June 14 next. In his reply, dated June 15, 1874, the colonial secretary stated that he had been unable to advise her Majesty to assent to this bill, because certain provisions, contained therein, are in conflict with imperial legislation in regard to copyright. Moreover, the validity of the bill would not have been established, even if her Majesty had been pleased to assent to it; inasmuch as it was "repugnant" to an imperial act extending to the colony,

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[q] Canada Commons Journals, Oct. 23, **1873**, pp. 5–12; Commons Papers, **1874**, vol. xlv. pp. 3–9.

[r] Imp. Act 38 and 39 Vict. c. 38; Canada Sess. Papers, **1876**, no. 45. Accordingly, in 1876, the oaths bill, disallowed merely upon technical grounds, was re-enacted by the Canadian parliament. (Can. Stats. 39 Vict. c. 7.)

and therefore by the second section of the Colonial laws validity act, of 1865, is absolutely void and inoperative.[s]

Marine telegraphs.

In 1874, a bill was passed by both houses of the parliament of Canada, entitled, "an act to regulate the construction and maintenance of marine electric telegraphs." In conformity with the seventh paragraph of the royal instructions, and upon the advice of the minister of justice, his Excellency the governor-general reserved this bill for the signification of her Majesty's pleasure. The Anglo-American telegraph company had opposed the passage of the bill, but their objections to it had been overruled by the Senate; and the privy council, while advising its reservation, out of deference to the royal instructions, and because it "may possibly be considered to prejudice the interests and rights of property of her Majesty's subjects not residing in Canada," expressed their conviction that the measure was calculated to be highly beneficial to Canadian interests, and also was in accordance with the established policy of the country. They therefore prayed that it might receive the royal assent at an early date.

Meanwhile, the Anglo-American telegraph company petitioned the governor-general in council that the bill might not be allowed to become law; but they were informed that, the bill being now in the hands of the imperial authorities, the subject was no longer open for the consideration of the government of Canada.

Numerous representations were made to her Majesty's secretary of state for the colonies, both for and against the confirmation of this bill. But on Oct. 29, 1874, he wrote to the governor-general, intimating that, while he entirely appreciated the reasons which induced the Canadian ministers to advise the reservation of the same, he felt that he could not properly assume the function of deciding between the conflicting views expressed in regard to the policy embodied in this measure. He had therefore decided to tender no advice to her Majesty respecting it.

He added that "it seems to me to be clearly within the competency of the dominion government and parliament to legislate" upon this subject, "without any interference on the part of the government of this country." It being a local

[s] Canada Sess. Papers, **1875**, no. 28.

question, "involving no points in respect of which it would appear necessary that imperial interests should be guarded, or the relations of the dominion with other colonial or foreign governments controlled." "It is obvious that if the intervention of her Majesty's government were liable to be invoked whenever Canadian legislation on local questions affects, or is alleged to affect, the property of absent persons, the measure of self-government conceded to the dominion might be reduced within very narrow limits. It is to the dominion government and legislature that persons concerned in the legislation of Canada on domestic subjects and its results must have recourse; and this government cannot attempt to decide upon the details of such legislation without incurring the risk of those complications which are consequent upon a confusion of authority."

It having been decided by her Majesty's government to take no action with respect to this reserved bill, in order that, if thought desirable in Canada, a new bill might be introduced into the dominion parliament next session, the secretary of state for the colonies, in reply to a communication from the government of Newfoundland, in regard to certain rights presumed to accrue to parties under an act passed by the Newfoundland legislature, advised that those rights should be submitted to judicial determination by the Supreme Court of the colony. And that it would be of advantage for the government of Newfoundland to confer with the dominion government in relation to the best mode of settling what, if any, payments might be necessary for satisfying such rights.[t]

In the following session of the dominion parliament, a new bill to regulate the construction and maintenance of marine electric telegraphs was introduced; and after undergoing considerable modification in both houses, for the purpose of meeting the views of contending parties, it was passed and assented to by the governor-general.[u]

Merchant shipping act.

The imperial merchant shipping act of 1876 contains certain general provisions applicable to vessels trading with Canada. But the forty-fourth section of this act declares

[t] Canada Sess. Papers, **1875**, no. 20.
[u] Act 38 Vict. c. 26; and see Canada Sess. Papers, **1877**, no. 119.

that the regulations in respect to deck cargoes shall not apply to ships engaged in the coasting-trade of any British possession, and that no part of the act shall apply to any vessel trading exclusively in colonial inland waters. In 1878, however, a bill was passed through the dominion parliament to repeal, "as respects all ships while in the waters of Canada," from and after the time which may be fixed for that purpose by a proclamation issued by her Majesty in council, the twenty-third section of the said statute, which regulates the space occupied by deck cargoes which shall be liable for tonnage dues. This act was not allowed by her Majesty's government, inasmuch as it claimed to legislate not merely for Canadian shipping, and for vessels specially exempted by the forty-fourth section above mentioned, from the operation of the imperial act, but likewise for "all ships" while in Canadian waters. Such a provision was obviously in excess of the powers of the Canadian parliament. In making known to the Canadian government their disapproval of this act, the imperial board of trade suggested that another act might be passed on the subject, but limited in its operation to ships over which the dominion government could exercise control.[v]

Supreme Court act.

Furthermore, upon the introduction into the Canadian parliament in 1875, of a bill to create a supreme court for the dominion, it was the expressed intention of ministers to have prohibited any further appeals to her Majesty's privy council. They were notified, however, that the bill could not be sanctioned unless it preserved to the Crown its rights to hear the appeals of all British subjects, who might desire to appeal in

[v] Private information from the Marine and Fisheries Department of Canada, in March, 1879. In the session of 1879, the Canada parliament passed another act respecting the tonnage of ships, which was expressly limited to vessels amenable to Canadian law. (42 Vict. c. 24.) Upon the same principle, the colonial secretary, in a despatch to the governor of New Zealand, dated May 3, 1878, whilst admitting that, "so far as relates to communication with the shore and with the shipping in colonial waters, her Majesty's ships should be subject to local quarantine regulations, in the same manner as merchant ships," yet desired that instructions might be issued, by the government of the colony, to forbid the local authorities in any way to interfere with the internal management of her Majesty's ships, or with their freedom to proceed to sea whenever the officer in command may deem such course requisite. (New Zealand Parl. Papers, **1878**, appx. A. 2, p. 19.)

the ultimate resort to the queen in council. Accordingly, a saving-clause to that effect was inserted in the bill, and it received the royal assent.[w]

In Australia.

We would now invite attention to various precedents that have arisen in the Australian colonies, which illustrate the extent of the control now exercised by the queen in council over legislation in that part of the empire.

Assessment on pastures.

In 1858, the governor of New South Wales informed her Majesty's secretary of state for the colonies that a bill, intituled an act to impose an assessment on runs, and to increase the rent of lands leased for pastoral purposes in the colony, had passed both houses, and had been tendered to him for his assent, on behalf of the Crown. On consulting the colonial law officers in regard to this bill, he had received from them two separate reports, — one from the solicitor-general certifying to its legality, the other from the attorney-general disputing the same. Under these circumstances, the governor decided to act on his own judgment, and he gave the royal assent to the bill. But he deemed it to be his duty to report the case to the colonial secretary.

In reply to this reference, Earl Carnarvon informed the governor that the imperial government had decided, for certain reasons which he explained, to permit the act to remain in operation, notwithstanding its doubtful legality. If the act were illegal, it was open to any aggrieved person to seek for redress from its requirements by an action at law. Should the repugnance of the act to imperial legislation be conclusively established by a decision of a competent court, it would be disallowed; provided that the time limited for such an exercise of the prerogative should not then have expired.[x]

In 1866, a ministerial crisis occurred in Queensland. Owing to serious financial embarrassments in that colony, ministers had tendered to the governor (Sir G. F. Bowen) their advice that, in order to sustain the public credit, there should

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[w] Lord Norton, in Nineteenth Century, July, 1879, p. 173; Canada Act, 38 Vict. c. 11, sec. 47.

[x] New South Wales Leg. Assembly Votes, 1859–60, vol. iii. p. 911.

Paper currency.

be an immediate issue of inconvertible paper currency, in the shape of legal tender notes, to an amount not exceeding two hundred thousand pounds.[y] The governor demurred to this proposal, inasmuch as he was expressly forbidden, by the royal instructions — "which are a part of the constitutional law of the colony" — to assent to any bill of this nature, unless upon urgent necessity, as aforesaid.[z] He distinctly declared that in no event would he give the royal assent to any such bill. He suggested, however, another mode of meeting the financial difficulty, viz., by obtaining legislative sanction to the issue of treasury bills, coupled with the imposition of additional taxation; a course which had proved successful, under similar circumstances, in other colonies and in the mother country.

Ministers refused to entertain these suggestions, and adhered to their own plan. And they sought to persuade the governor that he would be amply warranted, in the emergency, in following their advice.

The governor, on his own part, was equally inflexible. He reminded his ministers that, in all purely colonial questions, he had invariably accepted the recommendations of his constitutional advisers, even when his individual opinion, in important cases, had differed from theirs; believing it to be his duty to give all just and lawful support to his ministers, together with the result of his own knowledge and experience, in local questions. But in this case, where imperial interests were concerned, he felt that his duty to the Crown and to the colony alike required him to refuse his sanction to the proposed measure; more especially as he failed to perceive any "urgent necessity" that would justify him in having recourse to such an extraordinary and questionable proceeding, until, at any rate, the ordinary measures of relief should have been tried in vain. Whereupon the Macalister administration tendered their resignations, which, however, the governor refused to receive.

But, with a view to conciliation, the governor intimated his willingness to waive the strict constitutional rule that, "to all important acts by which the Crown becomes committed,

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[y] Queensland, Leg. Assembly Journals, **1866**, p. 952.
[z] See *ante*, p. 132.

the sanction of the sovereign (or of her representative) must be previously signified;" and to permit the introduction in parliament of their financial scheme, pending his communication thereupon with the secretary of state; reserving his final decision thereon until the measure should have passed both houses, and be presented to him for the royal assent.[a]

Meanwhile, as much misapprehension prevailed as to the nature and extent of the impediment which was known to exist to the proposed legislation at this financial crisis, the governor consented, at the earnest request of the premier, to the immediate production of his correspondence with ministers in parliament; deprecating, however, the slightest desire to interfere with the privileges or influence the deliberations of parliament by such a step.[b]

But, on the following day, ministers again tendered their resignations; and his Excellency reluctantly accepted them, — being aware that they possessed the confidence of the Assembly, in their general policy, and being of opinion that the point of difference, on a question to be determined on imperial considerations, did not necessitate their retirement. The governor, however, had no difficulty in obtaining other advisers. A new ministry was at once formed, by Mr. R. G. Herbert, which proved acceptable to both houses.[c]

The Herbert administration met the emergency by the immediate introduction of a bill authorizing the issue of treasury bills, to the amount of three hundred thousand pounds, which sum was deemed to be sufficient to carry the colony through its commercial crisis. This bill passed both houses, and received the royal assent within four days.[d]

Afterwards, certain of the colonists petitioned the queen for Sir G. Bowen's recall, because of his action in this matter, and his alleged unconstitutional inducement of a change of ministry. This petition was transmitted, through the governor, to her Majesty. But the popular resentment against the governor speedily subsided; and he continued to enjoy the respect and confidence of the people of Queensland, for the ability and energy he had displayed in the government of

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[a] See further on this point, *post*, p. 434.

[b] Queensland Leg. Assembly, Votes, **1866**, pp. 437–447.

[c] *Ibid.* p. 183; Votes of **1867**, p. 81.

[d] Leg. Assembly Votes, **1866**, pp. 184–187; Votes of **1867**, p. 83.

the colony, until his promotion, in December, 1867, to be governor of New Zealand.[e] A formal answer was given to this petition, which was published in the "Official Gazette;" and, in a separate despatch, the colonial secretary (Lord Carnarvon) expressed his entire approval of the governor's conduct on this occasion.[f]

Chinese immigration into Queensland.

In 1876, a bill was passed through both houses of the Queensland parliament, entitled "a bill to amend 'the goldfields act of 1874,' so far as relates to Asiatic and African aliens," under which an increased license-fee was authorized to be collected from such aliens, with the view to discourage excessive immigration from China.

Whereupon, the governor, Mr. (now Sir W.) Cairns, requested the colonial attorney-general to furnish him with a special report upon this bill: intimating whether, in his opinion, there was any objection to the governor giving the royal assent to it; or whether, under the royal instructions, or pursuant to any existing law, his Excellency should withhold his assent, or reserve the bill for the signification of the royal pleasure.

The attorney-general, in reply, stated that in his opinion the bill contained nothing which would necessitate that the royal assent should be withheld from it, or that it should be reserved for the consideration of the Crown. In support of this conclusion, he quoted several precedents.

Notwithstanding the respect which he entertained for the opinion of the attorney-general, Governor Cairns was still persuaded that it was his duty to reserve this bill for imperial consideration; inasmuch as he deemed it to be of an extraordinary nature, and as possibly involving a breach of international comity, by imposing restraints upon Chinese immigrating into Queensland, contrary to the principle which the British government imposed on China, by the treaty of Tien-Tsin, as regards the treatment of foreigners by that nation, and especially at variance with the fifth article of the convention signed at Pekin, on Oct. 24, 1860. The exceptional and extraordinary amount of the license proposed to be imposed by this bill upon Chinese immigrants is apparent, from the fact that the fee for an ordinary miner's license

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[e] Leg. Assembly Votes, **1867**, p. 37; Adderley, Colonial Policy, p. 37.
[f] Leg. Assembly Votes, **1867**, p. 83; and see *ante*, p. 96.

was ten shillings, with a charge of four pounds for a business license; whereas this bill provided that all "Asiatic or African aliens" should pay three pounds for a miner's license, and ten pounds for a business license. The governor, accordingly, notified the prime minister that he should reserve this bill for the signification of the royal pleasure thereon.

On their part, ministers were unanimously agreed that the bill was within the competency of the colonial legislature, and that the governor was not required to reserve it. In communicating this opinion to the governor, they observed that they felt it "to be of the utmost importance that the authority of the colonial legislature to pass laws upon all subjects whatever which they may think necessary for the good government of the colony should be recognized and upheld, and that no other limit to that power should be admitted than that which is imposed by the royal instructions to the governor. They think that, to go beyond those instructions, or to allow the unusual character of proposed legislation not forbidden by them as a sufficient ground for not giving immediate effect to the wish of the legislature, would be of serious consequence to the independence and freedom of parliament." They, therefore, advised that the governor should assent to this bill.

His Excellency, however, decided that it was incumbent upon him to reserve the bill for the signification of the royal pleasure upon it. In transmitting it to her Majesty's secretary of state for the colonies, he recapitulated, in a despatch dated Oct. 11, 1876, his reasons for so doing.

In reply, the earl of Carnarvon (the colonial secretary), in a despatch dated March 27, 1877, expressed his approval of the governor's conduct, and of the reasons which had actuated him. For these reasons, he added, as well as upon other grounds, — although he was most unwilling even to appear to infringe upon the privileges of self-government enjoyed by the inhabitants of Queensland, — he had been unable to advise the queen that this bill should receive the royal assent in its present shape. He admitted that similar legislation had been agreed to by the colony of Victoria (in 1855, and later years, and consolidated in 1864, by the Act 27 Vict. no. 200), and by New South Wales (in 1861, &c., by the Acts 25 Vict. no. 3, and 31 Vict. no. 8), and that her Majesty had not been

Chinese immigration into Australia.

advised to disallow any of those acts, although at the time the colonial secretary had remonstrated, and declared the unquestionable fact "that exceptional legislation, intended to exclude from any part of her Majesty's dominions the subjects of a state at peace with her Majesty, is highly objectionable in principle." But, since then, these acts had been repealed, to the great satisfaction of her Majesty's government. Adverting to the contention of the local ministry that there should be no limit to the power of the colonial legislature to pass laws, other than that which is distinctly imposed by the royal instructions to the governor, Lord Carnarvon presumes that "this apparently unqualified statement was to be taken as being made subject to the paramount authority of the Imperial Parliament, and the power of disallowance expressly reserved to her Majesty by the Constitutional act." Not dissenting from the statement of ministers, as to the powers and functions of the Queensland parliament, so far as relates to matters of purely internal concern, — with which the local parliament is competent to deal, — the secretary of state was nevertheless of opinion that Governor Cairns "had no alternative, under the eleventh section of his instructions, but to reserve the bill; inasmuch as it is one of an extraordinary nature, whereby the rights of her Majesty's subjects not residing in the colony may be prejudiced."

Consequent upon the disallowance of this bill, the premier of the Queensland administration addressed a circular letter, dated April 20, 1877, to the agent-general of the colony in England (for the information of Lord Carnarvon) and to the chief secretaries of the sister colonies in Australasia, urging the necessity that the colony of Queensland should be at liberty to encourage or to discourage, at her unfettered discretion, immigration from China; and that the existence of international obligations between Great Britain and the empire of China should not be made a pretext for forcing upon Queensland a Chinese population, against her wishes or interests. This circular invited the several Australasian governments to a joint agreement with Queensland in some principles of action which would sustain the colony in the exercise of its rights as a self-governing community.

In reply to this communication, the colonial secretary of New South Wales wrote to the colonial secretary of Queens-

land, expressing sympathy in any well-devised scheme to arrest the excessive immigration of Asiatic and African aliens into the northern part of Australia, but submitting that the aforesaid "despatch from the secretary of state does not appear to have been inspired by any spirit opposed to the constitutional rights of Queensland. Being integral parts of the empire, the colonies must clearly be subject to the obligations of the empire; and it is no more than the duty of the imperial authorities to guard against local acts of legislation conflicting with the honour of the Crown. In the present instance, there does not appear to be any just ground for anticipating that her Majesty will be finally advised to withhold assent from any measure for the protection of the people of Queensland which respects imperial obligations, and does not exceed the necessities of the case." However, on July 4, 1877, the Legislative Assembly of New South Wales passed an address to the governor, expressing their sympathy with Queensland, in its endeavours to obtain protection from the dangers of excessive Chinese immigration, and their desire that the administration should represent to the imperial government the expediency of endeavouring to obtain from the Chinese government such a modification of existing treaty stipulations as would enable restrictions to be placed upon the present exceedingly undesirable flood of Chinese people coming into Australia.

None of the other Australian governments appear to have coincided with the Queensland administration, in the extravagant opinions they expressed in regard to the exercise of the royal prerogative by the governor upon this occasion.[g]

Her Majesty's secretary of state for the colonies having, in his despatch of March 27, 1877, above quoted, expressed his willingness to co-operate with the administration of Queensland in dealing with the very difficult question of Chinese immigration, in any way that might be consistent with equity and sound policy, a new bill to amend the gold fields act of 1874, so far as related to Asiatic and African aliens, was passed by the Queensland legislature, in 1877. This act was free from the most objectionable features in the act which had been disallowed.

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[g] Queensland Parl. Papers, **1876–78**. New South Wales Legislative Council Journals, **1876–77**, pp. 213–221.

Chinese immigration into Australia.

In the same session, the Queensland legislature passed another act "to regulate the immigration of Chinese," and to prevent them from becoming a charge upon the colony. By this statute, a poll-tax of ten pounds was imposed upon every Chinese immigrant; but, upon his leaving the colony, for foreign parts within three years, having meanwhile abstained from criminal offences and defrayed the cost of any treatment he might have received in any public hospital or asylum, it was provided that this sum should be refunded.

These acts were amended in 1878. Since they became law, they have been rigidly enforced with very satisfactory results; and the excessive influx of an alien population into Queensland has been materially reduced.[h]

In 1879, an "Anti-Chinese Influx Bill," drawn chiefly on the model of the Queensland act, was submitted by ministers to the New South Wales legislature. It passed the Assembly, but was rejected in the Legislative Council.[i]

It has been stated that there are about ten thousand Chinese already in New South Wales; in Queensland at least double that number; and in New Zealand about five thousand. There is accordingly just cause for alarm at the intrusion of such an excessive proportion of heathen emigrants into British territory, lest it should effect the gradual transformation of the Christian colonies of Australasia into Asiatic communities. In Victoria, there are comparatively few Chinese, and no legislation has been as yet directed against them. In South Australia, the government have deemed it expedient to issue an order in council forbidding contractors from employing Chinese labour on any public work in the colony.[j]

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[h] South Australia Parl. Proc. **1877**, vol. iii. nos. 91 *a*, 91 *b*. Mr. Macalister's paper read to the royal Colonial Institute in Dec., 1877, with the discussion thereon; Proc. of the Inst. vol. ix. pp. 43–83. Mr. Wisker's paper on "The Coloured Man in Australia," in Fortnightly Review, July, 1879. See also the correspondence between the foreign office and the Chinese minister in London concerning the appointment of Chinese consuls in Australia, and the reasons given by the Earl of Derby for refusing to sanction such appointments. New Zealand Parl. Papers, **1878**, appx. A. 2, p. 18.

[i] "The Colonies" Newspaper, March 15 and May 24, 1879.

[j] Fortnightly Review, July, 1879, p. 93. At the opening of the New Zealand Parliament, on July 11, 1879, the governor announced that "a bill to regulate the immigration of Chinese" would be duly submitted. This bill was to be framed in accordance with the legislation in Queensland. (New Zealand Parl. Deb. vol. xxviii. p. 417.) And the premier presented to the General

Chinese immigration into British Columbia.

Similar difficulties, in regard to an excessive and injurious influx of Chinese immigrants, have been experienced in the westernmost province of the dominion of Canada, British Columbia, which is situated on the Pacific coast. A stringent law, virtually intended to prevent Chinese immigration, was passed by the provincial legislature, and assented to by the lieutenant-governor, on Sept. 2, 1878.[k]

An action was immediately instituted in the Supreme Court of the colony to test the validity of this enactment. On Sept. 23, judgment upon the case was delivered by Mr. Justice Gray, who pronounced the act to be entirely beyond the powers of the local legislature, and therefore unconstitutional and void.[l] It was afterwards disallowed by the governor-general in council.

The British Columbia legislature could not dispute the soundness of this decision as a question of constitutional law. But being impressed with a sense of the injurious effects attending the presence of so large a number of Chinese (estimated at about six thousand) in a province the total population of which, at the last census, in 1871, was but 33,586 souls: of the pernicious influence of the Chinese, morally and socially, upon the rest of the inhabitants, and of the injury to the labour market from the unrestricted competition of Chinese workmen, — the legislature resolved to address the dominion government, calling attention to these facts, and requesting that the Canadian authorities would co-operate with other British colonies in the endeavour to obtain from the imperial government permission to restrain, if not entirely to prohibit, the further influx of Chinese into the British colonies, and especially into British Columbia.[m]

Assembly a memorandum pointing out the need of regulations to restrict excessive Chinese immigration. (New Zealand Parl. Papers **1879**, D. 3.) Soon after parliament was dissolved; but, at the opening of the new parliament on Sept. 25, the governor again announced a bill on this subject. The International Trades Union Congress, meeting in October, 1879, at New South Wales, unanimously condemned Chinese immigration.

[k] Brit. Columb. Stats. **1878**, c. 35. "To provide for the better collection of provincial taxes from Chinese."

[l] See *post*, p. 377.

[m] British Col. Leg. Assem. Journals, **1879**, pp. 55, 60, xxiv. And see a report of a select committee of the dominion House of Commons, presented May 14, 1879, with minutes of evidence, to the effect "that Chinese immigration ought not to be encouraged," and

Chinese immigration into United States.

The impediments in the way of the settlement, in the interests mainly of particular portions of the community, of a question which involves considerations of treaty obligations and of international rights, are strikingly shown in the fact that similar legislation by the state of California has been pronounced unconstitutional by the Supreme Court of that state.[n] And in 1879, the president of the United States vetoed a bill passed by Congress which was intended to discourage Chinese immigration. This bill proposed to restrict the number of Chinese that might be brought over, in a single voyage to the United States, to fifteen persons. In his message to Congress, dated March 1, the president stated that if passed the bill would virtually annul certain articles of an existing treaty with China; that the power of modifying treaties rested with the executive, not with Congress; and that even the acceptance by China of the partial abrogation of the treaty would not justify the action of Congress, or render it a competent exercise of constitutional authority. An attempt was made to override the president's veto; but, for lack of the requisite two-thirds majority, it failed.[o]

Disallowance of Australian bills.

For further examples of the disallowance by the Crown of bills passed by colonial legislatures, we may note that of a bill from New South Wales to enable a woman to obtain divorce on the sole ground of her husband's adultery, the royal assent to which was refused be-

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"that Chinese labour ought not to be employed on dominion public works." Canada Com. Journals, **1879**, appx. no. 4.

[n] See Sing *v.* Washburn, 20 Cal. Rep. 534. See also, The People *v.* Raymond, 34 Cal. Rep. 492. And to the same effect, the United States Circuit Court, in the Oregon District, decided, in the case of Baker *v.* The City of Portland, — which arose out of an act of the state legislature to prohibit the employment of Chinese labourers on public works, — that a treaty between the federal government and a foreign power was the supreme law of the land, which the courts were bound to enforce, and that an individual state could not legislate so as to interfere with the operation of a treaty, or to limit the privileges guaranteed thereby. Law Times, Oct. 18, 1879, p. 403.

[o] Congress Journals, **1879**. See the argument of J. C. Kennedy, before the senate committee on foreign relations, in February, 1878, adverse to legislation for the purpose of restricting Chinese immigration into the United States. Senate Miscel. Docts. **1877–78**, no. 36. For the views of the late O. P. Morton, ex-senator, on the character, extent, and effect of this immigration, see *ibid.* no. 20.

cause it would occasion confusion throughout the empire, as to the status of persons divorced for such a cause, and of their offspring. And a bill from Natal to legalize marriage with a deceased wife's sister was disallowed, — notwithstanding that similar bills had been sanctioned in Australia, — because "it did not appear to be urgently demanded by the people." [p]

Disallowance of a Natal bill.

c. *In matters of internal administration.*

The direct interposition of the Crown, through a secretary of state, in matters affecting the internal administration of a self-governing colony, would, in general, be at variance with the acknowledged principle of ministerial responsibility within the colony in all matters of local concern.[q] Such interference could only be constitutionally invoked, and properly exercised, under the following circumstances: (1.) In questions of an imperial nature;[r] (2.) In the interpretation of imperial statutes, which have assigned to the imperial authorities certain specified duties on behalf of the colony, in the performance whereof it would devolve upon a minister of the Crown, responsible to the Imperial Parliament, to act and decide, according to law;[s] or (3.) When, either at the express desire or with the concurrence of the local authorities, an appeal has been made to her Majesty's secretary of state for his opinion or decision upon a point whereon disagreements have arisen, between members of the body-politic, in the colony, concerning their respective rights and privileges.[t]

Interposition of the Crown in internal matters.

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[p] Lord Norton, in Nineteenth Century, July, 1879, pp. 172, 173.

[q] See the address of the Victoria Assembly, of June 4, 1868, and the resolutions of that house in Nov. 1869, to this effect, quoted in Commons Papers, **1878-9**, C. 2217, p. 74.

[r] See *ante*, pp. 140 *et seq.*, and *post*, p. 216.

[s] See *post*, pp. 164, 505.

[t] See *post*, p. 478.

When imperial interposition may be invoked.

Whenever reference is made to the imperial authorities, care should be taken that the claims and contentions of each party to the controversy should be fairly and fully submitted to the consideration of her Majesty's government. At the same time, it rests with the secretary of state, on his own responsibility, to use his discretion as to the means which he should adopt to inform himself upon both sides of colonial questions; and it would be unbecoming and unwarrantable for the local ministers of any colony to suggest any limitation upon this discretion, or to question the right of her Majesty's secretary of state to advise the presentation to the Imperial Parliament of any documents that he may think fit to submit to that tribunal, in order that it may be made acquainted with the opinions and arguments advanced on both sides of a litigated question.[u]

But even where the authoritative interposition of the imperial government, in matters of dispute between a governor and his constitutional advisers, would be objectionable or of doubtful expediency, — as in a question of purely local concern, — the governor, in view of his position as an imperial officer responsible to the Crown through the secretary of state for his public conduct, is always at liberty to appeal to his superior officer for advice and instructions, whenever he is called upon to exercise the royal prerogative, or to give the consent of the Crown to an act of administration. While, on the other hand, if a governor should transcend his lawful powers, or commit any act to which exception could be justly taken, an appeal is open to the secretary of state. The right of a governor to an appeal to the imperial authorities, in any matter affecting his character, or conduct in office, even though his ministers may not

[u] Secretary Sir M. Hicks-Beach, Despatches to Governor Bowen, of July 23, and August 16, 1878, Com. Papers, **1878**, C. 2173, pp. 84, 97.

concur in the necessity for the same, in the particular instance, cannot be questioned. For the authority of a governor is representative and derivative, and he possesses no independent jurisdiction.[v]

The undermentioned precedents, which have arisen in Canada since confederation, will serve to explain and enforce this principle.

Interposition requested by Nova Scotia Assembly.

In 1868, the year after the establishment of the confederate government in British North America, the provincial assembly of Nova Scotia addressed the queen, representing that, so far as Nova Scotia was concerned, the confederation had been effected without the people of the province having been freely consulted thereupon; that there was reason to fear that the results of the Union would be prejudicial to some of the special interests of Nova Scotia; and therefore praying for the repeal of the imperial act under which the union had taken place. This address was forwarded to her Majesty through Viscount Monck, the governor-general of Canada.

The secretary of state for the colonies, in a despatch dated June 4, 1868, informed the governor-general that her Majesty's government believed the confederation act "to be not merely conducive to the strength and welfare of the provinces, but also important to the interests of the whole empire." They could not therefore advise the reversal of this great measure of state policy. But they would undertake to appeal to the dominion government to remove any just causes of complaint that might be proved to exist on the part of Nova Scotia.[w] The dominion government promptly and honourably responded to this appeal, by agreeing to such a modification of the original terms of union as satisfied the claims of Nova Scotia, and removed the discontent prevailing in that province.[x]

The following case, which involved the question of

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[v] See the correspondence between Lord Normanby (governor of New Zealand) and Sir George Grey (premier of the colony) on this subject. New Zealand Papers, **1878**, A. 1, pp. 19–27, A. 2, p. 6.

[w] Lords Papers, **1867–68**, vol. xv. p. 222.

[x] Canada Sess. Papers, **1869**, no. 9; *ibid*, **1870**, no. 41.

the interpretation to be put upon a particular section of the British North America act, 1867, was appropriately decided by the imperial government.

Appointment of additional senators in Canada.

By the twenty-sixth section of the aforesaid statute, the queen is empowered at any time, on the recommendation of the governor-general, if she thinks fit, to direct that three or six members be added to the Senate of Canada; who shall represent equally the three divisions of the dominion.

In December, 1873, on the report of the premier, Mr. Mackenzie, the Canadian privy council advised that an application should be made to her Majesty to add six members to the Senate, "in the public interests." Though no such reason was alleged at the time, it was not denied that the proposed addition was desired simply for the purpose of remedying the preponderance of the political party adverse to the existing administration in the Senate, by the selection of six members who would support the ministry in that chamber.[y] This recommendation was forwarded to the secretary of state, through the governor-general.

The colonial secretary (the earl of Kimberley), in a despatch dated Feb. 18, 1874, stated that after a careful examination of the question, he was satisfied that it was intended that the power vested in her Majesty, under the section aforesaid, should be exercised "in order to provide a means of bringing the Senate into accord with the House of Commons, in the event of an actual collision of opinion between the two houses." And that "her Majesty could not be advised to take the responsibility of interfering with the constitution of the Senate, except upon an occasion when it had been made apparent that a difference had arisen between the two houses of so serious and permanent a character that the government could not be carried on without her intervention, and when it could be shown that the limited creation of senators allowed by the act would apply an adequate remedy."

Pursuant to an address of the Canadian Senate in 1877, this correspondence was laid before that house. And on March 19, five resolutions were agreed to, on division, reciting the facts

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[y] See Mr. Reesor's amendment, in Canada Senate Journals, 1877, p. 130.

of the case, expressing a "high appreciation of the conduct of her Majesty's government in refusing to advise an act for which no constitutional reason could be offered," and recording the opinion of the senate that any addition to their body under the twenty-sixth clause of the British North America act, "which is not absolutely necessary for the purpose of bringing this house into accord with the House of Commons, in the event of an actual collision of a serious and permanent character, would be an infringement of the constitutional independence of the senate, and lead to a depreciation of its utility as a constituent part of the legislature." These resolutions were directed to be transmitted, through the governor-general to the secretary of state for the colonies, for the information of her Majesty's government.[z]

Imperial guarantees on loans.

Upon the same principle, the secretary of state for the colonies (Earl of Kimberley) addressed a despatch to governor Fergusson, of New Zealand, on Dec. 12, 1873, remonstrating against certain observations made on July 29 previous, in the New Zealand House of Representatives, by the colonial treasurer and chief minister (Mr. Vogel), in his budget speech. Mr. Vogel in treating of colonial loans, had implied that the imperial government gave an "undisclosed guarantee," for the same; and in reference to the payment of loan interest before other charges, had observed that "the governor being an imperial officer, the imperial government would be responsible if their nominee did not respect the priority which the law established."

All such responsibility, as attaching to the imperial government, the colonial secretary disavowed. Her Majesty's government in no way guarantees colonial loans, "except for particular amounts specified in imperial guarantee acts, and inasmuch as it exercises no interference or control as to the financial policy of a colony under responsible government, it shares none of the responsibility for the due payment of the principal and interest of loans which it has not specifically guaranteed."

Warrants for payment signed by the governor are of the same character as royal orders in this country, which are issued under the royal sign-manual: but her Majesty's signature in no way relieves her ministers from responsibility in

[z] Senate Journals, **1877**, pp. 130, 134.

respect to the due administration of moneys voted by Parliament. "Her Majesty's government cannot therefore admit, that because the governor is an imperial servant, the imperial government would incur any responsibility with regard to moneys issued under his order, beyond that which may be imposed on them by the legislature of this colony." [a]

British Columbia and the Canada Pacific Railway.

In 1873, the government of the province of British Columbia addressed a formal remonstrance to the dominion government, complaining of the non-fulfilment of the terms of union of that province with Canada, in respect to the commencement of a line of railway from the Pacific coast to connect with existing railways in eastern Canada. The reply of the dominion government to this protest not being deemed satisfactory, the provincial government deputed two ministers of the lieutenant-governor's cabinet to proceed to England to appeal to her Majesty's government on the subject. Before the arrival of the delegates, the Earl of Carnarvon, in a despatch to the governor-general of Canada, dated June 18, 1874, intimated his willingness to arbitrate between the two governments, if they would agree to accept his decision upon all matters in controversy between them.

This offer of her Majesty's secretary of state for the colonies was readily accepted by the dominion and provincial governments, and full information upon the points in dispute was communicated to Lord Carnarvon. Whereupon, in a despatch to the governor-general, dated Aug. 16, 1874, he stated the modifications of plan for the commencement and completion of the great trans-continental railway, which, in the interest of both parties, he would advise for their acceptance. The Canadian government expressed their willingness to accept these recommendations, if modified in certain particulars. After further consultation with the delegation from British Columbia, the secretary of state, in a despatch

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[a] New Zealand Parl. Papers, **1873–74**, A. 2, no. 25. See also Papers in reference to the claims of Messrs. Brogden, contractors for the construction of railways in New Zealand. These claims arose out of a question raised by Messrs. Brogden against the constitutionality of a statute passed in the colony which affected their private rights. Instead of raising this question in the colonial courts, which were capable of affording redress, the claimants appealed to the secretary of state. The colonial secretary, however, merely requested the governor to bring the case under the notice of his ministers. *Ibid.* 1878, E.–3.

dated Nov. 17, 1874, gave his final judgment upon the question, and a statement of the new terms with British Columbia, which he considered were fair and reasonable, in regard to the construction of the Pacific Railway. These terms were frankly accepted by the parties concerned, and they contributed for a time to restore a good understanding between the dominion and provincial governments. But further delays ensued, at which the local government of British Columbia again remonstrated, and on Feb. 2, 1876, the Legislative Assembly unanimously petitioned her Majesty the queen, praying that she would cause the dominion government to be immediately moved to give effect to the terms of Lord Carnarvon's settlement, above mentioned.[b]

A despatch from the colonial secretary, in reply to the petition of the British Columbia Assembly to the queen, was laid before the local legislature in 1877, together with further papers explanatory of the non-fulfilment, by the dominion government, of the railway clause in the terms of union. With a view to allay the continued dissatisfaction and irritation which prevailed in the province on this subject, the governor-general visited the province in the autumn of 1876, and delivered an able address on the question, vindicating the government of Canada from the imputation of bad faith, and pointing out the enormous and hitherto insuperable difficulties which had occasioned delay in the commencement of this great national work. His Excellency's speech was of much service, in restoring public confidence, and in reviving a good understanding between the local and the federal governments. It became necessary, however, for the Legislative Assembly of British Columbia to address a further appeal to her Majesty, in connection with the railway question, in the session held in 1878. But before a reply could be obtained to this address a change of ministry occurred in Canada. The local government received from the new dominion administration assurances that the representations and claims of the province would receive their best consideration. The local legislature reassembled in January, 1879, when correspondence and telegrams on this momentous subject were submitted by the lieutenant-governor, which reanimated the

[b] Canada Sess. Papers, **1875**, no. 19; *ibid.* **1876**, no. 41.

hopes of the province that the national railway would be constructed as speedily as possible. This confidence was expressed by the lieutenant-governor at the close of the session of April 29, 1879, when he referred to "the assurance given by the dominion government that railway work in the province would not only be commenced, but be vigorously prosecuted, this season."

Imperial Dominion exercisable over Self-governing Colonies: d. *By means of imperial legislation.*

Supreme authority of the Imperial Parliament.

In 1766, at the commencement of the unhappy disputes between Great Britain and her colonies in North America, which terminated in the achievement of independence by the United States, an act was passed by the Imperial Parliament which was intended to be declaratory of the legislative authority of Parliament over the colonies of the British Crown. This statute recited that "whereas several of the houses of representatives in his Majesty's colonies and plantations in America have of late, against law, claimed to themselves, or to the general assemblies of the same, the sole and exclusive right of imposing duties and taxes upon his Majesty's subjects in the said colonies and plantations, and have, in pursuance of such claim, passed certain votes, resolutions, and orders, derogatory to the legislative authority of Parliament, and inconsistent with the dependency of the said colonies upon the Crown of Great Britain;" — be it, therefore, declared that the said colonies in America have been, are, and of right ought to be, subordinate unto, and dependent upon, the Imperial Crown and Parliament of Great Britain; and that the King's Majesty, by and with the advice and consent of Parliament, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the said colonies, in all cases whatsoever.[c]

[c] 6 Geo. III. c. 12.

Mr Pitt, who then led the opposition in Parliament, desired expressly to except from this declaratory act the right of taxation without the consent of the colonists; but the crown lawyers would not yield the point, and the bill passed without any alteration.[d]

Imperial taxation of the colonies.

In fact Parliament had exercised the right of taxation in the colonies for nearly one hundred years. The first tax which appears to have been imposed upon the colonies, by the British Parliament, was under the Act 25 Car. II. c. 7, passed in 1672. This imposed an export duty on certain articles shipped in the colonies for consumption abroad. It was designed for the purpose of protecting and regulating commerce. It was followed, from time to time, by similar acts for the same purpose imposing duties on importations into or exports from the colonies or plantations in America. In 1763, an act was passed continuing, permanently, these protective duties, and directing that the net produce thereof should be reserved for the disposition of Parliament "towards defraying the necessary expenses of defending, protecting, and securing the British colonies in America," and in 1767, another act was passed (7 Geo. III. c. 41), to establish in these colonies, a board for the management of the customs duties imposed upon goods imported into or exported from those colonies. These protective duties continued to be levied, under parliamentary authority, and their net produce to be paid into the exchequer, until 1845. But by the Act 9 and 10 Vict. c. 94, passed in 1846, they came to an end; the various colonial legislatures being empowered, by that statute, to adopt measures, with the sanction of the Crown, for the repeal of any imperial protective duties of customs, which had been heretofore imposed upon them.[e]

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[d] See May, Const. History, c. 17.

[e] Accounts of Public Income and Expenditure, from 1688 to 1869, part 2, pp. 402-405. (In Com. Papers, **1869**, vol. xxxv.)

The colonies in North America before their revolt were in the habit of taxing themselves, by their own laws. They not only imposed internal taxation, but also, in certain cases, customs duties on imports. But they never disputed the right of the Imperial Parliament to impose duties for the regulation of commerce. In 1765, however, Parliament passed the celebrated Stamp Act, 5 Geo. III. c. 12, which authorized the levying, in the colonies, of internal taxation, in aid of the imperial revenue. This act excited the utmost indignation in America. Those who did not object to imperial customs duties, which might be necessary for the regulation of trade, and were a natural and equitable toll on merchandise safely carried by ships over seas protected by English fleets, saw a material difference in the attempt to impose duties of excise. It was the general conviction in the colonies that a parliament in which the American people were not duly represented had no right to impose internal taxation. Upon these considerations being made publicly known, by numerous petitions, and especially by the evidence of Dr. Benjamin Franklin, at the bar of the House of Commons, on January 28, 1766, Parliament hastened to repeal these objectionable imposts.[f]

Stamp Act.

But, in the following year, an equally objectionable measure was proposed, by the chancellor of the exchequer (Mr. Charles Townshend) and enacted by Parliament. The supporters of this bill, though they admitted that the right of internal taxation of the colonies was virtually extinguished, nevertheless affirmed the continued existence of the right of taxing commodities imported into them from other countries, not merely for the regulation of trade, but also for rais-

[f] Accounts of Public Income and Expenditure, from 1688 to 1869, part 2, p. 403. (Commons Papers, 1869, vol. xxxv.) Parl. Hist. vol. xvi. pp. 136–150. Act 6 Geo. III. c. 11.

ing a revenue. And this act proceeded to appropriate the proceeds of certain duties of customs imposed under its provisions to the establishment of a permanent civil list throughout every province in America, and to settle salaries hitherto dependent upon the vote of the local assembly.[g] This enactment greatly increased the discontent and disturbance already existing amongst the American colonists, and they came to a general agreement not to import any of the articles on which the new duties were laid. Riots and disturbances occurred at Boston in December, 1773, in the attempt to prevent the landing of tea, subject to duty under this obnoxious statute. Thus began the American Rebellion; and a war which was prolonged for seven years, at a cost to Great Britain of £115,654,914. It was finally terminated by the treaty of Paris, on November 30, 1782, which acknowledged the independence of the United States of America.[h]

Imposition of customs duties.

During the continuance of the war, and with a vain hope of arresting its progress, the Imperial Parliament repealed the duty on tea imported from Great Britain into any colony in America, which had been imposed by the Act of 7 Geo. III. c. 46; and at the same time renounced the claim of the mother country to impose, merely for the augmentation of the public revenue, any imperial taxation in the colonies. This was done in 1778, by an act which recited that, in order to aid in restoring peace in his Majesty's dominions, it is expedient to declare that the King and Parliament of Great Britain will not impose any duty, tax, or assessment, for the purpose of raising a revenue, in any of the colonies; and will only impose such duties as may be necessary for the regulation of commerce, the net

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[g] 7 Geo. III. c. 46.
[h] Pub. Inc. & Exp. 1688 to 1869, part 2, p. 404.

produce whereof shall always be applied to and for the use of the colony wherein they shall be levied.[i]

Imperial taxation for revenue purposes abandoned

The declaratory statute of 1766, with the proviso agreed to in 1778, that it shall not be construed to sanction taxation for revenue purposes, is still to be regarded as embodying the constitutional assertion of the supreme authority which is exercisable by the Imperial Parliament over all the queen's dominions; notwithstanding that they may be in possession of local legislatures with powers for local self-government.[j]

The colonial possessions of the British Crown, howsoever acquired and whatever may be their political constitution, are subject at all periods of their existence to the legislative control of the Imperial Parliament. But in practice, especially in the case of colonies enjoying representative institutions and responsible government, the mother country, in deference to the principle of self-government has conceded the largest possible measure of local independence, and practically exerts its supreme authority only in cases of necessity, or when imperial interests are at stake.

Colonial powers of self-government.

Once the Crown has granted to a colony representative institutions, with the power of making laws for its interior government, it has been decided that the Crown alone cannot thenceforth exercise, with respect to such colony, peculiar powers of legislation appropriate to a governor and council; that prerogative having been impliedly renounced by the appointment of a legislative body within the colony itself.[k]

But the supremacy over the colonies which appertains to the Imperial Parliament is a paramount right, and may even be exercised so as to override and con-

[i] 18 Geo. III. c. 12. And see Clark, Colonial Law, pp. 13, 14.

[j] See Clark's Colonial Law, p. 10. Forsyth, Constitutional Law, p. 21. Sir J. Holker (attorney general), Hans. Deb. vol. ccxxxiii. p. 1401.

[k] Campbell *v.* Hall, Cowper Rep. 204.

trol the powers possessed by any local government. The exercise of this authority is, however, reserved for extreme occasions of public necessity. Thus, in 1838 and 1839, Parliament, by virtue of its inherent powers, legislated on behalf of Jamaica and of Canada; by a special enactment supplied certain defects, otherwise insuperable in the laws of Jamaica; and afterwards suspended and remodelled the constitutions of both these colonies.[1]

Imperial legislation in colonial concerns.

Nevertheless, at the very time when necessity compelled the Imperial Parliament to have recourse to these extreme measures, the Crown was careful to define the principles on which the interposition of the supreme authority of Parliament over British colonies having representative institutions could alone be justified. In a despatch, addressed by the colonial minister (Lord Glenelg) to Sir F. B. Head, upon his appointment as lieutenant-governor of Upper Canada, in 1839, it is stated that "parliamentary legislation, on any subject of exclusively internal concern, in any British colony possessing a representative assembly, is, as a general rule, unconstitutional. It is a right the exercise of which is reserved for extreme cases, in which necessity at once creates and justifies the exception." [m]

The subsequent extension, to Canada and to Australia, of the principle of local self-government, or, as it has been usually termed in the colonies, "responsible government," set the seal upon all former concessions,

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[1] See May, Const. Hist. 3d ed. vol. iii. p. 365: and see the debates in the Imperial Parliament in 1860, on the bill for the better government of the native inhabitants of New Zealand. Hans. Deb. vol. clix. p. 1326; vol. clx. pp. 418, 1640.

[m] Commons Papers, **1839**, vol. xxxiii. p. 9. And see Earl Grey's observations, on the Ryland case, in the House of Lords, on June 8, 1849. Hans. Deb. vol. cv. p. 1277. See also extracts from despatch of Earl Grey (Colonial Secretary) to Governor Fitzroy, of New South Wales, in 1847, *ibid.* vol. cx. p. 657. And Lord John Russell's speech on Colonial Policy, on Feb. 8, 1850. *Ibid.* vol. cviii. p. 547.

Powers under colonial responsible government.

and enlarged the bounds of freedom and independence, in the determination of all questions of local concern, by establishing in these colonies institutions which were expressly designed to be "the very image and transcript" of those of the parent state.

The first use to which the colonial legislatures applied the enlarged powers conferred upon them by the grant of responsible government was to claim from the mother country the entire control over provincial revenue and expenditure. Heretofore it had been customary for the Imperial Parliament to settle the amount that should be paid out of colonial revenues to defray the cost of civil government and of the administration of justice, and to make permanent provision for the same by imperial enactment. It was thus in New South Wales, under the constitution established in 1842, by the Act 5 and 6 Vict. c. 76. And in other Australian colonies, under the Imperial Act 13 and 14 Vict. c. 59, which was passed in 1850. In Canada, the constitutions framed in 1791, and in 1841, by imperial legislation, each contained schedules fixing the sums payable for the services above mentioned (otherwise termed "the civil list"), and thereby appropriating colonial revenues, by imperial authority, without the consent of the local legislature. It was not until 1847 that, by the Imperial Act 10 and 11 Vict. c. 71, the Canadian legislature was empowered to grant a civil list, and to provide for the remuneration of judges, and other officers of the civil service, in the province. Similar power was conceded to the legislatures of New South Wales and Victoria, in 1855, by the Imperial Acts 18 and 19 Vict. cc. 54 and 55; which were passed pursuant to an agreement, on the part of the Australian colonies, to accept an offer made to them by her Majesty's secretary of state for the colonies, in 1852, and to make adequate provision for the

Civil list.

expenses of the civil government, in return for the surrender to them of the revenues from public lands.[n]

Appropriation of local revenues in Victoria by imperial statute.

And here mention may be made of a curious question which was raised in the colony of Victoria, during the continuance of the "dead-lock" between the two houses of the legislature, in 1877–1878, in regard to the interpretation that should be put upon the forty-fifth section of the Imperial Act 18 and 19 Vict. c. 55, for amending the constitution of Victoria. Eminent counsel, consulted by the local government in 1877, gave it as their opinion that this section expressly appropriated so much of the consolidated revenue of the colony as might be required to defray the costs, charges, and expenses incident to the collection, management, and receipt of the provincial revenue; without the necessity for any further grant or appropriation of the same by the parliament of Victoria. Hitherto it had been customary, in Victoria, to disregard this section, and to include all such costs, charges, and expenses, as aforesaid, in the annual votes in supply, and in the subsequent appropriation act passed by the local parliament. Counsel contended, however, that the imperial act gave ample authority for all such appropriation and expenditure. This interpretation was accepted by the Victoria Assembly, and the local government decided to give effect to it, albeit the Legislative Council protested against the proceeding. The governor (Sir. G. Bowen) requested the secretary of state to obtain the opinion of the law officers of the Crown in England upon the point. These officers confirmed the interpretation put upon the act by the colonial lawyers; with a proviso, that such expenditure, if incurred under the provisions of the forty-fifth section of the act, must be strictly limited to the purposes therein stated. If diverted to any other purpose, the previous sanction of an act of the Victoria parliament would be required. Fortunately, the temporary settlement of the difficulties between the two houses in Victoria rendered it unnecessary, at this time, to have recourse to this strained interpretation of the imperial

[n] Adderley, Colonial Policy, pp. 31, 102. And see Lord Glenelg's despatch to the Earl of Gosford, of July 17, 1835; Commons Papers, **1836**, vol. xxxix. p. 5.

act, to obtain the issue of public moneys for the purposes therein specified.[o]

Colonial trade and tariffs.

The freedom granted to the principal British colonies, by the establishment therein of local self-government, began speedily to lead to the demand for complete emancipation from imperial control, in all matters of local concern, including the regulation of their trade and commerce. Heretofore, the imposition of customs duties, and the regulation of trade between the colonies and the mother country, or with foreign countries, as well as all intercolonial commerce, had been regarded as within the undoubted competency, if not within the exclusive jurisdiction, of the Imperial Parliament.

In Canada, so recently as on Sept. 8, 1842, the governor-general, in his speech from the throne, at the opening of the legislature, announced that the Imperial Parliament had framed a tariff for the British Possessions in North America which, it was anticipated, would promote essentially their financial and commercial interests. But this was the last instance of imperial interference in a matter so vitally affecting the welfare and internal development of the Canadian people.

Consequent upon the incorporation into the commercial system of the mother country of free trade, — a principle which the colonies, generally, were reluctant to accept, and slow to approve, — an additional boon was conceded to the self-governing colonies, in the shape of enlarged freedom from imperial control in the determination of all fiscal and commercial questions.

Every British colony possessing legislative institutions had from the first been more or less free to tax itself, and to impose, with the consent of the Crown, duties of customs upon importations into or exporta-

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[o] Victoria Leg. Coun. Journals, **1877-78**, pp. 193, 211, appx. A. 5; *ibid.* **1878** (*in loco*). And Commons Papers, **1878**, C. 2173, pp. 32–45, 97. And see *post*, p. 504.

tions from its own territory. But, concurrently with this privilege, the Imperial Parliament, as we have seen, retained the right to regulate colonial trade, and to subject the same to certain imposts, at its discretion, with a view to the general regulation and control of the commercial policy of the empire.[p]

In 1842, however, the imperial government undertook to obtain from the Imperial Parliament certain advantages for Canada, in the introduction into the United Kingdom of Canadian wheat and flour at a reduced rate of duty; provided that the Canadian legislature would meet the views of her Majesty's government by the imposition of a higher duty upon American wheat imported into Canada. This condition was faithfully observed on both sides, by means of legislation in Canada and in the United Kingdom in the following year.[q] The imperial statute of 1843 was memorable, not only because it granted to Canada a long-desired boon, in permitting her produce to enter the markets of the mother country upon exceptionally advantageous terms, but for the more important reason, that it elicited from leading statesmen in the Imperial Parliament an admission of the principle that Canada ought to possess the exclusive right (and prospectively all other British colonies in the enjoyment of "responsible government"), to frame her own tariffs, and to regulate her own trade and commerce at her discretion.[r]

In 1846, another imperial statute was passed, which empowered the British colonies in America, and the colony of Mauritius, to reduce or repeal, by their own

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[p] See *ante*, p. 169. And see Earl Grey's paper on the Colonies, in the Nineteenth Century for June, 1879; and Lord Norton's reply thereto, in the July number.

[q] See Imp. Act 6 and 7 Vict. c. 29. Canada Act 6 Vict. c. 31. This act was reserved, and assented to, after the passing of the imperial act; see Canada Leg. Assem. Journals, **1843**, p. 16.

[r] See Hans. Deb. vol. lxix. pp. 713-747.

legislation, duties imposed by imperial acts upon foreign goods imported into the said colonies from foreign countries.[s]

Trade and tariffs free from imperial control.

And in the revised edition of the "Rules and Regulations for her Majesty's Colonial Service," issued in 1856, the principle above mentioned was distinctly enunciated in the following terms: "The customs establishments in all the colonies are under the control and management of the several colonial governments, and the colonial legislatures are empowered to establish their own customs regulations and rates of duty."[t]

An additional benefit was granted to the colonies by the repeal, in 1849, by the Act 12 and 13 Vict. c. 29, of the old navigation laws, which had continued in operation for about two hundred years. By these laws, and the system of legislation to which they belonged, the monopoly of a large part of the import trade of the United Kingdom had been secured for British-built ships; and nearly all the trade, both import and export, between the mother country and the colonies, and the entire intercolonial trade, was limited to ships of British tonnage.[u] Certain privileges were granted to colonial ships, so that they might share in the protection thus retained against foreign shipping. Nevertheless, to Canada this protection was of small account compared to the injury she sustained by being deprived of the opportunity of securing for her vast system of inland navigation the great and growing carrying-trade of North-western America. Accordingly, in 1848, numerous petitions were sent from Canada for the repeal

[s] Imp. Act 9 and 10 Vict. c. 94. Canada was not slow to avail herself of this liberty, inasmuch as the introduction of free-trade into Great Britain deprived her of the privileges conferred upon her in 1843, and necessitated defensive measures for the protection of Canadian commerce. See Adderley's Colonial Policy, p. 28.

[t] Sec. 399.

[u] For a brief account of the history and present operation of the imperial navigation laws, see Stephen's Commentaries on the Laws of England, 7th ed. (1874), vol. iii. p. 143.

of the navigation laws, so far as they applied to Canada, and that the river St. Lawrence might be opened to the use of vessels of all nations.[v] These petitions were responded to by the entire repeal, in 1849, of the restrictions imposed upon foreign shipping in British and colonial trade, save only as respected the coasting trade of Great Britain and her dependencies, which was afterwards dealt with by separate legislation. Navigation laws.

The powers of the Canadian legislature and of other self-governing colonies received a further extension by the imperial customs act of 1857, and by the act of 1869, amending the law concerning the coasting trade and colonial merchant shipping. These statutes conferred upon the colonies the right of making entire provision for the management and regulation of their customs, trade, and navigation; subject only to certain limitations, to be hereafter mentioned, in regard to differential duties and to the observance of treaty obligations.[w]

From these precedents, it will be seen that the authority of the Imperial Parliament is no longer used for the purpose of maintaining a uniform commercial policy throughout the empire. Self-governing colonies are now free to regulate their own commercial policy as they think fit; but with the proviso, — which is either expressed or understood, as the case may be, — that they may not use their liberty to the direct injury of British commerce, or so as to infringe upon obligations incurred by the mother country in her treaties with other nations. To this extent, restraints upon colonial commercial legislation continue to be maintained, save only as respects the dominion of Canada.

By special instructions to colonial governors (but

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[v] Canada Leg. Assembly Journals, **1849**, appx. C.

[w] Imp. Act 20 and 21 Vic. c. 62, sec. 15; since repealed, but reenacted by the 39 and 40 Vic. c. 36, secs. 149–151.

Differential duties.

which are no longer issued in relation to Canada), the legislatures are forbidden to impose differential duties, — so as to bestow exceptional advantages upon foreign over British trade, — or to the detriment of countries with which Great Britain has entered into commercial treaties. They are also forbidden to alter duties imposed by the Imperial Parliament on British goods, or to interfere in any way with the treaty obligations of the empire.[x]

Bounties.

Colonial legislatures were formerly prohibited from granting bounties or exemptions from duty, for the purpose of affording special encouragement to particular branches of commerce or industry.[y] But this prohibition is no longer enforced.[z]

Reserved imperial rights.

The imperial government, however, has not relinquished the right to make general regulations concerning trade and navigation with the British colonies, and to enforce the same by the authority of orders in council, in cases wherein exclusive powers to legislate upon such matters have not been directly conceded to colonial legislatures.[a] And it is always in the discre-

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[x] See despatches from the colonial secretary respecting differential duties, in 1843 and 1846. Commons Papers, **1846**, vol. xxvii. pp. 27–55. The Australian Constitutions Act, 1850 (13 and 14 Vict. c. 59, sec. 27) forbids the imposition of such duties, by Australian legislatures; and these colonies, as also New Zealand, are prohibited from any fiscal or financial legislation in opposition to any existing treaty between Great Britain and any foreign power. And see Lord Kimberley's despatches of July 13, 1871, and April 19, 1872. (*Post*, p. 196, and South Australia Parl. Proc. **1872**, vol. iii. no. 104.)

[y] Grey, Col. Policy, vol. i. pp. 279–286. Adderley, Col. Pol. p. 58. Commons Papers, **1864**, vol. xl. p. 697.

[z] See Lord Norton's Paper, in Nineteenth Century, for July, **1879**, p. 172.

[a] See Colonial Rules and Regulations, **1879**, c. 12. See also the Imperial Navigation Act, 16 and 17 Vict. c. 107, secs. 181, 185, and 187, regulating certain process in regard to shipping in colonial ports, where the same has not been provided for by any colonial enactment. And the colonial secretary's circular despatch of Jan. 21, 1878, transmitting copies of imperial orders in council, to give effect to the Act 15 Vict. c. 26, for the apprehension of deserters from foreign merchant vessels in any part of the empire, — whenever foreign powers shall afford similar facilities for the recovery of British seamen deserting within their territories. "These

tion of the secretary of state for the colonies to make known the views of her Majesty's ministers upon questions of trade and commerce to the governors of colonies, for the information and guidance of the local legislatures.[b]

Exceptional privileges allowed to Canada.

But on account of the growing importance of Canada, as well before as since confederation, exceptional privileges have been conceded to her, from time to time, in respect to fiscal and commercial matters wherein the interests of Canada were concerned, with freedom to adopt whatever policy might be approved by the local legislature, irrespective of the opinions or policy of the Imperial Parliament.

In 1859, upon the enactment of a new Canadian tariff, certain manufacturers of Sheffield moved the colonial secretary (the Duke of Newcastle) to protest against it. Whereupon his Grace wrote a despatch to the governor-general, dated Aug. 13, 1859, upon the subject. In reply, Mr. (now Sir Alexander) Galt, the Canadian finance minister, wrote a memorandum, which was transmitted to the colonial office by the governor-general, wherein he asserted it to be his duty "distinctly to affirm the right of the Canadian legislature to adjust the taxation of the people in the way they deem best, even if it should unfortunately happen to meet the disapproval of the imperial ministry. Her Majesty cannot be advised to disallow such acts, unless her advisers are prepared to assume the administration of the affairs of the colony, irrespective of the views of its inhabitants." This position, he added, "must be maintained by every Canadian administration."[c]

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orders affect the whole of her Majesty's dominions." New Zealand Parl. Papers, **1878**, appx. A. 1, p. 12; A. 2, pp. 1–3, 11. For a list of the foreign countries with which this arrangement has been made, see Col. Rules & Reg. **1879**, sec. 415.

[b] Hans. Deb. vol. lxxxviii. pp. 678, 908. Earl Grey's Despatches to the governor of Canada in 1846 and 1848; Canada Leg. Assem. Journals, **1847**, appx. K.; *ibid.* **1849**, appx. N.

[c] Mr. Galt's Memorandum, Ca-

The imperial government did not attempt to question the soundness of this position; and they have ever since evinced a disposition to acquiesce in the exercise, by the Canadian parliament, of the utmost freedom in the determination of their commercial policy, without regard to its application to or agreement with the ideas embodied in the legislation of the mother country, or advocated by the ministers of the Crown in Great Britain.

Dominion commercial legislation.

In the British North America act of 1867, "the exclusive legislative authority of the parliament of Canada" was recognized, as extending to "all matters" included in "the regulation of trade and commerce," "the raising of money by any mode or system of taxation," "navigation and shipping," "currency and coinage."[d] And, although for a time the restriction upon the imposition of differential duties continued to be enforced, at least to the extent of requiring the governor-general to reserve any bills of this nature for the special consideration of her Majesty's government, yet upon the issue of revised instructions to the Marquis of Lorne, upon his assumption of the government of Canada, in October, 1878, these directions were omitted, and the imperial government were content to rely upon the prerogative right of disallowance, as a sufficient security against the enactment of any measures, by the parliament of Canada, that should be of such a character as to call for the interposition of the royal veto.[e] Respect for the rights of local self-govern-

nada Sess. Papers, **1860**, no. 38. And in Commons Papers, **1864**, vol. xli. p. 79.

[d] See the B. N. A. Act, 1867, sec. 91. The extent to which the powers conferred by this statute were immediately acted upon will be apparent on referring to the first customs' act passed by the dominion parliament, 31 Vict. c. 7. And see the Report of the Imperial Board of Trade thereon. Canada Sess. Papers, **1869**, no. 47, p. 13.

[e] See *ante*, p. 86. In the colony of New Zealand, likewise, the prohibition against the imposition of differential duties has been so far relaxed as to permit of bills for this purpose being passed by the colonial legislature, provided only that they

ment, previously conceded to the Canadian provinces, — and which were ratified and enlarged by the operation of the act establishing the dominion of Canada, — has prevented the imperial government from interposing any other hinderance to the adoption, by the Canadian parliament, of whatever description of commercial legislation might be generally acceptable to the inhabitants of the dominion.

Canadian protective tariff.

In the session of the Canadian parliament held in 1879, a tariff was enacted which was professedly based upon the principle of protection to native industries. Although this policy was directly opposed to the system of free-trade, approved and enforced by the mother country, the secretary of state for the colonies, on being invited by a prominent member of the House of Commons, on March 20, 1879, to discountenance and disallow the "Canadian national policy," declined to interfere, alleging that this measure was not in excess of the rights of legislation guaranteed by the British North America act, under which (subject only to treaty obligations) the fiscal policy of Canada rested with the dominion parliament, and that, however much her Majesty's government might regret the adoption of a protective system, they did not feel justified in opposing the wishes of the Canadian people in this matter.[f]

Furthermore, in view of the peculiar position in which Canada stands in relation to the United States

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(together with any bills that might prejudice the trade and shipping of the United Kingdom and its dependencies) are reserved by the governor for the consideration and approval of the Crown. Memorandum by Mr. (now Sir) Julius Vogel, colonial treasurer of New Zealand, dated Dec. 8, 1871. South Australia Parl. Proceed. **1872**, vol. iii. no. 104, p. 10.

[f] Hans. Deb. vol. ccxliv. p. 1311. For a copy of the despatch from the governor-general of Canada, respecting the new customs tariff, see Commons Papers, **1879**, C. 2305. Further particulars as to the growth of colonial independence, in questions of commercial policy, will be found in the next section, which deals with the treaty-making power, and the rights conceded to the colonies in connection with the negotiation and enforcement of treaties.

of America, and to the circumstances of political exigency, and other considerations of importance, which tend to favour the removal of all restrictions to the establishment of reciprocal trade between the two countries, her Majesty's government have approved, from time to time, of proposals to effect the same by means of reciprocal and concurrent legislation by Canada and the United States; a method of procedure which has been regarded, by American statesmen, as preferable to that of stipulations by treaty. All such legislation, however, must needs be carefully reviewed by the imperial government, in order to secure that it should involve no substantial infringement of treaty obligations towards other nations, and no appreciable injury to the interests of Great Britain.[g]

Reciprocity between Canada and the United States.

Colonial agents-general.

And here it may be convenient to make mention of an office, of comparatively recent origin, which is gradually acquiring considerable weight and influence in the oversight of the commercial interests of the principal British colonies, and in matters affecting emigration, and trade between the colonies and the mother country and foreign nations. I refer to the agents-general, who are deputed by different colonies in Australia, and by the Canadian dominion, to reside in London, expressly to watch over the interests of their

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[g] See the correspondence between the Imperial and Canadian governments on this subject, in Canada Sess. Papers, **1869**, no. 47. For examples of such reciprocal legislation, see the Canada order in council, issued in 1870, to impose tonnage dues on United States vessels frequenting Canadian ports, to the same extent as the duties to be exacted from Canadian vessels frequenting United States ports (Canada Orders in Council, p. 176). And see an act passed by the United States Congress, in 1877–78, c. 324, authorizing Canadian vessels to aid Canadian or other vessels wrecked or disabled in American waters conterminous to Canada, which act is not to take effect until the issue of a proclamation by the president of the United States declaring that a similar privilege has been extended to American vessels by the government of Canada. Up to April 1, 1879, no such proclamation had been issued, as the Canadian government had not granted the reciprocal privilege. See Report Marine and Fisheries Department, for 1878–79, p. lxx.

respective colonies, to superintend local emigration agencies, and generally to transact business on behalf of their respective colonies with the imperial government.

This office is now conferred, as a rule, upon men of experience, who have filled the highest positions in the colony, and who are regarded by all parties as possessing special authority and qualifications.

It has not been unusual for agents-general to be chosen from the imperial House of Commons, or else to be in a position to obtain seats in that powerful assembly. Thus an indirect representation of the colony in the British Parliament is secured, through individuals who are not mere political nominees, but who possess the confidence of all parties; and who, from their familiarity with the condition and resources of their colony, are admirably fitted to be spokesmen of colonial interests in the national council.[h]

Resident minister for Canada in England.

With a view to the increased responsibility and consideration which is now attributed to agents-general, it has been proposed to confer upon them a more distinctive and appropriate designation. In fact the dominion government, in appointing in November, 1879, Sir Alexander Galt to represent the interests of Canada in England, has already given him a more defined position and larger powers by nominating him, with the consent of the imperial government, as resident minister for the dominion of Canada.

The expediency of this change of title, and its anticipated advantages, are well described in the following extract from a letter, written by Sir Julius Vogel, agent-general for the colony, to the secretary of New Zealand, dated Feb. 12, 1879:[i] —

"In making the recommendation to appoint Mr. Kenna-

h See Hans. Deb. vol. ccxlv. pp. 1122, 1178.
i New Zealand Parl. Papers, Sess. II. 1879, D. 3.

Change of colonial agents-general into resident-ministers.

way assistant agent-general, I am assuming, of course, that the title of agent-general is to be continued. There is, however, I think, much to be said in favour of altering this title, and the status of the agent-general. The designation is, I believe, borrowed from that which was formerly borne by the representative of the New England States before the declaration of American independence. But it does not do justice to the many responsibilities and the true position of the officer in question. It is open also to much misconstruction, of which, indeed, there is a ludicrous instance on record. The agent-general of Victoria some years ago ordered the words 'agent-general' to be inscribed on some blinds, in gold letters. Much to his consternation, he found that the artist considered "general agent" the more correct phrase. It seems to me that the functions of agents-general are eminently representative, and that they should be called resident ministers in England for their respective colonies. At the same time, I think they should have a defined position amongst the queen's servants, which at present they have not. They are, in fact, without any rank at all. I think, too, that many things which now pass through the governors of colonies, with some risk of disturbing the harmonious relations between the colonies and the mother country, might be dealt with by the resident minister, under direct instructions from the governor in council; and so the suspicion of personal government be avoided. You will, I hope, acquit me of any personal object in making this recommendation. As an ex-premier of New Zealand, the change would not improve my position; for the colony has no greater honour to bestow than that which is enjoyed by one who is fortunate enough to have held that high position. The rank of resident minister should, I think, be the same as that of an ordinary minister. I do not think he should necessarily retire with a government any more than ambassadors are in the habit of so doing. An agent-general's position should, in my opinion, be analogous to that of an ambassador, making allowance for the fact that he is representing a portion of the same empire. I find, from a conversation I have had with Sir Archibald Michie (the agent-general for Victoria), that he thinks as strongly as I do, that the designation of agent-general is a mistake. He finds, as I have found, that there are people who consider it

to mean a general agency of the most enlarged description of a commercial character.

"I have, &c.,

"JULIUS VOGEL, *Agent-general.*

"The Hon., the Colonial Secretary, Wellington, New Zealand."

With these substantial reasons to justify the change of title, it is probable that, after the example of Canada, and with the consent of the imperial government, the agents-general of the principal British colonies will hereafter be known as the resident ministers in England for their respective colonies.

Coasting trade of British colonies.

The general control of the coasting trade of British possessions abroad, so far as relates to foreign vessels taking part therein, is retained by the imperial government,[j] — notwithstanding the powers granted to colonial legislatures, on this subject, by the colonial merchant-shipping act of 1869. Vessels of foreign states are usually allowed a free commercial intercourse with Great Britain and her dependencies, upon terms of equality with British vessels; provided only a reciprocal and equal freedom is conceded by such foreign powers.[k]

By the colonial merchant-shipping act of 1869, the legislature of any British possession is empowered to pass an act to regulate the coasting trade thereof; provided that the same shall not go into operation until the pleasure of the Crown is expressly signified; that all British and colonial ships shall be entitled to equal privileges, and likewise ships of foreign nations with whom privileges in respect to the coasting trade

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[j] See the Imperial Regulations, applicable to United States vessels navigating British North American waters, to prevent collisions, issued by the queen in council, on Nov. 30, 1864. (Canadian Orders in Coun. p. 163.) And see the reasons given by the imperial government for disallowing the Canada shipping act amendment in 1878, *ante*, p. 150.

[k] Stephen, Commentaries, ed. 1874, vol. iii. p. 145. Imp. Act, 39 and 40 Vict. c. 36, sec. 141. Com. Papers, **1878-79**, C. 2424.

of any colony have been granted by treaty.[l] Pursuant to this act, Canada Statutes 33 Vict. c. 14 and 38 Vict. 27 were passed, to regulate the coasting trade of the dominion; and, by the thirtieth article of the treaty of Washington, 1871, further provision was made thereon, which, after the necessary legislation by the respective governments concerned, was formally ratified, at a conference held at Washington, on June 7, 1873, and went into operation on July 1, following.[m]

Maritime jurisdiction in Canada.

Maritime jurisdiction over the high seas is a branch of international law which is administered throughout the British colonies by the imperial vice-admiralty courts established therein. But, in 1876, her Majesty's government consented to the establishment, by dominion legislation, of courts having maritime jurisdiction over navigation on the great lakes and other inland waters of Canada. Accordingly, in 1877, a Canadian statute was passed, to establish a maritime court in the province of Ontario.[n]

Reassertion of imperial supremacy over the colonies.

The constitutional supremacy of the Imperial Parliament over all the colonial possessions of the Crown was formally reasserted in 1865, by an act passed to remove certain doubts respecting the powers of colonial legislatures. This act declares that "any colonial law which is or shall be in any respect repugnant to the provisions of any act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such act of Parliament, or having in the colony the force and effect of such act, shall be read subject to such act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain

[l] 32 and 33 Vict. c. 11, sec. 4.

[m] See Canada Sess. Papers, **1869**, no. 59; *ibid*, **1870**, no. 37. Orders in Council, p. 401.

[n] See Canada Sess. Papers, **1877**, no. 54. And Report of minister of justice (Mr. Blake) on maritime jurisdiction; *ibid*. no 13, pp. 25–28. Acts, 40 Vict. c. 21; 41 Vict. c. 1; and 42 Vict. c. 40.

absolutely void and inoperative." And, in construing an act of Parliament, "it shall be said to extend to any colony, when it is made applicable to such colony by the express words or necessary intendment of" the same.[o]

By this rule, it is clear that imperial acts are binding upon the colonial subjects of the Crown, as much as upon all other British subjects, whenever, by express provision or by necessary intendment, they relate to or concern the colonies.[p]

Reserved powers of Imperial Parliament.

The reserved right of intervention and control which must always remain in the imperial legislature may appropriately be invoked by or on behalf of a British colony, to redress grievances to British subjects which have resulted from the operation of local institutions in any part of the empire; or for the purpose of amending the constitution of a colony, for the benefit of its inhabitants. But no appeal of this kind to the supreme authority of the realm would be constitutionally justifiable, except under circumstances of sufficient gravity and importance to warrant imperial interference with the rights of local self-government, so far as they have been formally conceded to the particular colony.

Not impaired by the British North America act.

The British North America act of 1867, in distributing the powers exercisable under its provisions, and in vesting "exclusive" rights of legislation in certain specified matters, either in the dominion parliament or

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[o] 28 and 29 Vict. c. 63, secs. 1, 2.

[p] Sir C. Adderley (Pres. Board of Trade), Hans. Deb. vol. ccxxix. p. 1334. And see an able letter by "Historicus," on this point, in the "Times," of June 1, 1876. For examples of imperial statutes applicable to the colonies, see the Colonial Rendition of Criminals Act, 6 and 7 Vict. c. 34; and 16 and 17 Vict. c. 118; the Colonial Naval Defence Act of 1865; The Extradition Acts of 1870 and 1873; the Merchant Shipping Acts, as explained by the 32 and 33 Vict. c. 11, sec. 7; the Colonial Shipping Act of 1869; the acts passed in 1870 on coinage and foreign enlistment; and in 1875, respecting copyright and unseaworthy ships. See also the Papers on Merchant Shipping Legislation (Canada), Commons Papers, **1876**, vol. lxvi. p. 295, and Canada Sess. Papers, **1876**, no. 22.

in the provincial legislatures, has in no respect altered the relation of Canadian subjects to the Imperial Crown or Parliament, or interposed any additional obstacle to prevent imperial legislation in reference to Canada, in any case of adequate necessity. The term "exclusive," as used in the ninety-first and two following sections of that statute, must be understood as defining and apportioning the limits of legislation in Canada between the dominion and provincial jurisdictions, — not as intended to exclude the right of the Imperial Parliament, at its discretion, to make necessary laws for the welfare and good government of any portion of the empire.[q] For no parliament is competent, by its own act or declaration, to bind or restrain the freedom of action of a succeeding parliament.[r] In fact, legislation, either to remove doubts or to define or enlarge the powers of the dominion parliament, has been undertaken by the Imperial Parliament in repeated

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[q] It is true that Chief Justice Draper (in the case of Regina *v.* Taylor, 36 U. C. Q. B. Rep. 221) expressed an opinion that the term "exclusive" in the ninety-first section of the British North America act, was "intended as a more definite or extended renunciation on the part of the Parliament of Great Britain of its powers over the internal affairs of the new dominion, than was contained in the Imperial Statute 18 Geo. III. c. 12, and the 28 and 29 Vict. c. 63, secs. 3, 4, 5." But we have shown in the text this position is untenable and inconsistent with fact. The correct constitutional doctrine on this point is clearly stated by Mr. Justice Gray of the Supreme Court of British Columbia, in his judgment delivered on Sept. 23, 1878, on the Chinese tax bill: "The British North America act, 1867, was framed, not as altering or defining the changed or relative positions of the provinces towards the imperial government, but solely as between themselves. . . . Moreover, with reference to the Imperial Parliament, as the paramount or sovereign authority, it could not be restrained from future legislation, and therefore, in that light, the term would have no legal bearing. . . . The British North America act, 1867, was intended to make legal an agreement which the provinces desired to enter into as between themselves, but which, not being sovereign states, they had no power to make. It was not intended as a declaration that the imperial government renounced any part of its authority."

[r] See Burke's Speech, in 1772, on the proposed alteration of the Act of Union with Scotland, Parl. Hist. vol. xvii. p. 275: Works, ed. 1812, x. 1.

instances, since the establishment of the Canadian confederation.[s]

The absolute and unqualified supremacy of the Imperial Parliament over all minor and subordinate legislative bodies — and over all legislation which had previously been enacted by Parliament itself — was remarkably exemplified by a decision of the House of Lords, sitting as a court of final appeal, on May 3, 1839, in the celebrated Auchterarder case, which led to the disruption of the Church of Scotland: —

Right of Imperial Parliament to legislate at its discretion.

Before the union between the parliaments of England and Scotland, which took place in 1704, a settlement was effected between the Crown and the Scottish Established Church, whereby lay patronage was abolished in that communion, and congregations were empowered to elect their own ministers. This settlement was ratified, by an act of the Scottish parliament, in 1690. Immediately after the union of the two countries had been accomplished, the Imperial Parliament in 1707 enacted a law to declare that the existing form of Presbyterian church government in Scotland, its doctrine and discipline, should continue unchanged and unalterable.[t] Nevertheless, in 1711, Parliament, in direct contravention of the settlement aforesaid, repealed the Scotch act of 1690, and restored the exercise of lay patronage.[u] This legislation was protested against by the General Assembly of the Scottish church, and gave rise to much dissatisfaction throughout Scotland. The General Assembly continued to oppose this fundamental alteration in their church law; and finally, in 1834, passed a measure known as the veto act, which forbade the exercise of church patronage against the express desires of the particular congregation. Whereupon, there ensued the memorable conflict between the Established Church of Scotland and the civil courts of the United Kingdom, which ended in the total discomfiture of the ecclesiastical body. The law courts in Scotland, and ultimately the House of Lords, decided that the

[s] See Imp. Acts 31 and 32 Vict. c. 105; 32 and 33 Vict. c. 101; 34 and 35 Vict. c. 28; 38 and 39 Vict. cc. 38, 53.

[t] The Act of Security, 6 Anne, c. 7, sec. 17.

[u] 10 Anne, c. 12.

act of the general assembly restricting the power of patrons was in violation of the imperial statute of 1711. This statute was declared to be binding upon the Church of Scotland, — notwithstanding that it was a direct infringement of the act of union, — inasmuch as it had emanated from the supreme legislative authority of the realm.[v]

These decisions warrant the conclusion that by the law of England the Imperial Parliament is regarded as omnipotent and supreme in all matters upon which it may undertake to legislate; and that no court of law would venture to question the right of Parliament to legislate in any case or upon any question, or presume to assert that any act of the Imperial Parliament was *ultra vires*.[w]

It is equally certain that a Parliament cannot so bind its successors by the terms of any statute, as to limit the discretion of a future Parliament, and thereby disable the legislature from entire freedom of action at any future time when it might be needful to invoke the interposition of Parliament to legislate for the public welfare.

Imperial Dominion exercisable over Self-governing Colonies:

e. *In foreign relations; and through the operation of treaties.*

It is a rule of international law, that none but supreme and independent sovereign powers are competent to contract treaties with foreign nations. The only

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[v] Maclean and Robinson, House of Lords' Reports, p. 238 (Auchterarder case). Hanna, Memoirs of Dr. Chalmers, vol. iii. p. 267. The same principle was asserted by the Court of Queen's Bench of Lower Canada, in 1875, in the case of Brossoit *v.* Turcotte, L. C. Jurist, vol. xx. p. 141.

[w] C. J. Cockburn and other judges in the "Franconia" case, Regina *v.* Keyn; Law Rep. 2 Ex. Div. pp. 152-160, 207. "If the legislature of England, in express terms, applies its legislation to matters beyond its legislatorial capacity, an English court must obey the English legislature, however contrary to international comity such legislation may be." Mr. Justice Brett, in Niboyet *v.* Niboyet, Law Rep. Probate Div. vol. iv. p. 20.

exception to this rule is where the right to conclude treaties in its own behalf, with other states or foreign powers, has been expressly delegated to a subordinate government by the Crown and Parliament of the mother country. But responsibility for the exercise of such delegated power continues to rest upon the imperial authority, to the same extent as for the acts of any other accredited public agents of the Crown.[x] Treaty-making power.

Prior to the abolition of the sovereignty exercised by the British East India Company over India, power was delegated to the company, by various royal charters, which were confirmed by acts of Parliament, to make treaties with the native princes under certain restrictions.[y]

And pursuant to the ninety-first section of the British North America act 1867, sub-section twenty-four, which empowers the parliament of Canada to legislate in regard to Indians and Indian lands therein, in connection with the Imperial Act 31 and 32 Vict. c. 105, which authorizes the transfer to the dominion of Canada of all territories "held or claimed to be held" by the Hudson Bay Company in North America under their royal charter, authority has been given by the dominion governor-general in council to certain persons to act as commissioners to make and conclude treaties, in the name of her Majesty, with Indian tribes inhabiting the territories of the north-west, which territories are comprised within the limits of the dominion of Canada.[z] Indian treaties.

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[x] Phillimore, International Law, 2d ed. vol. i. p. 167, vol. ii. pp. 69-71. And see the correspondence with the Canadian government in 1877, with a view to a modification of the Franco-English treaty of 1860, in respect to the French duty on Canadian ships. Canada Sess. Papers, **1878**, no. 70.

[y] See the case of the Nabob of the Carnatic *v.* The East India Company, 1 Ves. Jr. p. 371; and 2 *ibid.* p. 56.

[z] See Canada Statutes, 31 Vict. c. 42; 33 Vict c. 3. Canada Sess. Papers, **1872**, no. 22. Reports of Indian Branch of Department of Secretary of State for the Provinces. In regard to the exclusive powers of legislation by the parliament of Canada, concerning Indians and Indian lands, and the right of legislation

In 1875, an act passed by the provincial legislature of British Columbia respecting crown lands, was disallowed by the governor-general in council, because it claimed to deal with Indian lands, while, under the treaty of capitulation of 1760, the king's proclamation of 1763, establishing governments in British North America, and subsequent imperial legislation, the right to make treaties with the Indians, and to acquire Indian territorial rights, is vested in the Crown itself, and is exercisable only by the governor or commander-in-chief in the queen's possessions in North America.[a]

Our epitome of the history of colonial self-government in relation to commercial policy, as given in the preceding pages, would not be complete without some reference to the circumstances under which colonies, in immediate proximity with each other, have obtained permission to regulate their trade and tariffs at their own discretion; either upon a basis of reciprocity, or otherwise as they may decide.

Inter-colonial commerce in British North America.

Several years prior to the confederation of the British North American provinces, and while as yet their closer union was not contemplated, the expediency of affording to these provinces greater facilities for intercolonial trade, and free commercial intercourse, was the subject of repeated discussions, between Canada and the other North American colonies, on the one hand, and the imperial government on the other. From 1850 onwards to the time of confederation, partial facilities in this direction received the sanction of her Majesty's

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by the provincial legislatures concerning lands surrendered by the Indians for the purpose of being sold, and of which the Indian title had been wholly extinguished, see Mr. Justice Gwynne's judgment, in Church *v.* Fenton, 28 C. P. 384; affirmed by the Ontario Court of Appeals. 4 App. R. 159. In regard to the relations between the aboriginal tribes in New Zealand and the colonial government, see Commons Papers, **1864**, vol. xli. p. 219.

[a] Report of H. Bernard, deputy minister of justice, and proceedings thereon, in Canada Sess. Papers, **1877**, no. 89, pp. 2–7.

government. But by sections 121 to 123 of the British North America act of 1867, all impediments in the way of reciprocal trade were absolutely removed, and the dominion parliament was authorized to regulate all such matters at its unfettered discretion.[b]

Inter-colonial commerce in Australia.

The Australian colonies of New South Wales, Tasmania, South Australia, and Victoria, together with New Zealand, were not long in preferring a claim to similar commercial advantages. In 1871 they addressed a formal application to the imperial government for liberty to make arrangements between themselves for the establishment of a commercial union, upon the basis of a common tariff, akin to that which had been effected in Canada, under the British North America act. But, in addition to this, they demanded that no treaty should be concluded by the imperial government with any foreign power, which should conflict with the exercise of intercolonial reciprocity; and that imperial interference with intercolonial fiscal legislation should absolutely cease. They likewise claimed liberty for the several Australian legislatures to impose such duties on imports from other places, not being differential, as each colony might think fit to enact.

On July 13, 1871, the colonial secretary (Lord Kimberley) addressed a circular despatch to the governors of the colonies aforesaid, stating the views of her Majesty's government in reference to these demands. This despatch was carefully considered by the several governments concerned, and their opinions freely expressed upon it. In reply to their joint statements, a further despatch was written on April 19, 1872, by the colonial secretary, which explained the extent to which the imperial government was willing to accede to their

[b] See the Memorandums of the Minister of Finance (Mr., afterwards Sir John Rose) of 13 January, and 3 Sept. 1868, in Canada Sess. Papers, **1869**, no. 47.

requirements. While desirous to satisfy all reasonable claims, for the removal of restrictions upon commercial intercourse between the Australian colonies, "her Majesty's government apprehend that the constitutional right of the queen to conclude treaties binding all parts of the empire cannot be questioned, subject to the discretion of the Parliament of the United Kingdom, or of the colonial parliaments, as the case may be, to pass any laws which may be required to bring such treaties into operation." [c]

In February, 1873, an intercolonial conference, held at Sydney, New South Wales, and including delegates from the colonies above mentioned, as well as from Queensland and Western Australia, after duly considering Lord Kimberley's despatch of April 19, 1872, and other correspondence on the subject, resolved again to urge the claims of the Australasian colonies for the removal of all imperial restrictions which prevented the establishment of intercolonial commercial reciprocity.[d]

Australian colonies duties act.

Upon being informed by telegram of the proceedings at this conference, her Majesty's government lost no time in submitting to Parliament a bill to give effect to the strongly and repeatedly expressed wish of the Australian colonies on this subject. The "Australian Colonies Duties' Act, 1873," was passed. It gives full power to each of the colonies concerned to make laws, imposing or remitting duties, whether differential or preferential or otherwise, for or against one another. It also extends the powers of the colonial legislatures in Australia to regulate the duties on the importation of articles, not the growth, produce, or manufacture of Australia or New Zealand. But it retains the prohibition against differential duties on goods imported into

[c] New Zealand, House of Rep. Journals, **1871**, appx. A. no. 1, a. p. 46. South Australia Parl. Proceed. **1872**, vol. iii. no. 104.
[d] *Ibid.* **1873**, vol. ii. no. 31.

the colonies from foreign countries or from Great Britain. And it forbids the levying of duties upon articles imported into Australia for the use of the imperial army or navy, and the levying or remitting of any duty contrary to or at variance with any existing treaty between her Majesty and any foreign nation.[e]

This timely concession of increased powers of commercial legislation has, for the present, proved unproductive of the results anticipated. The colonies concerned have been unable to agree upon any arrangement for giving effect to the beneficent intentions of the Imperial Parliament; and though six years have elapsed since the passing of the act of 1873, it still remains a dead letter.[f]

Extension of treaty privileges to colonies.

It is, however, a well-understood principle, that the privileges and advantages, commercial or otherwise, which have been accorded to a nation, pursuant to any treaty or convention entered into with another nation, do merely extend to the particular state or sovereign power which has contracted the same, to the exclusion of the colonial possessions of such power unless they are expressly named in the treaty; and that colonies not so expressly included cannot claim to be admitted to share in the treaty privileges enjoyed by the mother country, as of right, on the ground that they form part of the empire. The colonies of a high contracting power, not included in a treaty, can only be admitted to a participation in the benefits of the same by a further treaty or convention made on their behalf; or by a law, to be passed by the foreign state, admitting them to the enjoyment of the advantages sought to be attained.[g]

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[e] *Ibid.* **1873**, vol. iii. no. 59. See also Com. Papers, **1873**, vol. xlix. p. 27; Act 36 Vict. c. 22. Hans. Deb. vol. ccxv. p. 2007, vol. ccxvi. p. 157. And see Adderley, Colonial Policy, p. 60.

[f] Earl Grey, in Nineteenth Century, June, 1879, p. 944.

[g] See diplomatic correspondence concerning British Columbia. Canada Sess. Papers, **1876**, no. 42. Correspondence respecting the duty

But, in point of fact, in the treaties of commerce and navigation now in force between Great Britain and upwards of forty independent foreign powers, such treaties have been expressly made applicable to the British "dominions," "possessions," or "colonies," except in the case of the following nations; viz. China, Japan, Muscat, Siam, and the Sandwich Islands, France, Spain, the Netherlands, and the United States of America. As regards the coasting trade, it is customary to provide that the privilege of sharing therein shall only be granted to those colonies and foreign possessions of any contracting power of which the coasting trade shall have been, or shall be hereafter, open to foreign vessels upon equal terms.[h]

The Italian and French governments, having notified the British government of their intention to terminate the existing commercial treaties, between themselves and Great Britain, and propositions being entertained for the negotiation of fresh treaties, her Majesty's secretary of state for foreign affairs, on Dec. 31, 1877, communicated with the colonial secretary in reference to the inclusion of the colonies therein. In reply, Lord Carnarvon intimated the propriety of consulting the governors of colonies possessing responsible government in reference to the terms of the proposed treaties before deciding upon the same. He accordingly addressed a circular despatch to the principal colonial governments, transmitting a copy of a draft article, for insertion in future treaties of commerce, applying the same to the British colonies.

This article is as follows: "The stipulations of the present treaty shall be applicable to the colonies and foreign possessions of the two high contracting parties

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on Canadian ships sold in France: *ibid.* **1877**, no. 100; **1878**, no. 70.

[h] See the list of treaties now in force, and their special provisions, in Commons Papers, **1878–79**, C. 2424.

named in this article." [Here insert the names of the colonies, &c., to be included in the treaty.] They "shall also be applicable to any colony or foreign possession, &c., not included in this article, upon the conclusion by the two high contracting parties of a supplementary convention to that effect." [i]

By this means, the imperial government is endeavouring to secure for all her colonies, the benefits she has herself obtained by the negotiation of commercial treaties with foreign powers; while, at the same time, she retains in her own hands the right of deciding upon the terms of all treaties, and the extent to which it may be expedient to apply the same to the colonial possessions of the empire.

Privileges to Canada in negotiating treaties.

But though the imperial government has strictly maintained the principle that the negotiation of treaties with foreign powers is a matter of imperial concern, to be conducted only by agents specially authorized by the Crown, and by ministers directly responsible to the British Parliament,[j] a concession has been made of

[i] New Zealand Parl. Papers, **1878**, appx. A. 2, pp. 9–12.

[j] See British North America Act, 1867, sec. 132; South Africa Act, 1877, sec. 54. In the years 1871, 1872, and 1873 much correspondence passed between the imperial and Australian governments, with a view to the modification of the treaty-making power, so as to enable certain of the principal colonies of Great Britain to make reciprocal arrangements with foreign states. But the imperial government would not surrender the prerogative rights and obligations of the Crown in its international relations, and would only consent to such a modification of the existing practice as would place the Australian colonies, practically, in a position towards each other similar to that of the provinces which form part of the dominion of Canada. This concession was embodied in the Australian colonies duties act, 1873, already referred to. (See *ante*, p. 196.) For the correspondence on this subject, see Commons Papers, **1872**, C. 576; *ibid.* **1873**, C. 703. Also, New Zealand House of Repres. Journals, **1871**, appx. vol. i. p. 48; *ibid.* **1872**, appx. A. no. 1, pp. 27, 47. *Ibid.* **1873**, appx. A. no. 1, p. 13; no. 2, pp. 7–12. And see a motion in the Canadian House of Commons, on March 21, 1870, for an address to the governor-general to urge the expediency of obtaining from the imperial government all necessary powers to enable the government of the dominion to enter into direct communication with other British possessions, and with foreign powers, for the purpose of extending the trade and commerce of Canada abroad. An amendment was proposed to this motion on the

late years to the dominion of Canada, in the negotiation of treaties between her Majesty and the United States of America which have a special bearing upon Canadian interests.

In 1871, the prime minister of Canada (Sir John A. Macdonald) was appointed by the queen to be one of her high commissioners and plenipotentiaries to frame and conclude upon the treaty of Washington, expressly to represent Canada upon the commission, and in order that the important questions relating to the trade and commerce and fisheries of Canada might be duly considered and determined upon with the assistance of the most competent authority.[k]

Again, in 1874, the imperial government acquiesced in a proposal, made by the privy council of Canada through the governor-general, that the British minister at Washington should be authorized to enter into negotiations with the government of the United States for a treaty to establish reciprocal trade between Canada and the United States. And they agreed to asso-

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part of ministers, deprecating any attempt to enter into treaties with foreign powers "without the strong and direct support of the mother country," and asserting that the object in view "can be best obtained by the concurrent action of the imperial and Canadian governments." This amendment was agreed to, on a division. The formal steps necessary to empower agents sent from a British colony for the purpose of obtaining an extension of commercial relations between such colony and any foreign country, and the proceedings required to give effect to the same, — so as to bring into the shape of international engagements whatever arrangements might be ultimately considered acceptable, as well to the colonies concerned as also to the foreign powers in question, — are detailed in a memorandum from the under-secretary of foreign affairs (Mr. Hammond) to the under-secretary at the colonial office, dated Nov. 11, 1865; in Commons Papers, **1873**, vol. xlix. p. 42.

[k] Governor-general's Speech to Parliament of Canada, on Feb. 15, 1871. Despatch of the Earl of Kimberley (colonial secretary) to Governor-General Lisgar, of June 17, 1871, Canada Sess. Papers, **1872**, no. 18. Previously to this important concession to Canadian interests, the imperial government had, in 1865, cordially assented that the British minister at Washington should "act in concert with the Canadian government" in negotiating with the American government for a renewal of the reciprocity treaty. See Canada Sess. Papers, **1867–78**, no. 63, and *ibid.* **1869**, no. 59.

ciate with the British minister a commissioner (Senator George Brown) named by the Canadian government; but with the distinct understanding that the Canadian commissioner should act under imperial instructions, and that all propositions to be made to the American government should be previously submitted to her Majesty's secretary of state.

The dominion government expressed their appreciation of the regard shown to their proposals, in relation to reciprocity with the United States, by her Majesty's government, and promised that they would not suggest any modification, in matters of trade and commerce, which would injuriously affect imperial interests.

In June, 1874, a draft commercial treaty was agreed upon by the British, Canadian, and American commissioners, and submitted for the ratification of the imperial government and of the United States Senate. It was approved by her Majesty's government, but failed to receive the sanction of the American Senate.[1]

On Nov. 26, 1874, while these negotiations were still pending, a deputation from certain British chambers of commerce waited upon the secretary of state for foreign affairs (Lord Derby) and the secretary of state for the colonies (Lord Carnarvon), to express their fears that the proposed reciprocity treaty between Canada and the United States was likely to prove prejudicial to important branches of British industry; and that, contrary to the rule hitherto invariably observed in such treaties, it would place the mother country in a worse position, commercially, than other countries, in regard to the importation of British goods into Canada.

Entirely concurring in the conviction that it was the bounden duty of her Majesty's government to insist that British trade should not be placed at a dis-

[1] Commons Papers, **1874**, vol. lxxv. pp. 931–956.

advantage, as compared with other countries, in any treaties which might be entered into on behalf of colonies, — and also to forbid the imposition of differential duties in favour of the United States, as against Great Britain, in any such treaty, — Lord Derby assured the deputation that there was no intention, on the part of her Majesty's government, to allow such a distinction to be drawn, and nothing in the proposed treaty to warrant the conclusion that the Canadian government were in favour of it. As to whether the effect of the treaty would be to increase taxation on other than British goods, that was a question hereafter to be considered by the secretary of state for the colonies. Satisfied with these assurances, the deputation withdrew.[m]

In 1879, the imperial authorities permitted Sir A. Galt, as representing the Canadian government, to conduct negotiations for improved commercial intercourse between Canada, France, and Spain.

Interpretation and enforcement of treaties.

Finally, it should be observed that the responsibility of determining what is the true construction of a treaty, made by her Majesty with any foreign power, must remain with the imperial government, who can alone decide how far Great Britain should insist upon the strict enforcement of treaty rights, whatever opinions may be entertained upon the subject in any colony specially concerned therein. On the other hand, the legislature in any colony is free to determine whether or not to pass laws necessary to give effect to a treaty entered into between the imperial government and any foreign power, but in which such colony has a direct interest.[n]

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[m] London Times, Nov. 27, 1874, p. 6.

[n] Earl of Kimberley's despatches of March 17 and June 17, 1871, to governor-general of Canada, Can. Sess. Papers, **1872**, no. 18. Correspondence as to whether British Columbia was included in the purview of the Washington treaty, notwithstanding that she did not enter the dominion until about three months after the treaty was signed. *Ibid.* **1876**, no. 42.

Complaints of the non-observance by foreigners of treaty stipulations, and requests for the more expeditious carrying out of treaty requirements, should be addressed by her Majesty's government to the foreign power in question; although, for convenience, it is usual to permit the governor-general of Canada to communicate directly with the British minister at Washington on such matters. Under these circumstances, however, it becomes the duty of the governor-general to notify her Majesty's government, through the colonial secretary, of any representations made or proceedings taken by the dominion government through her Majesty's minister, and of the answers received to the same.[o]

Extradition of offenders.

Another matter will now claim our attention, which is appropriately regulated by means of treaties between the mother country and foreign powers; namely, the extradition of criminal offenders.

From a very early period, the nations of Europe have made provision by treaty for the mutual surrender of criminals escaping from justice and seeking refuge in other lands. But with the exception of a partial arrangement to this effect by the twenty-seventh article of "Jay's" treaty of 1794, which expired on the breaking out of the war of 1812, no treaty of this kind appears to have been made between Great Britain and the United States of America until 1842, when the subject was included in the Ashburton treaty.[p]

Meanwhile, notwithstanding the lack of any treaty obligations on this subject, legislative provision for the rendition of fugitives from justice was made in 1822 by the legislature of the state of New York, and in 1833 by the parliament of the late province of Upper Canada.

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[o] Canada Sess. Papers, **1876**, nos. 110, 111; *ibid.* **1877**, nos. 14, 104; *ibid.* **1878**, nos. 70, 125.

[p] See Commons Papers, **1876**, vol. lxxxii. p. 279.

The general principle of legislation, by local ordinance or statute, for the delivery to foreign governments of fugitive criminals, has been repeatedly admitted in various colonies and possessions of the British Crown, under circumstances which have made it difficult or impossible to provide for the same by treaty. But it should be stated that eminent judges of the federal courts of the United States have decided that the statute enacted by the New York legislature in 1822, above referred to, is in contravention of the constitution of the United States, article one, section ten, which says that "no State shall enter into any treaty;" and it was observed by Judge Curtis "that, in the fifty years which had elapsed since the passage of the state law, no case is remembered in which a governor has undertaken to make extradition under it. During this half-century, it has been considered that the national government had exclusive jurisdiction over the subject, and that the act of the state legislature was unconstitutional and void."[q] This is unquestionably sound doctrine, and equally applicable to legislation by British colonies where there has been no previous treaty or act of the Imperial Parliament to authorize the same. For, in view of the importance of regulating all international questions upon a uniform basis and by the supreme authority of the empire, it is obvious that the extradition of criminals should be provided for by treaties between the powers concerned therein, or by special legislation based upon formal treaties.

By the one hundred and thirty-second section of the British North America act of 1867, it is enacted that "the parliament and government of Canada shall have all powers necessary or proper for performing the obli-

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[q] American Law Review, vol. vii. p. 187. Holmes *v.* Jennison, 14 Peters, 540. United States *v.* Davis, 2 Sum. 482, 12 Vermont, 636. People *ex rel.* Barlow *v.* Curtis, 50 New York Rep. 321.

gations of Canada, or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the empire and such foreign countries."

Extradition law in Canada.

This clause of the Confederation act embodied no new principle, but merely conferred upon the dominion government the powers formerly exercisable by the several provinces in Canada. Thus, the Imperial Statute 6 and 7 Vict. c. 76, (as amended by 8 and 9 Vict. c. 120), passed to give effect to the Ashburton treaty, while it expressly applies to the colonies in cases where no colonial legislation existed in reference to extradition, provides for the suspension of the act upon suitable provision being made by the Canadian legislature for carrying out the object of the same. And the operation of the imperial act was suspended accordingly by an order of the queen in council, upon the passing of an act on this subject by the legislature of the province of Canada in 1849.

In June, 1868, the imperial statute was again suspended, upon the passing of a dominion act to enforce throughout the whole of Canada the objects contemplated by the aforesaid treaty.[r]

In 1870, the imperial law relating to the extradition of criminals was amended by the Act 33 and 34 Vict. c. 52. This statute did not alter the Canadian law, but by its eighteenth section authorized the same to be carried into effect by an order in council to be issued pursuant to this act. But this applies only to Canadian legislation as aforesaid, for the purpose of carrying out the Ashburton treaty. As respects foreign countries other than the United States of America, any extradition treaties

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[r] Act 31 Vict. c. 94. This act was reserved, but subsequently assented to. For orders in council to give effect to the same, see Canadian Orders in Council, pp. 379, 380. The act was amended, in respect to the classes of magistrates empowered to act under it, by 33 Vict. c. 25.

Extradition law in Canada, and in Victoria.

which extend to Canada must (as hereinafter explained) be put into operation under the provisions of the imperial act of 1870, as amended by the Act 36 and 37 Vict., c. 60, passed in 1873.

In the colony of Victoria, Australia, by "the extradition act of Victoria, 1877," the imperial extradition acts of 1870 and 1873 are directed to be administered by conferring upon the colonial police magistrates the like powers and authorities for the surrender of fugitive criminals as are by the said acts vested in similar functionaries in the United Kingdom. The Victoria statute will be enforced by the promulgation within the colony of an imperial order in council, to be issued under the eighteenth section of the act of 1870, above mentioned.

As respects the dominion of Canada, larger powers have been asserted. The Canadian privy council contend that the provisions of all extradition treaties entered into by Great Britain with foreign powers should be carried into effect in Canada by means of local legislation, pursuant to the one hundred and thirty-second section of the British North America act, 1867, already cited in this connection. The practical advantages of such an arrangement are obvious and unquestionable. But hitherto difficulties have arisen in giving full effect to the same.

After the passing of the imperial act of 1870, two general measures on the subject of extradition were enacted by the Canadian parliament, — one in 1873, the other in the following year. By these statutes, it was proposed to apply to all other foreign states the provisions of the Canadian law which had proved so effectual and convenient in the case of fugitives to or from the United States claimed under the Ashburton treaty. But these acts were not altogether approved by the law officers of the Crown in England; and, though not formally disallowed, they have not been put in force by

the issue of the necessary order of the queen in council. The Canadian government have acquiesced in the non-enforcement of these statutes. But in the event of a new and enlarged extradition treaty not being speedily entered into between her Majesty's government and that of the United States, they reserve the right of legislating upon the whole question of extradition so far as the interests of the dominion are concerned.

In December, 1875, the dominion government deputed the minister of justice (Mr. Blake) to confer with her Majesty's government upon this subject, and especially to consider the expediency of negotiating a more comprehensive extradition treaty.[s]

About this time, a misunderstanding arose between the British and the United States governments upon an application to the British government for the surrender of one E. D. Winslow, a fugitive from justice, charged with forgery. The British government declined to surrender this man unless they were assured that he should not be tried for any offence other than that for which he should be surrendered. This stipulation was in accordance with a clause in the imperial act of 1870. But inasmuch as this condition appeared to be a restriction imposed by an imperial statute only, and not enjoined either by the treaty of 1842 or by the American statutes passed to give effect thereto, the United States government refused to comply with it. A prolonged correspondence ensued, in which the American government adhered to their construction of the treaty, while the British government contended that the imperial act of 1870 imposed no new condition upon the observance of the treaty, but merely declared the law that

Winslow extradition case.

Mr. Blake's letter to the secretary of state for the colonies, dated June 27, 1876, in Canada Sess. Papers, **1877**, no. 13, pp. 10–18. For the previous correspondence referred to in the text, see *ibid.* **1876**, no. 49.

should regulate its administration. As neither party would give way, the operation of the treaty was suspended. The suspension continued for a year, when the British government consented to waive the point in dispute, and the treaty was revived; but with an understanding that negotiations should be entered into for a more explicit treaty to regulate the extradition of criminals.[t]

Extradition treaties.

No new extradition treaty between Great Britain and the United States of America has yet been agreed upon. But all extradition treaties entered into by the British government with any foreign state since 1870, have contained a clause expressly stipulating that "a person surrendered shall not be tried for any crime or offence committed in the other country before the extradition, other than the crime for which his surrender has been granted."[u]

The dominion government have urged upon her Majesty's government the expediency of providing, in

[t] See Clarke on Extradition, ed. 1874, c. 4. Kent, International Law by Abdy, 2d ed. 1878, p. 117. Hans. Deb. vol. ccxxxii. p. 250. The American courts are not unanimous in supporting the interpretation put upon the treaty by the United States government. In the case of the United States *v.* Lawrence, decided by the United States Circuit Court, Southern District of New York, in 1876, the view held by the American government is upheld (Cox, Criminal Law Cases, vol. xiii. p. 361). But this construction is repudiated, and the view expressed by the British government approved, by the Court of Appeals of Kentucky, in April, 1878, in the case of the Commonwealth *v.* Hawes. (Law Times Rep. N. S. vol. xxxix. p. 80). See also Spear on the Law of Extradition (Albany, 1879), Part I. of which contains an able argument in support of the British contention. Canadian jurists have inclined the other way. Thus Judge Ramsay decided in the Court of Queen's Bench for Montreal, in February, 1874, that so much of the imperial extradition act of 1870 as was inconsistent with the Ashburton treaty of 1842, was not necessarily to be held as being in force in Canada; until, at least, an order of the queen in council should be issued, under the fifth section of the said act, applying the act to a particular foreign state; which order, it seems, has not been promulgated. Lower Canada Jurist, vol. xviii. p. 200. And see Mr. Blake's letter (cited in the previous note), p. 21.

[u] Canadian Orders in Council, pp. 381–409. Treaty between Great Britain and France, of Aug. 14, 1876; and other similar treaties, prefixed annually to the volumes of the statutes of Canada.

any new treaty or convention for the purpose of extradition, that special arrangements should be made for carrying out the same in Canada, by the direct action of the Canadian authorities. And, in the event of it being found impossible to conclude a new treaty with the United States, that the sanction of the imperial government should be given to Canadian legislation upon the subject; such legislation to be reciprocal, if possible, but, if that be not attainable, then without reciprocity. This proposal is the more reasonable, and likely to be finally carried out by common consent, inasmuch as the general principle of local legislation in reference to the extradition of criminal offenders has been repeatedly recognized and applied in the case of various British colonies.[v] Extradition law in Canada.

Meanwhile, the Canadian government has not lost sight of its claim to deal, by legislation in Canada, with the general question of extradition.

On April 10, 1877, the dominion House of Commons agreed to a series of resolutions, upon which a joint address to the queen was adopted, by both branches of the Canadian parliament, representing that, inasmuch as they possessed all the powers necessary for the purpose, they had passed a bill — which was afterwards assented to by the governor-general — to make provision by one Canadian law for the execution, as respects Canada, of all arrangements made between her Majesty the queen and foreign states for the extradition of fugitive criminals; that, by the eighteenth section of the imperial act of 1870, above mentioned, it is enacted that by order in council the provisions of any colonial law to provide within the colony for the surrender of fugitive criminals may be substituted for the clauses of the imperial act to the same effect; that the provisions

[v] Mr. Blake's letter (above cited) of June 27, 1876, pp. 17, 18.

of the said imperial act are unsuitable for Canada; that the Imperial Parliament be invited to repeal these provisions; and that meanwhile her Majesty, by order in council, should suspend their operation, in order that the Canadian statute of 1877 (40 Vict. c. 25) may have force and effect, in lieu of the same.[w]

In reply to this joint address, the governor-general was informed, by despatch from the colonial secretary, dated Feb. 5, 1878, that the imperial government were not willing at present to suspend in Canada the operation of the extradition act of 1870, inasmuch as the question of the extradition relations of the empire with foreign powers was under consideration by a royal commission.[x]

Commission on law of extradition.

On May 30, following, the royal commission appointed to inquire into and consider the working and effect of the existing law and treaties relating to the extradition of persons accused of crime presented their report. They recommended that treaties for the surrender of criminal offenders to foreign powers should no longer be regarded as indispensable; but that, while the Crown should still retain the right to enter into such treaties, statutory power should be granted to the proper authorities to deliver up fugitive criminals, upon application, wherever such an arrangement could be made in a suitable manner, irrespective of the subsistence of any treaty between Great Britain and the state against whose law the offence had been committed. Imperial legislation will, of course, be necessary to effect this change. Meanwhile, the commissioners refrain from recommending any alteration in the existing law on this subject, — at least, as regards the colonies.[y]

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[w] Canada Com. Journals, **1877**, p. 238.

[x] *Ibid.* **1878**, p. 45.

[y] Commons Papers, **1378**, C. 2039.

Imperial law of extradition.

Accordingly, the Canadian act of 1877 remains in abeyance, for the present; and all extraditions in Canada, other than those which are carried out under the Ashburton treaty, must be conducted pursuant to the provisions of the imperial statutes.[z]

How applied to the colonies.

All new extradition treaties negotiated between the British government and foreign powers are invariably made "applicable to the colonies and foreign possessions of the two high contracting parties." The requisition for the surrender of a fugitive criminal, who has taken refuge in a colony, is addressed to the governor, or chief executive officer thereof, through the chief consular officer of the power applying for the criminal. The governor disposes of the requisition in accordance with the provisions of the treaty. But he may either grant the surrender or refer the matter to the imperial authorities. The British government usually reserves to itself the right to make special arrangements for the surrender of criminals from the colonies, — conducting the same, as nearly as possible, in conformity with existing treaties.[a]

Lamirande case.

Here, mention may appropriately be made of a case arising out of an extradition treaty between Great Britain and France, which gave rise to much correspondence, and led to a rebuke being administered by the secretary of state for the colonies to the governor-general of Canada, for his action in the matter: —

In August, 1866, one Lamirande was apprehended in Canada, on a charge of forgery committed in France, under a warrant issued by the governor-general, on the requisition

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[z] C. J. Dorion, Court of Queen's Bench, Quebec: L. C. Jurist, vol. xxii. p. 111. C. J. Harrison, Ontario Practice Rep. vol. vii. p. 275. And see Mr. Blake's letter, above cited, of June 27, 1876, p. 16.

[a] For various extradition treaties, with the orders in council to give effect thereto, see Canada Orders in Council, pp. 381–409. For later ones, see the prefix to Canada Statutes of 1877, 1878, and 1879. For a list of all such treaties in force up to November, 1878, see Colonial Regulations, **1879**, p. 309.

of the French consul-general. Lamirande was committed to gaol, with a view to his surrender, as a fugitive criminal, under the extradition treaty. But he applied for a writ of *habeas corpus*, in order that the validity of the proceedings against him might be determined by the Court of Queen's Bench, at Montreal. While his case was still under consideration by the court, the governor-general, acting on the advice of the solicitor-general for Lower Canada, signed the warrant of extradition, which was promptly carried out; and Lamirande was delivered up to the agent of the French government. This appears to have been done in ignorance of the fact that the court was actually deliberating on the prisoner's case, and moreover with an idea that his legal rights would not be prejudiced by the issue of a warrant for his extradition. But, owing to some delay in the proceedings before the court, no order was made for the issue of the writ of *habeas corpus*, until the day after Lamirande's surrender.

Nevertheless, the court continued to deliberate on the case, and decided that "the pretended warrant of arrest, alleged to have been issued in France, and all the proceedings taken with a view to obtain the extradition of the petitioner, were unauthorized" by the imperial statute passed to give effect to the extradition treaty with France, and were "illegal, null and void, and that the prisoner was therefore entitled to his discharge." But, as the judge went on to state, the prisoner "is now probably on the high seas, swept away by one of the most audacious and successful attempts to frustrate the ends of justice which has yet been heard of in Canada."

The governor-general (Lord Monck), in a series of despatches in answer to the request of the imperial government, gave full explanations of the proceedings taken in this case, and assumed direct responsibility for the miscarriage of justice which had occurred. At the same time, he pointed out that the blame for what had happened ought to rest with those who, having charge of the prisoner's interests, had neglected to act with sufficient promptitude on his behalf.

In reply to these despatches, the colonial secretary, in a despatch dated Nov. 24, 1866, while giving the governor-general credit for the best intentions, rebuked him for his precipitancy in the matter, and for his neglecting to ascertain whether the prisoner was under the protection of the queen's

bench, before authorizing his surrender to the French authorities. "The omission to take this precaution has led to a most unfortunate abuse of your authority." "A great scandal has taken place, and an insult has been passed upon the dignity of the law, and the regular administration of justice in the Canadian courts." "I am obliged, therefore, with whatever reluctance, to express my decided disapproval of the course which your Lordship was induced to adopt." Lamirande extradition case.

With the conduct of the Canadian officers who had taken part in this transaction, the colonial secretary was not concerned to deal. They "are responsible to their superiors, and their superiors to the parliament, the constituencies, and the public opinion of Canada." But "the explanations hitherto afforded by your solicitor-general of his conduct in obtaining the warrant, whilst the case was actually under the hearing of the judge, would not have been deemed satisfactory by her Majesty's government."

Subsequently, the British government made an official request to the French authorities for the surrender of Lamirande, on the ground that his extradition was unauthorized by the treaty of 1843, and the British statute confirming the same, inasmuch as the demand for his extradition had been irregularly preferred, and that the offence charged against him was not a crime contemplated by the treaty. The French government, however, demurred to these conclusions. At this juncture, Lamirande himself made known to the imperial government his desire to renounce all claim to be surrendered, and stated that he wished to remain in France to undergo the punishment awarded to him. As he had previously invited the interference of her Majesty's government on his behalf, this later request was duly communicated to the secretary of state for foreign affairs. Whereupon the British ambassador at Paris was instructed to state that her Majesty's government no longer insisted on their application for Lamirande's release; although "their abstaining from doing so must not be construed into an admission on their part that there were not sufficient grounds for insisting upon it."[b]

And thus this vexatious case was brought to an amicable

[b] Canada Sess. Papers, **1867-68**, no. 50.

conclusion, after exciting strong feeling in Canada, and endangering the good understanding between the governments of Great Britain and of France; perilous consequences which might have been avoided, if the Canadian government had manifested a proper discretion, and a due regard for private rights.

Naturalization of aliens.

The naturalization of aliens, and their release from the obligations they inherit as natural-born subjects in the country of their birth, is another matter which is properly effected by means of treaties between sovereign states. This subject has repeatedly attracted attention in the British colonies, and has given rise to much correspondence between the imperial and colonial governments.

By the Imperial Act 7 and 8 Vict. c. 66, passed in 1844, the secretary of state was empowered to grant certificates of naturalization to aliens, which conferred upon them all the rights and capacities of British subjects, except in regard to certain political privileges. But this act was limited in its operation to the United Kingdom.

Naturalization laws.

Accordingly, it became customary for naturalization laws to be passed by the local legislatures, on behalf of aliens resident in the colonies; and, by the Imperial Act 10 and 11 Vict. c. 83, passed in 1847, it was declared that all statutes heretofore passed by any colonial legislature in the queen's dominions, for naturalizing persons within the respective limits of such colonies, shall be valid and effectual therein, and likewise all future acts to the same purport, subject to confirmation or disallowance by her Majesty. But, whenever aliens, so naturalized by colonial laws, pass beyond the limits of the particular colony, they lose all claim to be considered as British subjects.[c]

[c] See Earl Grey's Despatch of Sept. 25, 1847; Canada Leg. Assem. Journals, **1848**, p. 42. The Act 10 and 11 Vict. c. 83, was repealed and re-enacted by Act 33 Vict. c. 14. When a naturalization bill is pro-

In 1865, the imperial government enlarged the privileges of foreigners naturalized in any British colony, by enabling them — under certain restrictions, and for a limited period — to obtain passports, signed by the governor, as "naturalized British subjects," which would afford to them protection for a certain specified time when travelling abroad. Such passports, however, confer on the bearer no claim to British protection in the country of their birth.[d]

In 1870, an amended naturalization act was passed by the Imperial Parliament, which entitled aliens who had received certificates of naturalization from the secretary of state (to be granted under certain specified conditions) to claim all political and other rights of British subjects, excepting that, when in the country of his birth, an alien should be liable to his original allegiance therein, "unless he has ceased to be a subject of that state in pursuance of the laws thereof, or of a treaty to that effect." And this act empowers naturalized aliens to divest themselves of their original status, — and British subjects to renounce their allegiance to the British Crown, with a view to being naturalized in a foreign state, — in any case where her Majesty has entered into a convention with a foreign state, for the purpose of giving effect to such a renunciation of allegiance. But this act does not extend to the colonies.[e]

German emigrants to Canada.

The continued inconveniences and disabilities to which German emigrants to Canada are exposed by reason of the partial benefits afforded to them by naturalization under the colonial law, which leaves them

posed in any colony, the governor should ascertain whether his instructions do or do not require the insertion therein of a suspending clause. He should also take care that words are inserted in the terms of the statute, confining the privileges granted to the limits of the colony. Col. Rules & Reg. **1879**, c. 14.

[d] *Ibid.* And see Canada Sess. Papers, **1867-68**, no 74.

[e] 33 Vict. c. 14; Canada Orders in Council, **1876**, p. lxxii.

still liable to be claimed as German subjects when travelling abroad or on a return to their native country, induced the Canadian privy council to request the governor-general to write to the secretary of state for the colonies and represent this grievance. Accordingly, the Earl of Dufferin, on Nov. 16, 1872, addressed a despatch to the Earl of Kimberley on the subject, and requested that her Majesty's government would take measures to obtain for aliens naturalized in Canada precisely the same rights as those which are conferred by naturalization in the United Kingdom. The receipt of this despatch was acknowledged; but no action was taken thereon by the British government.[f]

Accordingly, on April 21, 1873, the Canadian House of Commons passed an address to the queen, praying that, pursuant to the provisions of the imperial naturalization act of 1870, above mentioned, her Majesty would be pleased to negotiate naturalization treaties with the German and other foreign states, under which legally naturalized foreigners in Canada may no longer be subjected to the disabilities of a divided allegiance, but, on formally renouncing their native allegiance, may become entitled to all the privileges of native-born British subjects.

A despatch in reply to this address, dated September 3, 1873, was transmitted by the governor-general to the House of Commons, on May 6, 1874. It enclosed a memorandum from her Majesty's secretary of state for foreign affairs, which stated that the imperial government were prepared to place aliens naturalized in any British colony, out of Europe, on the same footing, so far as passports and protection in foreign countries are concerned, as aliens naturalized in England under the act of 1870. But it suggested that a compliance

[f] Canada Sess. Papers, **1873**, no. 66.

with the request for the negotiation of naturalization treaties would prove less advantageous to aliens naturalized in the colonies than the existing practice,—inasmuch as no such treaties could be negotiated, except upon the basis of a five years' residence in the colony of the alien who desired to be allowed to change his allegiance. The only way in which the objections urged could be satisfactorily overcome would be by an extension of imperial naturalization to the colonies, the expediency of which is under the consideration of her Majesty's government.[g]

No further imperial legislation having taken place regarding naturalization, in the mean while the Canadian House of Commons, on April 5, 1875, again addressed her Majesty on the subject, representing that the extension of the naturalization act of 1870 to the colonies would not meet the just expectations of the Germans and other naturalized foreigners in Canada, inasmuch as the passports granted under that act, though permanent, are expressly declared to be invalid in the state in which the individuals concerned were formerly subjects, the place of all others in which they desire to be protected in their acquired rights and privileges. The house, therefore, reiterated their request, that her Majesty would be pleased to enter into a treaty with the German states (such as has been already negotiated between Great Britain and the United States; and between the United States of America and Germany); so that her Majesty's naturalized German subjects in Canada, after a residence therein of from three to five years (as may be agreed upon by the contracting powers) may become entitled to all the rights, privileges, and immunities of British subjects, in any part of the world, and in as full a measure as if they were native-born British subjects.

Naturalization of Germans in Canada.

[g] Canada Sess. Papers, **1874**, no. 54.

In a despatch dated Aug. 4, 1875, the colonial secretary acknowledged the receipt of the foregoing address; but intimated that her Majesty's government were unable, at present, to make any progress towards a compliance therewith, but would resume the consideration of the whole question hereafter.[h]

No communication has since been made to the Canadian Parliament on this subject. But in March, 1879, the attention of the governor-general was directed to the matter, by a deputation of senators and members specially interested in the removal of the disabilities which continue to devolve upon German emigrants in Canada, and his Excellency promised to bring the question under the notice of her Majesty's ministers.

Right of aliens to hold property in Canada.

While by the ninety-first section of the British North America act, 1867, the dominion parliament is exclusively empowered to legislate upon "naturalization and aliens," it has been assumed that, by the ninety-second section of this act, — which empowers provincial legislatures to exclusively make laws concerning "property and civil rights in the province," — these legislatures are competent to authorize aliens to hold and transmit real estate.[i]

Mention has already been made (*ante*, page 154) of the serious questions which have arisen in various British colonies, from the large and indiscriminate influx therein of Chinese, under the treaty with China.

Imperial Dominion exercisable over Self-governing Colonies:

f. *By appeals to the courts of law and to the privy council.*

Legislation by the Imperial Parliament, as has been already pointed out, is not subject to be reviewed and

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[h] Canada Commons Journals, **1876**, p. 63.

[i] Rev. Stats. Ontario, c. 97. Manitoba Stats. **1873** (37 Vict. c. 43). The dominion naturalization acts, which apply to all the provinces, contain no provisions of this nature.

annulled by any court of law within the realm. Parliament itself, in its collective capacity, is the highest court in the kingdom, and is necessarily the supreme judge of the proper limits of its own jurisdiction and powers; and it is not either constitutional or lawful for an inferior court to question the propriety or the discretion of any act done or passed by the Imperial Parliament.[j]

Plenary powers of local legislatures.

Within the limits of every colony or province having representative institutions, the local legislature is invested with a similar supreme authority and jurisdiction:[k] subject of course to the discretion of the Crown in assenting to or disallowing colonial enactments; and subject, moreover, to the determination of the question, whether the legislature has exceeded its competency, and the lawful bounds of its prescribed powers, on any given occasion.

Their legislation not to be repugnant to English law.

It is the general condition of all legislation by subordinate and provincial assemblies, throughout the British Empire, that the same "shall not be *repugnant* to the law of England."[l] This condition is enforced in two ways: firstly, as has been elsewhere shown, by the right and duty of the Crown to disallow any act that contravenes this principle;[m] secondly, by the decision of the local judiciary in the colony, in the first instance, and ultimately of her Majesty's imperial privy council, upon an action or suit at law, duly brought before such a tribunal, to declare and adjudge a colonial, dominion, or provincial statute, either in whole or in part, to be *ultra vires* and void, as being in excess of the jurisdiction conferred upon the legislature by which the same was enacted, or at variance with some imperial law in force in the colony; or otherwise, by a similar decision, to confirm and approve

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[j] See *ante*, p. 191.
[k] See *post*, p. 368.
[l] See *ante*, p. 133.
[m] See *ante*, p. 138.

of the legality of the act the validity of which had been impugned.[n]

Interpretation of colonial statutes by the courts.

The power of interpreting colonial statutes, and of deciding upon their constitutional effect and validity, is a common and inherent right, appertaining to all her Majesty's courts of law before which a question arising out of the same could be properly submitted for adjudication.[o]

We have elsewhere discussed this subject, at considerable length, in connection with legislation in the several provinces of the dominion of Canada, as well as in respect to legislation by the dominion parliament:[p] it is unnecessary therefore to enlarge upon the question any further in this section; and we may proceed to show the extent and method of control which is still exercised by the Crown over all the colonies and dependencies of the empire, through the instrumentality of the privy council.

Appeals to the Crown in council.

The sovereign, as the fountain of justice, is constitutionally competent to receive petitions and appeals from all her colonies and possessions abroad, upon whatever regulations and conditions may be defined and imposed by the authority of the Crown in council.

Such petitions or appeals are referred to the consideration either of the judicial committee of the privy council, or of some other committee of that body, upon whose report the decision of the sovereign is pronounced. The reference may be made either upon an appeal from an inferior colonial court, or on a petition or claim of right, or on a petition praying for the

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[n] Mr. Secretary Cardwell, Hans. Deb. vol. clxxxv. p. 1320. And see the judgment of the privy council in the Queen *v.* Burah, 3 App. Cas. 889. For other precedents of such judicial decisions, see *post*, p. 376.

[o] See Law Magazine for August 1867, p. 287. La Revue Critique, &c., du Canada, Janvier, 1871, p. 117; *ibid.* Janvier, 1872, p. 51; *ibid.* Avril, 1872 and Avril, 1873. Commons Papers, **1847–48**, vol. 43, pp. 624–671. *Ibid.* **1849**, vol. xxxv. p. 57.

[p] See *post*, pp. 375–387.

redress of a grievance that is not within the prescribed jurisdiction of other courts or departments of state, but which the Crown is willing to entertain.[q]

Judicial committee of the privy council.

If the matter of grievance or complaint be one that is properly cognizable by a legal tribunal, it would be referred to the judicial committee of the privy council, which, by the Act 3 and 4 Will. IV. c. 41, in addition to its ordinary functions as a court of appeal from inferior courts of law, is empowered (by sec. 4) to consider "any matters whatsoever" that the Crown shall think fit to refer to it.[r] It has, however, been decided that this clause will not justify a reference to the judicial committee of anything whatever that could not be properly entertained by, or come before, the Crown in council. For example, this committee could not advise upon questions of general or political policy, for that is the especial province of the cabinet council; neither could it advise in criminal matters, in which, except in certain colonial cases, no appeal to the privy council is allowed by law.[s]

With a view to increase the efficiency of the judicial committee, it is customary to summon to the privy council judges, and men of eminence in every branch of legal study, expressly that they may assist at the deliberations of the same.[t] And in 1871 by the Act 34 and 35 Vict. c. 91, four additional paid judges were

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[q] Stephen, New Commentaries, ed. 1874, vol. ii. p. 461; Regina *v.* Bertrand, P. C. Appeals, vol. i. p. 520. And see Canada Assem. Jour. 1861, p. 176.

[r] Todd, Parl. Govt. vol. ii. p. 624. Finlason, History, Constitution, and Character of the Judicial Committee of the Privy Council. London, 1878.

[s] Hans. Deb. vol. 209, pp. 977, 984. But the Crown may, by its prerogative, review the decisions of all colonial courts, criminal as well civil, unless this prerogative has been expressly annulled by charter or statute, though an appeal, in a criminal case, is rarely entertained by the privy council. Forsyth, Const. Law, p. 379. Macpherson, P. C. Practice, ed. 1873, p. 60.

[t] Todd, Parl. Govt. vol. ii. p. 625.

added to the judicial committee for the like purpose. By the Supreme Court of Judicature Act, 1873, sect. 21, her Majesty in council was empowered to transfer the jurisdiction of the judicial committee to the new Court of Appeals created by that statute. But by the amending act of 1875, the operation of this section was suspended; and, by the twenty-fourth section of the appellate jurisdiction act of 1876, it was repealed, and new provisions enacted to maintain the existence of the judicial committee of the privy council, and to strengthen the point of connection between that body and the House of Lords, as the ultimate courts of appeal for the British Empire.[u]

Beneficial effects of imperial appellate jurisdiction.

The appellate jurisdiction of the queen in council is retained for the benefit of the colonies, not for that of the mother country. It secures to every British subject a right to claim redress of grievances from the Throne. It provides a remedy in certain cases not falling within the jurisdiction of ordinary courts of justice; it removes causes from the influence of local prepossessions; it affords the means of maintaining the uniformity of the law of England in those colonies which derive the great body of their law from Great Britain; and it enables suitors, if they think fit, to obtain a decision in the last resort from the highest judicial authority and legal capacity existing in the metropolis. It is true that in a colony which possesses an efficient court of appeal, it may be seldom necessary to have recourse to this supreme tribunal. Nevertheless its controlling power, though dormant and rarely invoked, is felt by every judge in the empire, because he knows that his decisions are liable to be submitted to it. Under such circumstances, it is not surprising that British colonists have uniformly exhibited a strong

[u] Charley's Judicature Acts, 3d ed., 1877, pp. 32, 1014.

desire not to part with the right of appeal from colonial courts to the queen in council.[v]

Since the establishment of responsible government in the principal British colonies, the supreme interpretation and application of the law upon appeal to the mother country has become almost the sole remaining exercise of power exercised through the Crown over the self-governing dependencies of the realm. But, even in the colonies which have been entrusted with the largest measure of local self-government, the right of appeal to the privy council continues to be regarded with the greatest respect and appreciation.[w]

This is, moreover, one of the rights of the subject with which the Crown, by its mere prerogative, cannot interfere; for the Crown has no power to deprive the subject of any of his rights. Although, with the consent of the other branches of the legislature, the Crown is enabled to exercise this power.[x]

Supreme Court of Canada.

Thus, by the act passed by the parliament of Canada, in 1875, "to establish a Supreme Court, and a Court of Exchequer, for the dominion of Canada," it is enacted that "the judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to her Majesty in council may be ordered to be heard: saving any right which her Majesty may be graciously pleased to exercise by virtue of her royal prerogative."[y]

But this act does not deprive the subject in Canada,

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[v] Evidence of Mr. Henry Reeve, before the Lords' committee on appellate jurisdiction, 1872, pp. 17, 34. And see Chalmers's Political Annals, pp. 304, 671, 687.

[w] See Hans. Deb. vol. ccii. p. 1284; vol. ccviii. p. 930.

[x] Forsyth Const. Law, p. 378.

[y] Can. Act, 38 Vict. c. 11, sec. 47. See also, the acts making further provision in regard to these courts, of 39 Vict. c. 26; and of 42 Vict. c. 39.

of the right to appeal from the judgment of the Court of Queen's Bench, or court of review, direct to the queen in council. Appellants therefore have the choice of carrying their suit for final determination either to the Supreme Court of Canada, or to the judicial committee of the privy council.[z]

Right of appeal to privy council.

It has since been decided by the judicial committee, that, notwithstanding the foregoing statute, the judicial committee are competent, in any proper case, to advise her Majesty to allow an appeal to the privy council from a judgment of the Supreme Court of Canada.[a]

And, in 1876, the judicial committee decided that an act of the Quebec legislature transferring the right of trying election petitions from the Legislative Assembly of the province to the judges of the Superior Court, which declared that "such judgment shall not be susceptible of appeal," did not thereby infringe on the prerogative right of the Crown to hear appeals; which right cannot be taken away by any statute, except by express words. But from the peculiar nature of this particular act, to which the Crown had assented and which affected the rights and privileges appertaining to the Legislative

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[z] De Gaspe *et al. v.* Bessener *et al.* Law Times Rep. N. S. vol. xxxix. p. 550. In 1878, the Court of Queen's Bench at Montreal decided, in the case of the City of Montreal *v.* Devlin, that leave to appeal to the privy council from a judgment of the Court of Queen's Bench, Quebec, must be granted, upon the application of one party to the suit, notwithstanding that the adverse party had previously obtained leave, on application to another judge in chambers, to appeal from the same judgment to the Supreme Court of Canada. Whatever might be the inconveniences resulting from the allowing in the same case of a double appeal, to two separate tribunals, whose decisions are each held by law to be supreme and final, the court could not refuse to grant the appeal to the privy council, being equally bound so to do by the precise text of the law, as was the judge in chambers to allow the appeal sought for to the Supreme Court. It will be for the legislature, hereafter, to prevent a recurrence of this anomaly. (Lower Canada Jurist, vol. xxii. p. 136.) In this particular case, however, the parties to the suit finally came to a compromise, so that neither appeal was prosecuted.

[a] St. Andrew's Church, Montreal, *v.* Johnston; Appeal Cases, vol. iii. p. 159. Law Times Rep. N. S. vol. xxxvii. p. 556.

Assembly independent of the Crown, it was evident that it could not have been the intention of the legislature to have created a tribunal which should be liable to have its decisions reviewed upon an appeal to the Crown, under its prerogative.[b]

In order to ratify by the authority of Parliament the principle asserted in the case of St. Andrew's church, Montreal, above cited, that no British subject throughout the queen's dominions shall be deprived of the liberty of appeal to the privy council, it was provided in the fifty-first section of the South Africa union act, 1877, that no act of the union parliament shall be construed to abridge the right of appeal to the queen in council from any judgment of the general Court of Appeal to be hereafter established in South Africa.

Imperial Dominion exercisable over Self-governing Colonies:
g. *By the grant of honours and titular distinctions in the colonies.*

Having passed under review the use and control of the various prerogatives of the Crown that are incidental to the ordinary administration of government in a limited monarchy, we have next to consider certain extraordinary prerogatives appertaining to the sovereign, which are exceptional in their nature and personal in their exercise, and which, accordingly, are not transmissible from the Crown by any general delegation, but are only confided as a matter of high trust to certain eminent public functionaries who are specially commissioned by the sovereign to administer the same. These are, firstly, the prerogative wherein the sovereign acts as the fountain of honour; secondly, the prerogative of mercy. These prerogatives, from their especial cha-

[b] Théberge *v.* Laudry, Appeal Cases, vol. ii. p. 102; Law Times Rep. N. S. vol. xxxv. p. 640.

racteristics, are not included in the ordinary delegation of powers to a governor or a lieutenant-governor, but are either reserved for the exercise of the sovereign directly, or are administered by a viceroy or governor-general by express delegation to him as the queen's representative.[c]

Prerogative of honour.

It is a constitutional principle of great importance that all honours conferred upon individuals in any part of the empire should emanate from the highest source of authority and dignity. They should be bestowed, as far as possible, by the spontaneous action of the sovereign, and not necessarily or exclusively at the instigation of others. Nevertheless this prerogative, like every other function of royalty, must be exercised *with the concurrence and upon the responsibility of* ministers; and recommendations in respect to the same are suitably tendered to the sovereign by the prime minister.[d]

How administered in the colonies.

In regard to the distribution of honours in the colonies, Lord Elgin, when governor-general of Canada in 1853, wrote to the colonial secretary (the Duke of Newcastle) as follows: "Now that the bonds formed by commercial protection and the disposal of local offices are severed, it is very desirable that the prerogative of the Crown, as the fountain of honour, should be employed, in so far as this can properly be done, as a means of attaching the outlying parts of the empire to the throne." "As a general rule, imperial honours should appear to emanate directly from the Crown, on the advice, if you will, of the governors and imperial minis-

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[c] Earl of Carnarvon's Despatch to Governor Robinson, of New South Wales, Oct. 7, 1874, in Commons Papers, **1875**, vol. liii. p. 677. And see Sir John A. Macdonald's Memorandum as minister of justice, dated Jan. 3, 1872, to the governor-general of Canada. Canada Sess. Papers, **1877**, no. 89, p. 332.

[d] Todd, Parl. Govt. i. 366. Hans. Deb. vol. cxcii. p. 1813; vol. cxciii. p. 1835; vol. ccxxiii. p. 975. And see Martin, Life of the Prince Consort, vol. iii. p. 478. Torrens, Life of Melbourne, vol. ii. p. 169. Wellington's Despatches, 3d series, vol. 7, pp. 180, 366.

ters, but not on the recommendation of the local executives." [e]

This principle has been generally recognized in the exercise of this prerogative in the colonies. Rules and regulations in regard to honours and tables of precedence, and decisions to determine controverted questions arising out of the same, are communicated to colonial governors by her Majesty's secretary of state for the colonies.

Precedence in the colonies.

In the absence of and subject to any imperial or colonial enactment, or any royal declaration or instructions decisive of or bearing on the question, the precedence to be given to British subjects resident in any colony must be determined by the governor, as representing the Crown in its character of the fountain of honour.

The sixth chapter of the "Official Rules and Regulations for her Majesty's Colonial Service" (edition 1879), deals with this question, and treats of precedency, the conferring of the decoration of "the Victoria cross," military and naval salutes, and colonial uniforms. In regard to precedence of colonial officers, it is stated that this is, in some cases, regulated by colonial enactments, to which the Crown must necessarily have assented by royal charters, by instructions communicated either under the royal signet and sign-manual through the secretary of state, or by authoritative usage. In the absence of any such special authority, governors are directed to guide themselves by the subjoined table. It may be serviceable in this connection to compare the general official table of precedence with the special table for use within the dominion of Canada, — which was transmitted by the queen's command, after having received her Majesty's approval, to the governor-general of Canada on July 23, 1868, and was published

[e] Walrond, Letters of Lord Elgin, p. 114.

Precedence in Canada and in other colonies compared.

in the dominion official gazette, — pointing out at the same time any variations between the two tables arising out of the altered circumstances of Canada under the British North America act of 1867, and any additional regulations since received on the same subject.

General Table of Colonial Precedence.	*Table of Precedence for Canada.*
1. The governor, lieutenant-governor, or officer administering the government.	1. The governor-general, or officer administering the government.
2. The senior officer in command of the troops, if of the rank of general, and the officer in command of her Majesty's naval forces on the station, if of the rank of an admiral, their own relative rank being determined by the queen's regulations on that subject.	2. The same as in the general table.
	3, 4, 5, 6. The lieutenant-governor of the several provinces of Ontario, of Quebec, of Nova Scotia, and of New Brunswick. [And in their appropriate order, the lieutenant-governors of provinces afterwards added to the dominion.]
3. The bishop.	7. Archbishops and bishops, according to seniority [of consecration].[f]

[f] Before the removal of Roman Catholic disabilities by the Imperial Parliament, prelates of the Roman Catholic Church in the British colonies were not usually addressed by the title to which their rank in their own church entitled them. But on Nov. 20, 1847 (Parliament having by a recent act formally recognized the rank of the Irish Roman Catholic prelates, by giving them precedence immediately after prelates of the established church of the same degree), a circular despatch was addressed to colonial governors by Earl Grey, authorizing the Roman Catholic prelates to be officially addressed by the title of "your Grace" or "your Lordship," as the case may be. This despatch was understood as authorizing the precedence of Roman Catholic Church dignitaries to follow immediately after Anglican dignitaries of the same order and degree. It was afterwards qualified, to some extent, by a circular despatch from the Duke of Newcastle, dated May 3, 1860, which simply recognized as of "the Episcopate" all chief officers of the Roman Church, and assigned them positions next after "the Episcopate which derives its rank from the Queen's letters-patent." This despatch further provided that "the dignities of metropolitan, archbishop, or (it may be) patriarch, should only be recognized by her Majesty's officers when admitted by bishops of each communion as regulating their precedence *inter se*." (South Australia Parl.

4. The chief justice.[h]

5. The senior officer in command of the troops, if of the rank of colonel or lieutenant-colonel, and the officer in command of her Majesty's naval forces on the station, if of equivalent rank; their own relative rank being determined by the queen's regulations.

8. Members of the cabinet, according to seniority.[g]
9. The speaker of the Senate.
9 *a*. The chief-justice of the Supreme Court.[i]
10. The chief judges of the courts of law and equity, according to seniority.
11. Members of the privy council not of the cabinet.
12. General officers of her Majesty's army serving in the dominion, and officers of the rank of admiral in the royal navy, serving on the British North American station, not being in the chief command; the relative rank of such officers to

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Proc. **1871**, appx. no. 115.) Consequent upon a judgment of the privy council in 1865, in the case of the bishop of Natal, — that while the sovereign had undoubted right, by virtue of her prerogative, to give style, title, dignity, and precedence, in all parts of her dominions, she had no power to issue letters-patent professing to create episcopal sees, &c., in colonies possessing representative institutions, — the home government resolved to refrain henceforth from issuing letters-patent to bishops in such colonies. (Todd, Parl. Govt. vol. i. pp. 310–312.) This destroyed the last remaining vestige of state superiority in bishops of the Anglican church in the colonies, over bishops of other communions. Accordingly, the Canadian table of precedence places the Anglican and Romish bishops on an equal footing of precedence, giving them place according to seniority of appointment.

[g] Special precedence is assigned to "cabinet ministers" in Canada, because they form part (under the British North America Act, 1867, sec. 11), of the Queen's privy council for Canada. In England all privy councillors have precedence of legal functionaries except of the lord high chancellor, who is always a privy councillor. See Dodd, Manual of Dignities, pp. 50, 51.

[h] This is in conformity with the English Table of Precedence, which places the highest legal functionary (the lord chancellor) next after the highest ecclesiastical officer (the Archbishop of Canterbury), and before the lord president of the privy council. Dodd, Manual of Dignities, pp. 31–33.

[i] The secretary of state for the colonies (Sir M. Hicks-Beach), in a despatch dated Oct. 31, 1878, approved of an arrangement made by the governor-general of Canada, under which all judges of the Supreme Court took precedence next after the speaker of the Senate (Canada, Dominion Gazette, Dec. 14, 1878). But by a later despatch to the governor-general of Canada, dated Nov. 3, 1879, the chief-justices of the several superior courts of law and equity in the different provinces of the dominion, are to take rank next after the chief-justice of the Supreme Court of Canada; and the puisne judges of the said Supreme Court next before the puisne judges of the several provincial superior courts. Lord Carnarvon, then secretary of state, in a despatch of Aug. 29, 1877, to Australian governors, decided that retired judges of the supreme courts in Australia should retain the title of "honourable" for life, within the colony, with precedence next after the ex-

Precedence in Canada and in other colonies compared.

6. The members of the Executive Council.[k]
7. The president of the Legislative Council.
8. The members of the Legislative Council.
9. The speaker of the House of Assembly.
10. The puisne judges.
11. The members of the House of Assembly.
12, &c. The remaining office-holders in this list include various heads of departments, not be-

be determined by the queen's regulations.[j]
13. Similar to no. 5 in the general table.
14. Members of the Senate.
15. Speaker of the House of Commons.
15 *a*. Puisne judges of the Supreme Court.
16. Puisne judges of the courts of law and equity according to seniority.
17. Members of the House of Commons.
18. Members of the Executive Council (provincial), within their province.
19. Speaker of the Legislative Council, within his province.
20. Members of the Legislative Council, within their province.
21. Speaker of the Legislative Assembly, within his province.
22. Members of the Legislative Assembly, within their province.

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isting judges of their respective courts. And by Sir M. Hicks-Beach's despatch of Oct. 31, 1878, similar precedence is allowed to ex-judges of all other courts; viz., a retired chief-justice before actual puisne judges, and retired puisne judges next after those in service. Victoria, Leg. Assembly Journals, **1877-78**, appx. B. no. 10; and Canada Orders in Council, &c., prefixed to Can. Stats. for **1879**, p. 41.

[j] By the Canada militia acts of 1868 and 1875, the officer in command of the dominion militia shall have the rank of major-general in the militia of Canada; and the adjutant-general at headquarters the rank of colonel in the militia. Officers of her Majesty's regular army shall always be reckoned senior to militia officers of the same rank, whatever be the dates of their respective commissions. The relative rank and authority of officers in the militia shall be the same as that in the regular army.

By a circular despatch from the secretary of state for the colonies to colonial governors, dated March 17, 1879, revised regulations are promulgated with regard to the interchange of visits between officers of her Majesty's ships and governors, lieutenant-governors, administrators, and presidents of colonies. Under the new regulations provision has been made for paying and returning visits, in certain cases, by deputy; and it is provided that officers acting temporarily in higher civil offices or commands are, in respect of visits, to be upon the same footing as if they were confirmed in such offices or commands. Orders in Council, &c. prefixed to Canada Statutes for **1879**, p. 42.

[k] Before the confederation of the British North American provinces, and subsequent to the introduction

ing members of the executive council, and other principal officials; but inasmuch as the relative importance, as well of duty as of position, of these functionaries differs according to local custom, they need not be enumerated here; especially as liberty has been given, as will be presently shown, to governors of particular colonies to fix the precedence of local officers of the civil service therein.

In connection with the foregoing table of precedence for Canada, her Majesty was pleased to approve of the adoption of revised regulations in respect to the style and title to be used by the following personages: — Titular distinctions in Canada.

The governor-general of Canada to be styled "his Excellency."

The lieutenant-governors of the provinces to be styled "his Honour."

The privy councillors of Canada to be styled "Honourable," and for life.

Senators of Canada, executive councillors of the provinces, the president of the Legislative Councils, and the speakers of the Houses of Assembly in the provinces, to be severally styled "Honourable," but only

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of responsible government therein, it was the rule that when an executive councillor retired from office, he was no longer entitled to be styled "honourable." An exception was made, however, in regard to persons who had served in the capacity of councillors "for any considerable time, or with peculiar distinction." Such individuals, upon the recommendation of the governor, and by command of the sovereign, conveyed ordinarily through a despatch from the secretary of state (and in exceptional cases by warrant under the royal sign-manual), were permitted to retain the title of "honourable," upon retiring into private life; with precedence next after executive councillors for the time being, and, between themselves, according to their seniority upon retirement. (Nova Scotia Assembly Journals, **1859**, appx. nos. 23 and 33.). The rule was afterwards established in every colony under the British Crown, that executive councillors who have held office "for three years" should be permitted to retain the title of "honourable" for life with the precedence above-mentioned. New Zealand Parl. Papers, **1878**, appx. A. 1, pp. 15–18.

during office, and the title not to be continued afterwards.

Gentlemen who were legislative councillors, at the time of the union, are permitted to retain their title of "Honourable," for life; but legislative councillors in the provinces are not in future to have that title.[1]

Honours conferred upon Canadian statesmen in 1867.

Shortly after the passing of the imperial act of 1867, for the confederation into one dominion of Canada of the various colonies of British North America, her Majesty was graciously pleased to signify her intention of conferring special marks of royal grace and favour upon seven principal Canadian statesmen, who had been instrumental in the accomplishment of that great undertaking.

Accordingly, upon July 1, 1867, the appointed day for bringing into political existence the new dominion, the premier of Canada (Sir John A. Macdonald) was created a Knight Commander of the Bath. The position of Companion of the Bath was at the same time conferred upon certain ministers of state in the dominion. Two of the most eminent members of the administration, however (Messrs. G. E. Cartier and A. T. Galt), asked leave to decline the proffered distinction, on the ground that their prominent public services and recognized position in Canada would not warrant them in accepting a lower degree of distinction, in the distribution of honours upon this occasion, than that which had been assigned to Sir John A. Macdonald, lest their public usefulness should be thereby impaired. After some delay, owing to the technical difficulty that there was no precedent for refusing an

[1] For these despatches, and the Table of Precedence for Canada, see the volume of Dominion Orders in Council, Proclamations, &c., pp. 427–429. It is understood that the omission of the "speaker of the House of Commons" from the list of office-bearers in Canada who are entitled to be called "honourable" was purely accidental. By usage, the title is always conceded to him.

honour which had actually been conferred upon an individual by the sovereign, a method was adopted which met the views of these gentlemen, without lessening their self-respect or exposing their motives to possible misconstruction.[m]

Case of Messrs. Cartier and Galt.

On March 23, 1868, the Canadian House of Commons passed an address, asking for copies of the correspondence upon this subject. Upon receipt of the same, the papers were referred to a select committee. On May 15, this committee reported a recital of the facts above stated, and expressed satisfaction that her Majesty had since been pleased to raise Mr. G. E. Cartier to the dignity of a baronet of the United Kingdom. While this gracious act had removed any cause of misconstruction, so far as Mr. Cartier was concerned, the committee observed that it placed Mr. Galt in a still more objectionable position. They therefore recommended the presentation of an address to the queen, praying her Majesty to cause such a remedy to be applied as might remove the grievance justly felt by Mr. Galt. Whereupon, an address to the queen was immediately adopted by the house, and transmitted through the governor-general.[n] No reply to this address was communicated to the house; but, in the ensuing year, the dignity of Knight of the Order of St. Michael and St. George was conferred upon Mr. Galt, in acknowledgment of his official services to the Crown.

Precedence in South Australia.

In 1859, the governor of South Australia (Sir R. G. MacDonnell) called the attention of the colonial secretary to certain deficiencies in the table of precedence contained in the "General Colonial Regulations," above cited, especially in regard to the position of important colonial officers not named in that table.

[m] Canada Sess. Papers, **1867–68**, no. 64.
[n] Canada Commons Journals, May 15, **1868**.

He observed that, in India, the governor-general in council has authority to settle disputed cases of precedence not coming within her Majesty's specific instructions and warrant; and he inquired whether a similar power could not be intrusted to the governor of a colony, as representing the queen, so that he should himself decide in the first instance (and without *formally* consulting his executive council) all future disputed questions of personal precedence, — reporting his decisions invariably to the secretary of state.

The governor to decide questions of precedence.

In reply to this request, the Duke of Newcastle forwarded an opinion from the law officers of the Crown, for the information and guidance of Governor MacDonnell, which distinctly assigned to the governor, as representing the Crown, the right and duty of determining all questions of personal precedence in a colony, in default of specific rules and instructions already prescribed by law or by the authority of the Crown, applicable to the case. "In determining this precedence, it would be proper for the governor to have regard to the rules of precedence existing in the mother country, and to proceed by analogy to them; not being, however, in our opinion, bound to adhere strictly to those rules, in instances where the actual usages of the colonial society or the requirements of a particular case or class of cases seem to him to justify the establishing in the colony of a different rule. For it seems to us that a colony, though practically subordinate, must be regarded as, in social subjects, independent of the mother country; so that any rule of precedence recognized in the home society, but resting on usage only, is not necessarily in force in the colony, where the whole structure of the social system may be different from what it is in the mother country."

The opinion proceeds to suggest — in answer to inquiries sent to the colonial secretary by governors of

other colonies — that the governor is free "to determine, as it seems fit to himself, the precedence which he will allow between baronets on the one side and sons of peers on the other;" and likewise "the precedence which he will allow to a knight on the one side and the chief-justice and the members of the court of policy on the other." "A consideration of the importance of conferring rank and dignity on persons holding office, judicial or political, would properly have much influence" in giving the latter personages precedence over a knight. And here, it should be observed that the one hundred and fifty-eighth section of the "Colonial Service Official Rules" provides that "persons entitled to precedence in the United Kingdom or in foreign countries are not entitled, as of right, to the same precedence in the British colonies; but, in the absence of any special instructions from the queen, the precedence of such persons relatively to the colonial officers, in the above-mentioned Table of Precedence, will be determined by the governor, having regard to the social condition of the colony under his government."

Precedence of wives of public officers.

In reference to the precedence due to wives of official persons, the opinion of the law officers of the Crown proceeds to state that the usage in England is, "that the rank of the husband, if merely official, and not personal to himself, does not entitle the wife to a precedence higher than that which she would ordinarily have by virtue of her husband's personal rank. But we think that, in a colony, the determination of the precedence which the governor is to give to the wives rests with him to the same extent as the determination of the precedence to be given to the husbands does; and that, if it seems to him expedient to depart from the usage of the mother country, with respect either to all official persons or to the holders of particular offices, he is at liberty to do so."

The secretary of state for the colonies did not deem it expedient to add any further directions to this opinion of the law officers of the Crown, — beyond recommending the governor to adhere, as far as may be practicable, to the customs of the colony and to the table of colonial precedence.

Accordingly, the governor of South Australia (Sir James Fergusson), on May 9, 1871, fixed provisionally, and subject to the approval of the secretary of state, a Table of Precedence for use in that colony, which included all the principal public officers therein. The order of the civil service was recommended for the governor's sanction by his ministers.[o]

This Table of Precedence for South Australia, was transmitted to the House of Assembly, in compliance with an address from that chamber, together with the aforementioned despatches and correspondence with the home government in relation to the question.

Ecclesiastical precedence in South Australia.

The first two offices in this table — having precedence assigned over all other colonial functionaries — were the bishop of Adelaide, and the Roman Catholic bishop. The right of the sovereign to confer precedence upon church dignitaries, — irrespective of any connection between church and state, — in any part of the queen's dominions, has been already pointed out. It has been shown that this prerogative right has been recognized by a recent decision of the judicial committee of the privy council; and that in Canada, where all churches and sects are upon a footing of equality in the sight of the law, precedence is given to "archbishops and bishops," — next after the governor-general, and the officers in supreme command of her Majesty's military and naval forces in Canada, and the lieutenant-governors of the provinces.[p]

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[o] South Australia Parl. Proc. **1871**, no. 115.

[p] See *ante*, p. 228, note f.

The South Australian legislature, however, were not satisfied with this arrangement. They disapproved of any precedence being allowed to ecclesiastical functionaries. They therefore passed a bill "to provide for the regulation of precedency in South Australia," which was designed to abolish utterly all precedence of ecclesiastics in the colony. Upon the advice of the colonial attorney-general, and in conformity with the royal instructions, the governor reserved this bill for the signification of her Majesty's pleasure.

The colonial secretary, in a despatch dated Feb. 10, 1872, notified the governor that her Majesty's ministers had been unable to advise that this bill should receive the royal assent; it being regarded as an encroachment upon the undoubted prerogative of the queen, as the fountain of honour, to determine the precedence of her subjects. Any suggestion to amend the Table of Precedence in force in the colony, whether emanating from the governor, with the advice of his executive council, or from either or both of the houses of parliament in the colony, would always be most attentively considered, with a disposition to accede as far as possible to alterations proposed. But the queen could not be advised to deprive individuals (such as the church dignitaries especially aimed at by this bill) of any precedence to which they were now entitled.[q]

Whereupon, on June 19, 1872, the House of Assembly of South Australia passed an address to the queen, representing the grievance felt by the great majority of the inhabitants of the colony, at the precedence assigned to dignitaries of the Protestant Episcopal and Roman Catholic churches over ministers of other religious denominations therein, and praying her Majesty by the exercise of her prerogative to remove the same.[r]

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[q] South Australia Parl. Papers, **1872**, nos. 61 and 68.
[r] *Ibid.* **1872**, Journals, pp. 194, 230.

In reply to this address, the colonial secretary, in a despatch dated Sept. 16, 1872, conveyed her Majesty's assurance that no bishop, or other minister, of whatever persuasion, to be hereafter appointed, should be allowed precedence in the colony. But the queen could not consent to deprive any minister of precedence already conferred, so long as he retains his office; though he might voluntarily agree to relinquish such precedence.[s]

Ecclesiastical titles in the colonies.

It was during the administration of William Pitt, and soon after the first appointment of colonial bishops in the West Indies, that it was agreed to allow these dignitaries to be styled "my Lord." Since then the practice has become general; although, in the various letters-patent issued to bishops in North America and in Australia, up to the year 1866 (when the issue of episcopal letters-patent in the colonies was abandoned), no uniform practice was observed. At one time, and in one instrument, the title of "lord" would be appended to that of bishop, on another occasion it would be omitted; and that indifferently, and upon no definite principle.[t] Stubbs tells us, however, that "the title of 'lord' does not, in England, imply a dignity created by the Crown, but is simply a descriptive or honorary appendage to some other dignity." It "belongs to all bishops in all churches," — "nor has it anything to do with a royal prerogative of conferring titles, not being a recognized grade of peerage."[u] If this be correct, and few would be disposed to question the accuracy of so learned and painstaking a writer as Stubbs, it disposes of this vexed question in a very satisfactory manner.

Upon the receipt by the governor of New Zealand, of Lord Carnarvon's circular despatch, of Aug. 29, 1877, above mentioned, in reference to the dignity and

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[s] South Australian Journals, **1872**, no. 238.

[t] Todd, Parl. Gov. vol. ii. p. 524, *n.* Commons Papers, **1867**, vol. xlviii. pp. 855-914, particularly p. 908.

[u] Stubbs, Const. Hist. of England, vol. iii. p. 440.

precedence of judges in Australia,[v] the premier of the colony (Sir George Grey) addressed a memorandum to the governor, in which — while admitting that the action taken by the secretary of state accorded with the wishes expressed by his predecessors in office — he took exception to the interference of the Crown, in a self-governing colony and without the consent of the General Assembly, in establishing any order of rank and dignity therein.

Right of the sovereign to confer honours in a self-governing colony.

The governor transmitted this memorandum to the secretary of state in a despatch, dated May 22, 1878, wherein he declares his inability to understand the objection raised by the premier, or to see how the exercise by her Majesty — who is constitutionally the source of all honours throughout the empire — of her undoubted prerogative in conferring distinction upon a retired judge, can be supposed to interfere in the slightest degree with the constitution of New Zealand, or with the rights and privileges of the local parliament.[w]

On April 27, 1818, an order of knighthood known as that of St. Michael and St. George was established by letters-patent, for the purpose of affording an appropriate medium by which marks of royal favour might be conferred upon the natives of Malta and the Ionian Islands. The sovereignty of Malta was, and is, vested in the British Crown, while the Ionian Islands formed, at that period, an independent state, under the exclusive protection of the king of England. But, in 1864,

Order of St. Michael and St. George.

[v] See *ante*, p. 229.

[w] New Zealand Parl. Papers, **1878**, A. 1, pp. 15–18. In a similar narrow and mistaken spirit, Sir George Grey afterwards remonstrated with Sir M. Hicks-Beach because honours for political services had been conferred, on the advice of her Majesty's colonial secretary, upon two leading members of the opposition in New Zealand. This proof of the impartiality of the Crown, and its paternal recognition of all public services, was thus turned into an argument against imperial interference in colonial affairs, in a letter which is painful to read as the production of one who was formerly conspicuous for his eminent services as a colonial governor. *Ibid.* **1879**, A. 9.

England relinquished her control over these islands, and they were annexed to the kingdom of Greece. By additional letters-patent under the Great Seal of Great Britain, issued on December 4, 1868, and May 30, 1877, the order of St. Michael and St. George was enlarged and extended for the express purpose of enabling the sovereign to confer distinction upon such of her subjects as "may have rendered, or shall hereafter render, extraordinary and important services to her Majesty as sovereign of the United Kingdom of Great Britain and Ireland, within or in relation to any of her Majesty's colonial possessions; or who may become eminently distinguished therein by their talents, merits, virtues, loyalty, or services." The Knights Grand Cross of this order are not to exceed thirty-five in number; the Knights Commanders are not to exceed one hundred and twenty; and the Companions are not to exceed two hundred. But princes of the blood royal are constituted extra Knights Grand Cross, and foreign princes, &c., honorary members of their respective classes.[x]

Knights of this order created in Canada.

On May 24, 1879, the anniversary of the birthday of her most gracious Majesty, a special honour was conferred upon the dominion of Canada in the person of the governor-general, in that the nobleman holding that exalted office (the Marquis of Lorne) was authorized by her Majesty to hold an investiture of "the most distinguished order of St. Michael and St. George," at the city of Montreal, when, by command of the queen, six Canadian gentlemen, all of them being members of the queen's privy council for Canada, were created, by the governor-general in her Majesty's name, Knights Commanders of the order.[y] This was a remarkable and

[x] Col. Rules and Regulations, **1879**, p. 249. Burke, Peerage and Baronetage, **1879**, p. 1445. Dodd, Manual of Dignities, p. 241.

[y] Canada Official Gazette, May 26, 1879.

unprecedented occurrence in a colony; inasmuch as "for several centuries the power of bestowing this source of dignity and honour has been exclusively confined to the sovereign, and the lord-lieutenant of Ireland." [z]

Canadian questions affecting the prerogative of honour.

Since the confederation of the British North American provinces into the dominion of Canada, two questions have arisen, connected with the exercise of the prerogative of honour; firstly, as to whether appointments to the office of queen's counsel should emanate from the governor-general or from the lieutenant-governor in the several provinces; and, secondly, as to the proper authority under which the great seals, in use in the provinces, should be appointed, and changed, from time to time, as necessity might require.

Right to appoint queen's counsel.

On Jan. 4, 1872, the governor-general of Canada forwarded to the secretary of state for the colonies a report from the dominion minister of justice, requesting the opinion of the law officers of the Crown as to whether, — since the passing of the British North America act of 1867, — it devolved upon the governor-general or upon the lieutenant-governors to appoint queen's counsel; and whether a provincial legislature was competent to pass an act empowering the lieutenant-governor to make such appointments; and, finally, as to how the question of precedence or pre-audience should be settled.

In his reply, dated Feb. 1, 1872, Lord Kimberley intimated that, in the opinion of the Crown law officers, the

[z] Dodd, Manual of Dignities, p. 217. A similar instance of express delegation from the sovereign to bestow, in her Majesty's name, honours and titular distinctions upon her subjects, in a distant part of the empire, is afforded upon the occasion of the visit of his Royal Highness the Prince of Wales to India. On Jan. 1, 1876, the prince, in the presence of the viceroy of India, held a durbar at Calcutta, at which, acting under the authority of a royal warrant, dated Balmoral, Oct. 25, 1875, his Royal Highness, in the capacity of High Commissioner, held a chapter of the order of the Star of India, and invested certain persons, named in the warrant from the queen, with the dignities of Knight Grand Commander, Knight Commander, or Companions of that order. For an account of the ceremonial, see Russell's Tour of the Prince of Wales in India, pp. 370–375.

governor-general, as her Majesty's representative, was constitutionally competent to appoint queen's counsel, but that the lieutenant-governor of a province had no such right. Nevertheless, they considered that any provincial legislature might authorize, by statute, the lieutenant-governor to make such appointments; and might determine the right of precedence or pre-audience, in the provincial courts, between queen's counsel appointed by the governor-general or by the lieutenant-governor.

Notwithstanding this correspondence, or possibly in ignorance of it, the lieutenant-governor of Ontario, acting upon the advice of his ministers, and without previous legislation on the subject in Ontario, proceeded to appoint certain members of the provincial bar to be queen's counsel. These appointments were announced in the Ontario official gazette of March 17, 1872. Shortly afterwards, — upon a report from the dominion minister of justice, — a minute of council was passed, and approved by the governor-general, setting forth reasons which led to the conclusion "that, under the circumstances, great doubt must exist as to the validity of the commissions issued to" these gentlemen. To remove this doubt, and to prevent injurious consequences from an apparently illegal act, it was agreed that new commissions, appointing the same individuals to the office of queen's counsel for Ontario, should be issued by the governor-general under the great seal of Canada.

Upon this decision being made known to the Ontario government, they protested, by a minute of council, approved by the lieutenant-governor, against the proposed action of the dominion government; claiming that such appointments appertained to the local and not to the federal jurisdiction. They also declared that a measure on this subject would shortly be submitted to the provincial legislature.

The governor-general in council replied, in a minute dated Dec. 13, 1872, which reiterated the opinions previously expressed, and advised that the governor-general should not relinquish the proposed exercise of the royal prerogative; but recommended an arrangement between the federal and provincial governments, by which queen's counsel appointed by the governor-general should receive proper status and position in the provincial courts, and commissions issued under

statutory authority by the lieutenant-governors should be recognized in dominion courts.[a]

Accordingly, on March 29, 1873, two acts passed by the Ontario legislature were assented to, in the queen's name, by the lieutenant-governor. One declared that it was lawful for the lieutenant-governor, under the great seal of the province, to appoint from among the members of the Ontario bar such persons as he may approve, to be, during pleasure, "provincial officers under the name of her Majesty's counsel learned in the law for the province." The other declared it to be "lawful for the lieutenant-governor, by letters-patent under the great seal of Ontario, to grant to any member of the bar a patent of precedence in the said courts."[b] Legislation to the same purport took place in the province of Quebec on Dec. 24, 1872,[c] and in Nova Scotia in 1874.[d]

Meanwhile, in conformity with the minute of council above mentioned, the governor-general was pleased to appoint, on Dec. 13, 1872, the gentlemen previously appointed by the Ontario government, to be queen's counsel in and for the province of Ontario. And on Dec. 18 other members of the Ontario bar received the same distinction from the governor-general. On April 2, 1873, various members of the bar in the provinces of Quebec, New Brunswick, and British Columbia, were appointed to a similar rank and position by his Excellency the governor-general.

Acting under the authority of statutes passed by the local legislatures as aforesaid, the lieutenant-governors in the several provinces directed the issue of letters-patent, under the provincial great seals, conferring the distinction and precedence of queen's counsel within the province upon certain members of the provincial bar. In some instances, the same individuals received patents from the governor-general and from a lieutenant-governor.

In due course, this vexed question was submitted to the consideration of the courts of law. The issue was first raised in Nova Scotia. By a Nova Scotia act of 1874 (c. 20), the lieutenant-governor was empowered, by letters-patent under

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[a] Canada Sess. Papers, **1873**, no. 50.

[b] Ontario Statutes, 36 Vict. cc. 3 and 4.

[c] Quebec Statutes, 36 Vict. c. 13.

[d] Nova Scotia Statutes, 37 Vict. cc. 20 and 21.

Appointment of queen's counsel in Canada.

the great seal of the province, to appoint members of the provincial bar to be queen's counsel in and for the province. And by c. 21 of the same session, the lieutenant-governor was authorized to assign patents of precedence to the several queen's counsel in Nova Scotia who had been appointed since confederation. Under this act, on May 26, 1876, letters-patent were issued, sealed by the great seal of the province, appointing additional queen's counsel, and establishing a new order of precedence, which gave precedence and pre-audience to certain persons above Mr. J. N. Ritchie, Q. C., who were not previously entitled thereto.

Mr. Ritchie had been appointed to the rank of queen's counsel, in 1872, by a patent from the governor-general. He therefore appealed to the Supreme Court of the province for a recognition of his rank and precedence before the gentlemen who had, as he contended, unlawfully obtained precedence over him, by virtue of the letters-patent aforesaid. Mr. Ritchie protested against the patent of precedence granted to these gentlemen, on the grounds, firstly, that the Nova Scotia acts of 1874, cc. 20 and 21, were *ultra vires*, and the appointments thereunder invalid; and, secondly, that the act to enable the governor in council to regulate the precedence of queen's counsel could not lawfully be construed retrospectively, so as to interfere with his precedence by virtue of his appointment in 1872.

The matter of precedence was investigated by the Supreme Court of Nova Scotia. Judgment was rendered in December, 1876. The court refused to declare that the provincial statutes of 1874 were *ultra vires*, inasmuch as her Majesty, through her secretary of state, had suggested the passing of such acts, and afterwards, through the lieutenant-governor, had given her assent to the same; thereby authorizing, at any rate "prospectively, after the passing of the act, her lieutenant-governor of this province, to exercise her prerogative right, to the extent in which it is necessarily conferred on that high officer by the statute." But as the precedence claimed by the gentlemen who had received provincial appointments over Mr. Ritchie had been declared to be retrospective, contrary to the provisions of the statute, the court decided that their claim was unauthorized and invalid. The majority of the court were also of opinion that the wrong

seal had been made use of, for the purpose of authenticating the patents issued by the lieutenant-governor.[e] But this is a distinct question, which will be presently considered.

In 1878, the whole matter was brought before the Supreme Court of the dominion upon an appeal.

On Nov. 4, 1879, this court gave judgment. They dismissed the appeal with costs, thereby confirming to Mr. Ritchie, Q. C., his precedence, by virtue of his appointment in 1872, under the great seal of the dominion.

Lieutenant-governors not competent to appoint queen's counsel.

A majority of the court, moreover, expressed a decided opinion that the sole right of conferring the rank and dignity of queen's counsel within the dominion of Canada appertained to the queen, or to her direct representative, the governor-general. That the British North America act, 1867, does not, either expressly or by inference, divest her Majesty of this branch of her prerogative, or enable the lieutenant-governors of the provinces, either with or without an authority derived from the provincial legislatures, to exercise the same. That authority to exercise this prerogative could not be conveyed by a mere despatch from a secretary of state, but only by warrant, under the sovereign's sign-manual. Wherefore the acts of the Nova Scotia legislature (and, by the same rule, the acts of the other provincial legislatures), in so far as they assume to invest the lieutenant-governor with power to appoint to the rank or dignity of queen's counsel, are *ultra vires* and void. For the queen is not an integral part of the legislatures of the provinces, as she is expressly declared to be of the dominion parliament, by the British North America act, and therefore no provincial statute can impair or affect her Majesty's right to the exclusive exercise of all her prerogative powers.[f]

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[e] Russell and Chesley, Nova Scotia Rep. vol. ii. p. 450. See also, Canada Sess. Papers, **1877**, no. 86.

[f] Lenoir *v.* Ritchie. Montreal "Legal News," vol. ii. p. 373. The effect of this decision was to annul the appointment of about one hundred queen's counsel unlawfully

This admirable judgment entirely accords with the constitutional doctrine propounded at the beginning of this section, which reserves to the sovereign, or to her direct and immediate representative, the administration of the prerogative of honour.

Great seal of Nova Scotia.

As has been already intimated, in the case of Lenoir *v.* Ritchie, the further question of the validity of the existing great seal of the province of Nova Scotia was raised; and the use of the old seal, for the purpose of authenticating the appointment of queen's counsel, instead of the new seal, appropriate to Nova Scotia as a province of the dominion, was declared by a majority of the Supreme Court of Nova Scotia to have been illegal.

The uncertainty of the law, and the importance of obtaining a clear and speedy decision upon this question of the seals, had previously induced the government of Nova Scotia to request the intervention of the imperial authorities, and the passing of an imperial statute, to remove all doubts upon the subject. This request was made known to the governor-general by a despatch from Lieutenant-Governor Archibald, dated March 28, 1877.

Meanwhile, the imperial government itself had decided, upon the advice of the law officers of the Crown that, inasmuch as the new seal had not been formally and officially introduced into Nova Scotia, the use of the old seal of the province was not irregular; and that any legislation required to authorize a change of seal, or to validate supposed irregularities, should emanate from the dominion parliament. So, in 1877, a dominion act was passed authorizing the lieutenant governor in council, in each and all of the provinces,

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appointed by the lieutenant-governors in the various provinces of the dominion. The decision was received with much satisfaction by the leading lawyers and judges throughout Canada. *Ibid.* pp. 369, 392, 408.

to change the great seal of the province and to validate the past use of the old seal in Nova Scotia.[g] Statutes to this effect were thereupon passed by the Nova Scotia legislature without delay.[h]

The interest which attaches to this question from a constitutional point of view, and its bearing upon the royal prerogative, which we are now considering, will justify a fuller mention of the circumstances which led to this settlement of the difficulty.

On Oct. 14, 1868, the colonial secretary (the Duke of Buckingham) forwarded to the governor-general of Canada (Lord Monck) her Majesty's warrant granting and assigning certain armorial bearings to be hereafter used on seals, shields, banners, flags, and otherwise in and by the several provinces forming part of the dominion of Canada, "for the greater honour and distinction of the said provinces;" and declaring that the said united provinces shall use "a Great Seal of Canada" which shall be composed of a combination of the arms of the particular provinces.

On May 8, 1869, the colonial secretary transmitted to the governor-general five seals, to be used by the dominion of Canada and by the four provinces composing the same. Also, the queen's warrant, under her royal sign-manual, directing the use of the said seals, and requiring that the old seals, heretofore in use, should be returned, in order that they might be defaced by her Majesty in council.

On July 2, 1869, the governor-general applied to the secretary of state for instructions for his guidance in respect to the four provincial seals. He enclosed a memorandum from the minister of justice, which raised the question whether it was not within the competency of the lieutenant-governors in council (under the one hundred and thirty-sixth section of the British North America act) to appoint and direct the great seals to be used in the several provinces of the dominion; the more so as these lieutenant-governors were now appointed by the governor-general in council and not by the queen.

In his reply, dated Aug. 23, 1869, the colonial secretary

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[g] Canada Act 40 Vict. c. 3. [h] N. S. Acts 40 Vict. cc. 1 and 2.

Nova Scotia great seal case.

expressed his conviction that the right of her Majesty exclusively to order and to change at will the great seals of the provinces was as unquestionable as her right to determine the great seal of the dominion, which had not been disputed; and that, as this right was in existence before the passing of the British North America act, it cannot be deemed to have been taken away by implication, to be inferred from the one hundred and thirty-sixth section aforesaid, which is in terms expressly confined to the provinces of Ontario and Quebec. This section, moreover, may be construed as prescribing the proper mode of introducing any alteration of the seals in use in those provinces; namely, by proclamation, or by order of "the lieutenant-governor in council," and not as limiting the queen's prerogative to appoint and direct the seals to be used.[1] If, on the contrary, this clause is assumed to give direct and sole power to the lieutenant-governors of Ontario and Quebec in council to alter the seals of those provinces at pleasure, the same right should be conceded to the lieutenant-governors of New Brunswick and Nova Scotia; and this authority should be conferred either by an imperial statute or by local legislation, to which the consent of the Crown should first be given.

Accordingly on Nov. 16, 1869, the dominion government directed that the great seals for Nova Scotia and New Brunswick should be transmitted to the lieutenant-governors of those provinces, with instructions to give effect to the royal pleasure by the adoption of the same for use in their governments. The new seals for Ontario and Quebec were authorized to be forwarded in like manner, with copies of the correspondence on the subject, so as to afford these governments "the opportunity of adopting such seals, should they think proper to do so."

The executive council of Nova Scotia, however, preferred their old seal to a new one. They therefore adopted a minute, which was forwarded to the governor-general for the purpose of transmission to her Majesty's government, wherein, while freely admitting the right of the queen to change and alter

[1] The clause is as follows: "Until altered by the lieutenant-governor in council,' the great seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the provinces of Upper Canada and Lower Canada respectively, before their union as the province of Canada."

the provincial seal at pleasure, they asked leave to retain in use their old seal, instead of adopting a new one. They afterwards craved permission from the Crown to pass an act to sanction the continued use of the old seal, but authorizing the lieutenant-governor to alter and appoint the use of a new great seal in future. The secretary of state for the dominion acknowledged the receipt of this minute, but made no reply to its request.

For several years afterwards, the question of the seals remained in abeyance in Nova Scotia. At length, on March 28, 1877, the lieutenant-governor wrote to the dominion secretary of state, to call attention to a new difficulty which had arisen out of this matter. By two acts, passed in 1874, the lieutenant-governor in council was empowered to appoint queen's counsel, and to regulate precedence at the provincial bar. He had, accordingly, issued certain patents of precedence under the great seal of the province. The Supreme Court at Halifax, however, in a judgment already referred to,[1] impugned the validity of this proceeding, partly on the ground that the seal used to authenticate these patents was the old province seal, and not the new seal directed to be made use of by the queen's warrant of May 7, 1869. The court were of opinion that the use of the old seal was no longer legal, and that "the new seal, after its delivery to the lieutenant-governor in 1869, became, and is now, the great seal of Nova Scotia, and the only one."

With a view to dispose of this difficult question, the provincial government requested the dominion government to forward an address to the queen, from the Council and Assembly of Nova Scotia, to solicit the passing of an imperial statute for its solution. But, before this request could be complied with, a despatch was received by the governor-general from the colonial secretary, dated March 29, 1877, which stated that the law officers of the Crown were of opinion that the queen's warrant, of May 7, 1869, above mentioned, was directory and not imperative, so that the non-observance of its injunctions did not impair the validity of documents which had been authenticated by means of the old seal, the use of which was not abolished, until the new

[1] See *ante*, p. 244.

Nova Scotia great seal case.

seal was formally introduced; that while the failure to comply with the directions of the royal warrant in regard to the introduction of the new seal might properly be condoned by imperial authority, yet, under the existing circumstances, and having regard to the provisions of the British North America act, it would be more advisable to have recourse to dominion legislation for this purpose.

These opinions were approved by the governor-general in council; and the lieutenant-governor of Nova Scotia was notified thereof.[k]

Immediately afterwards, as has been already explained, the dominion parliament passed an act, to remove doubts on this subject, "so far as the parliament of Canada may have power to act in the premises," and to declare that "the lieutenant-governor of each province in council has the power of appointing and of altering from time to time the great seal of the province. This act also declared that the use, heretofore, of the old seal, in Nova Scotia, should be deemed to have been valid, "notwithstanding any doubt which may exist as to such seal being the great seal."[1]

On their part, the local legislature of Nova Scotia lost no time in acting upon these conclusions. In the same year, and without waiting (as they should have done, according to the opinion of the English Crown law officers) for dominion legislation on the subject, they passed two statutes, — one "to empower the lieutenant-governor of the province in council to alter and change the great seal of the province from time to time;" and the other, "to ratify and confirm all acts and proceedings heretofore had and done under the great seal" previously in use in this province, from the commencement of the year 1869 until the said great seal shall have been changed by order of the governor in council.[m]

Overlooking the irregularity attending the passing of these acts, before due authority for such enactments had been given by the dominion parliament, they were permitted to remain in operation, and thus to dispose effectually of a question which had continued in dispute for nearly ten years.

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[k] Canada Sess. Papers, **1877**, no. 86.

[1] Canada Act 40 Vict. c. 3.

[m] Nova Scotia Statutes 40 Vict. cc. 1 and 2.

Inasmuch as a majority of the judges of the Supreme Court of Nova Scotia, in giving judgment in the case of Lenoir *v.* Ritchie, had, as we have seen, dwelt at considerable length upon the question of the validity of the seal used to authenticate the patents issued by the lieutenant-governor to confer the rank of queen's counsel upon certain lawyers in the province, and as it had been held, by a majority of the judges of that court, that the seal affixed to these patents was not the true great seal of Nova Scotia, — this question necessarily came under the notice of the Supreme Court of the dominion, in deliberating upon the appeal from the judgment of the Nova Scotia court, in this case. The judges of the Supreme Court of Canada did not, however, deem it of consequence to consider this question. They were evidently of opinion that it had been duly settled by competent authority, and that no judicial interposition was required, either to explain the law or to regulate its operation.

Imperial Dominion exercisable over Self-governing Colonies :

h. *By the administration of the prerogative of mercy.*

Prerogative of mercy.

In the official rules and regulations for her Majesty's colonial service, it is stated that the powers of every officer administering a colonial government are conferred, and his duties for the most part defined, in her Majesty's commission and the instructions with which he is furnished. But that, subject to the special law of each colony, it is customary that a governor should be "empowered to grant a pardon or respite to any criminal convicted in the colonial courts of justice." And "he may pardon persons imprisoned in colonial gaols under sentence of a court-martial; but this is not to be done without consulting the officer in command of the forces." Furthermore, "he has in general the power of remitting any fines, penalties, or forfeitures, which may accrue to the queen; but if the fine exceeds fifty pounds, he is, in some colonies, only at liberty to sus-

pend the payment of it until her Majesty's pleasure can be known." [n]

It is also provided that "no judge presiding on a criminal trial must, upon any account, fail to take notes of the evidence adduced, and no capital sentence must be executed until the governor of the colony shall have perused those notes."

"In general no reference in criminal cases is to be made from the government of any colony to this country, with a view to the confirmation or remission of sentences pronounced by the colonial courts. But her Majesty's government will be ready to afford any information, instructions, or advice, for which the governor may think it necessary to apply, whenever any question may arise on any criminal proceeding on which there may be any special and adequate motive for invoking the interference of her Majesty's government in this country. Whenever a capital sentence shall have been executed, a report of it must be transmitted to the secretary of state." [o]

Exercise of this prerogative by colonial governors.

By these regulations, direct and exclusive authority is conferred upon governors of British colonies holding commissions from the Crown to administer the royal prerogative of pardon to any criminal convicted in any court of justice in the colony.

More explicit and detailed directions on this subject are embodied in the royal commission of every colonial governor, and in the instructions accompanying the same. These directions have been modified of late years, particularly in the case of colonies in the enjoyment of "responsible government," and to a still greater extent in reference to the dominion of Canada.

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[n] Col. Reg. 1879, secs. 22–25. Forsyth, Const. Law, pp. 75–82, 460. For the special law in India, see Lyon's Law of India, vol. i. c. p. c. p. 71; The Queen *v.* Burah, Appeal Cases, vol. iii. p. 899.

[o] Col. Reg. 1879, secs. 406, 407. Circular Despatch of Nov. 14, 1877.

The revised instructions applicable to self-governing colonies in general, are to be found in the letters-patent and royal instructions issued to the governor of South Australia, on April 28, 1877.

Instructions for the guidance of governors.

By these official instruments, the governor is authorized and empowered by her Majesty "as he shall see occasion, in our name and on our behalf, when any crime has been committed within our said colony, or for which the offender may be tried therein, to grant a pardon to any accomplice in such crime who shall give such information as shall lead to the conviction of the principal offender, or one of such offenders if more than one; and, further, to grant to any offender convicted in any court, or before any judge, or other magistrate, within our said colony, a pardon either free or subject to lawful conditions; or any respite of the execution of the sentence passed on such offender, for such period as to our said governor may seem fit; and to remit any fines or forfeitures due or accrued to us in respect thereof; provided always, that our said governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself, or be removed from our said colony."

The twelfth section of the draft of instructions accompanying the letters-patent aforesaid, further provides that the governor shall call upon the judge presiding at the trial of any offender who may be condemned to suffer death by the sentence of any court within the said colony, to make to him a written report of the case of such offender, and such report shall be taken into consideration by the governor at the next meeting of the executive council, where the judge may be specially summoned to attend with his notes; "and our said governor shall not pardon or reprieve any such

offender as aforesaid, unless it shall appear to him expedient so to do, upon receiving the advice of our said executive council therein; but in all such cases he is to decide either to extend or to withhold a pardon or reprieve, according to his own deliberate judgment, whether the members of our said executive council concur therein or otherwise; entering, nevertheless, on the minutes of our said executive council a minute of his reasons at length, in case he should decide any such question in opposition to the judgment of the majority of the members thereof." [p]

An act of clemency, not of judicial authority.

In administering the prerogative of mercy, a governor in council does not act as a court of appeal in criminal cases. For though in exercising the royal prerogative the governor may remit a sentence, he does not technically reverse it, nor by his action in any way pronounce it wrong. This he could only do after hearing an appeal from the finding of the court, if there were provision for such an appeal. The act of pardoning a sentenced criminal is one of pure clemency: it is in no respect judicial. And not only in capital cases, where the course of procedure to be taken by the governor is prescribed by the royal instructions, but in all cases where clemency is sought at his hands, a governor would do well to consult informally those who could best assist his judgment; more especially the crown prosecutor and the judge who has tried the case, whose advice would doubtless be readily afforded when thus solicited. But judges should not be required to report beforehand upon every case wherein they have passed sentence, as that would place both the judges and the governor in an untenable and undesirable position.[q]

The independent authority which is conferred upon

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[p] South Australia Parl. Proc. **1877**, vol. iii. no. 109.

[q] Secretary of state (Lord Carnarvon) to Governor Weld, of Tasmania. Tasm. Leg. Coun. Jour. **1878**, appx. no. 36, p. 8.

governors by their commission and instructions to determine absolutely, whether to grant or to withhold the royal clemency to criminal offenders, irrespective of the opinions expressed or advice given by their responsible ministers, has given rise in repeated instances, to complaints, as being a proceeding at variance with the principle of local self-government, and with the responsibility of ministers, whose advice the governor is required to ask, but is not obliged to follow.

Exercise of this prerogative in self-governing colonies.

With a view to allay dissatisfaction, and to define with greater precision the constitutional practice which should be observed in cases of this kind, her Majesty's secretary of state for the colonies (Lord Carnarvon) addressed a circular despatch to the governors of all the Australian colonies on this subject, on May 4, 1875.

This despatch proceeds to state "that it should be understood that no capital sentence may be either carried out, commuted, or remitted, without the consideration of the case by the governor and his ministers, assembled in executive council. A minor sentence may be commuted or remitted by the governor after he has duly considered the advice either of his ministers collectively, or of the minister more immediately responsible for matters connected with the administration of justice." All such advice, however, whether tendered in council or otherwise, should be in writing. Upon receiving the same, the governor "has to decide for himself how he will act." "Under a system of responsible government, he will allow greater weight to the opinion of his ministers in cases affecting the internal administration of the colony, than in cases in which matters of imperial interest or policy, or the interests of other countries or colonies are involved." Nevertheless, under all circumstances, "it is true that a governor may (and indeed must, if in his judgment it seems right) decide in opposition to the advice tendered

to him. But the ministers will have absolved themselves of their responsibility, and though in an extreme case, — which, for the sake of argument, may be stated, although it is not likely to arise in practice, — [the local] parliament, if it disapproves the action taken, may require the ministers to resign; either on the ground that they tendered wrong advice, or that they failed to enforce recommendations deemed to be right. I do not think the great principle of parliamentary responsibility is impaired by this result. On the other hand, a governor who, by acting in opposition to the advice of his ministers, has brought about their resignation, will obviously have assumed a responsibility for which he will have to account to her Majesty's government."

The colonial secretary proceeds to state that he knows it has been argued, "that ministers cannot undertake to be responsible for the administration of affairs unless their advice is necessarily to prevail on all questions, including those connected with the prerogative of pardon. But I am led to believe that this view does not meet with general acceptance, and there is at all events good reason why it should not. The pressure, political as well as social, which would be brought to bear upon the ministers if the decision of such questions rested practically with them, would be most embarrassing to them, while the ultimate consequences might be a serious interference with the sentences of the courts.

"On the whole, therefore, I hope that the colonial legislatures, and public opinion generally, will concur with me in the opinion that the existing rule and practice is salutary, and may with advantage be maintained." [r]

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[r] Commons Papers, **1875**, vol. liii. p. 696. See also, to the same effect, Earl Carnarvon's Despatches to Governor Robinson, of Oct. 7, 1874; *ibid.* p. 678.

Double responsibility for exercise of this prerogative.

Expressing himself to a similar effect, in a debate in the House of Lords upon this question, on April 16, 1875, Earl Carnarvon adds these significant remarks: "No doubt it may be objected to the system of the governor consulting his ministry, and still acting on his own judgment, that it sets up a double responsibility. In reply, I submit that in this case a concurrent responsibility is better. On the one hand, the governor will not be relieved of his responsibility to the Crown, and, on the other hand, the local government will not be relieved of its responsibility to its own parliament; so that, while the colonial parliament may punish the minister for improper advice, the Crown may punish the governor for an improper decision. The fact is that, in these matters, we cannot be too logical," an expression which was afterwards explained to mean "we ought not to be too logical." [s]

These conclusions, however, merely point to the possible consequences of a material difference of opinion, upon a question arising out of the exercise by a governor of the prerogative of mercy, between the Crown and the governor on the one hand, and between his ministers and the local parliament on the other. It is quite conceivable that a governor might so act, in a case of this description, as to merit and receive a rebuke from the Crown, without, at the same time, being recalled or dismissed from office. In like manner, it is equally reasonable to suppose that, under certain circumstances, one or both of the houses of the local parliament might record their disapproval of advice given by ministers, in a matter affecting the administration of the prerogative of mercy by the governor, without their insisting that their vote of censure should be followed up by the resignation of the ministry.

[s] Hans. Deb. vol. ccxxiii. p. 1073. See the Earl of Kimberley's speech, *ibid.* p. 1076.

While it is true that, as a general principle, "advice and responsibility go hand in hand," complete responsibility for an act should not always be insisted upon, when that act is performed by one who is himself primarily responsible for it, on imperial considerations, which remove the act itself from the category of cases of purely local import and signification.

The undermentioned precedents will exhibit these principles in action, and will show their practical operation in colonial politics: —

Australian precedents.

After the establishment of responsible government in the several colonies of Australia, much misapprehension and diversity of practice arose therein, in regard to the constitutional mode of dealing with applications for the remission or mitigation of sentences upon convicted criminals.

In some places, it was customary to allow the prerogative of mercy to be administered, as in ordinary matters of local concern, upon the advice of ministers, without attaching to the governor any peculiar or exclusive responsibility. So far had this departure from strict rule, and from the obligations imposed upon the governor by his instructions, been carried that, in at least one colony, it had been the practice for the governor to leave signed pardons in blank, to be filled up and used during his temporary absence from the seat of government.[t]

Lord Belmore in New South Wales.

Shortly after the appointment of the Earl of Belmore, in 1868, to be the governor of New South Wales, the proper constitutional procedure, in the administration of this prerogative, was amicably discussed between himself and the premier (Mr. John Robertson). By mutual consent, the secretary of state for the colonies was appealed to for his views in the matter of the personal responsibility of the go-

[t] New Zealand, House of Representatives Journal, **1871**, appx. vol. i. pp. 79–82, 90; *ibid.* **1872**, A. no. 1, *a*. p. 10. New Zealand Parl. Deb. July 5, **1876**, p. 336.

vernor in granting or withholding remissions of sentences, as to whether, in fact, the governor was bound by his instructions to act on his own independent judgment or not.

This application elicited from the secretary of state (Lord Granville) a brief reply, dated Oct. 4, 1869, which said that "the responsibility of deciding upon such applications rests with the governor, and he has undoubtedly a right to act upon his own independent judgment. But unless any imperial interest or policy is involved, as might be the case in a matter of treason or slave-trading, or in matters in which foreigners might be concerned, the governor would be bound to allow great weight to the recommendation of his ministry." [u]

Lord Granville's despatch was followed by another from his successor, Lord Kimberley, addressed to all the Australian governors, and dated Nov. 1, 1871. It was herein stated that "the governor, as invested with a portion of the queen's prerogative, is bound to examine personally each case in which he is called upon to exercise the power entrusted to him, although in a colony under responsible government he will, of course, pay due regard to the advice of his ministers, who are responsible to the colony for the proper administration of justice and the prevention of crime, and will not grant any pardon without receiving their advice thereupon." [v]

Clear and explicit as were the directions contained in this circular despatch (of which a brief extract only is given in the preceding citation), they appear to have been misunderstood in New South Wales. Upon the arrival of Sir Hercules Robinson in that colony, in June, 1872, to assume the government, he found a practice prevailing there almost as objectionable and irregular as the one above mentioned which was complained of by Lord Belmore; namely, that all applications for mitigation or pardon of sentences (not being capital cases,) were expected to be disposed of by the governor himself, unaided by advice from any minister. Governor Robinson lost no time in applying to the colonial secretary for further instructions thereupon.

Sir Hercules Robinson.

Lord Kimberley, in reply to this appeal, wrote a despatch,

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[u] Commons Papers, **1875**, vol. liii. pp. 631, 632.

[v] *Ibid.* vol. liii. p. 633.

dated Feb. 17, 1873, pointing out that there was no inconsistency in previous instructions issued from the colonial office on this subject. "A governor, in granting pardons, is exercising a portion of the queen's prerogative, and has strictly a right to exercise an independent judgment;" but, in a colony under responsible government, he is "bound not to grant any pardon without receiving [ministerial] advice thereon." It is only necessary, "in capital cases," for the governor to "formally consult with his ministers in council." In other cases, the governor may consult, or act upon the advice of, "the minister who is, for the time being, primarily concerned in such matters, in whatever manner is most convenient to both." [w]

Impressed with the importance of securing ministerial responsibility on behalf of all administrative acts he might perform, and considering these directions as a ratification by the colonial minister of this doctrine, Governor Robinson lost no time in informing his chief minister (Mr. Parkes) of his readiness to initiate a system in regard to the prerogative of pardon in strict accordance with constitutional principles.

Mr. Parkes embodied his own views upon the subject in a memorandum, dated May 30, 1874. "He preferred that the responsibility of deciding upon applications for mitigation of sentences should remain, as heretofore, solely with the governor; but, if a change were insisted on, and the cases of prisoners were to be decided on the advice of ministers, as required by the secretary of state, he could see no sufficient reason for making a distinction between this class of business and the ordinary business of government. In effect, he declined to accept any responsibility for ministers, unless they had, not only in form, but in substance, a voice in such decisions." [x]

Contrasting the "independent judgment" claimed for the governor, under his instructions, with the position of the sovereign in the mother country, Mr. Parkes proceeds to remark: "There can be no question, I believe, that from the beginning of the present reign the home secretary in England decides absolutely in all matters of this kind in the name of

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[w] Commons Papers, **1875**, vol. liii. pp. 637, 642.
[x] *Ibid.* pp. 638, 642.

the Crown, and that the Crown does not in practice interfere." [y] This portion of the prerogative, then, when intrusted to the governor of a colony, "unlike the prerogative in England, is intended to be a reality in its exercise;" and the governor, in such cases, "is subject to a superior and instructing authority." And, even when ministers are permitted to "advise him," "it cannot be doubted that the advice here intended is wholly distinct in its nature from the advice given in the general conduct of affairs. In the general case, the advice is uniformly accepted, as the first condition of the adviser continuing in office." . . . "The exceptional advice implied seems to be of the nature of opinion or suggestions, to which weight may be attached as coming from persons 'responsible to the colony for the proper administration of justice and the prevention of crime,' but which, in any case or in every case, may be partially or wholly disregarded." [z]

In reply to this memorandum, Governor Robinson observes that, "under a constitutional form of government, the Crown is supposed to accept or reject the advice of responsible ministers." As governor, he has an "undoubted right" to reject such advice, — if he is prepared to accept the consequences. But, practically, he would never do so, except in cases which he considered to involve "such a gross abuse of the prerogative that both the secretary of state and local public opinion would be likely to support him in the adoption of extreme measures."

"In all ordinary cases, therefore, in which neither imperial interests or policy were involved, the governor, whatever his own private opinion might be," was prepared to accept the advice of the minister specially responsible to the colony for the administration of justice. He entirely concurred with Mr. Parkes, "that the responsibility for the exercise here of the queen's prerogative of pardon must either, as heretofore, rest solely with the governor, or it must be transferred to a minister, who will be subject in this, as in the discharge of

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[y] Commons Papers, **1875**, vol. liii. p. 638. Mr. Parkes might have said the same of the reign of George IV. See Colchester Diary, vol. iii. p. 297. For the constitutional practice in the present reign, see Martin, Life of the Prince Consort, vol. i. p. 141.

[z] Commons Papers, **1875**, vol. liii. p. 638.

Sir H. Robinson on this prerogative.

other administrative functions, only to those checks which the Constitution imposes on every servant of the Crown who is at the same time responsible to Parliament. He therefore expressed his desire "that, for the future, all applications for mitigation of sentences should be submitted to me, through the intervention of a responsible minister, whose opinion and advice as regards each case should be specified in writing upon the papers." [a]

Ministers agreed in these conclusions; and a minute of council was passed, dated June 2, 1874, in conformity with the plan proposed by the governor.

In reporting this decision to the secretary of state for the colonies (Lord Carnarvon), for his approval, Governor Robinson states: "This is simply the mode in which all the ordinary business of government is conducted; and I could see no sufficient reason for making any distinction in these cases." "It appears to me, too, that the plan determined on meets all the requirements specified in Lord Granville's and Lord Kimberley's despatches on this subject. The papers, in every case, will be laid before the governor, for his decision. He will thus have an opportunity of considering whether any imperial interest or policy is involved, or whether his personal intervention is called for on any other grounds." If there should be no such necessity, he would of course give effect to the advice of his responsible minister upon the case.

Adverting to the possible difference of opinion upon such a question between the governor and his advisers, — and to Mr. Parkes's contention "that the refusal of the governor to accept the advice of the minister, in any case of pardon, would necessarily involve his resignation," — Governor Robinson remarks that this argument is, in his opinion, pushed too far. "Of course, theoretically, such a view is correct; but I need scarcely point out that, in the practical transaction of business, ministers do not tender their resignations upon every trivial difference of opinion between themselves and the governor." [b]

Lord Carnarvon, in three separate despatches to Governor Robinson, severally dated Oct. 7, 1874, expresses his ap-

[a] Commons Papers, **1875**, vol. liii. p. 640.
[b] *Ibid.* vol. liii. p. 643.

proval of the foregoing arrangements, which are essentially identical with the practice established, in similar cases, in all other Australian colonies, and with the views of her Majesty's government. But, "as Mr. Parkes correctly observes, the minister in a colony cannot be looked upon as occupying the same position, in regard of the queen's prerogative of pardon, as the home secretary in this country. The governor, like the home secretary, is personally selected by the sovereign as the depositary of this prerogative, which is not alienated from the Crown by any general delegation, but only confided as a matter of high trust to those individuals whom the Crown commissions for the purpose. Actually, therefore, as well as formally, the governor will continue to be, as he has hitherto been, in New South Wales and in other colonies, the person ultimately responsible for the exercise of the prerogative. But this is quite consistent with the further duty, expressly imposed upon him, of consulting his ministers or minister, before he acts."

In proof of the necessity for reserving to the governor the final decision upon questions that might involve consequences too momentous for the determination of the ministers of any one colony, however large and important, Lord Carnarvon points out that "the effect upon neighbouring colonies, the empire generally, or foreign countries, of letting loose a highly criminal or dangerous felon to reside in any part of the world, except only that principally concerned to take charge of him, was a step which might clearly and not unreasonably give rise to complaints from without the colony; nor could the recommendation of a colonial ministry, in favour of such a course, be of itself a sufficient justification of it." Moreover, to release a felon upon any such condition was altogether contrary to the theory now generally accepted: "that a community should not relieve itself of its worst criminals, at the expense of other countries." The local enactment which has heretofore authorized the exercise of this right (11 Vict. c. 34) "ought to be considered as virtually obsolete," and as an act which "cannot be too soon repealed." [c]

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[c] Commons Papers, **1875**, vol. liii. pp. 676–679. Lord Carnarvon afterwards stated "that the colonies of New South Wales and [South] Australia have expressed their willingness to repeal this law." Hans. Deb. vol. ccxxiii. p. 1074. And the revised instructions issued to the

This decision of the secretary of state, that, while the governor of a colony is bound to consult his ministers upon all applications connected with the exercise of the prerogative of pardon, — whether capital cases or otherwise, — he remains ultimately responsible for the administration of this prerogative, was accepted in New South Wales, as a reasonable and satisfactory settlement of the constitutional question.[d]

Gardiner's case.

Meanwhile, in the year 1872, before the change of practice had been adopted which relieved the governor of personal responsibility in all ordinary cases of applications for pardon, Governor Robinson, in his discretion and independent judgment, had seen fit to release from gaol one Gardiner, a convicted felon, on condition that he should leave the colony. Two years afterwards, in June, 1874, this matter was brought before the House of Assembly. A motion was made to present an address to the governor, disapproving of Gardiner's release, which was only negatived by the casting-vote of the speaker. But the question was agitated in the country, and numerous petitions were addressed to the governor on Gardiner's behalf. This led his Excellency to reconsider the question. After reviewing his former decision, and determining that it ought not to be reversed, he embodied his views in a minute, which he laid, with the petitions, before the executive council. That body, having examined the papers, were of opinion that no grounds existed to warrant them in advising the governor to withdraw the conditional pardon he had given to Gardiner. His Excellency accordingly refused to grant the prayer of the petitioners.

In order to allay the existing agitation in the public mind, and at the same time to acquaint parliament with what had been done, the proceedings of the executive council in this case, together with the governor's minute to council, were laid on the table of both houses by ministers, just before the prorogation, so that the papers might be printed and circulated during the recess.

When parliament re-assembled, this act of laying on the

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governor of South Australia, in 1877, and to the governor-general of Canada in 1878, contained a clause forbidding banishment, as a condition of pardon, except in the case of political offences.

[d] Commons Papers, **1875**, vol. liii. p. 691.

table the governor's minute was taken exception to in the Assembly, and an address to the governor, condemnatory of that proceeding, as well as of the tenor of the document itself, was moved and defeated (again) by the speaker's casting-vote. But during the debate the governor was charged, by different members, with having "insulted and degraded the house by unconstitutional interference and criticism."[e] Shortly afterwards, parliament was dissolved. In the new Assembly, the attack was renewed, under circumstances which have been already explained in a previous section of this chapter.[f]

These repeated and not altogether unsuccessful attempts to render the governor directly amenable to the House of Assembly, for acts performed by him upon his personal responsibility as an imperial officer, were reported by him to the secretary of state, in a despatch dated Nov. 30, 1874. While these attempts had hitherto been defeated, the governor's actions had been exposed to parliamentary criticism, through, as his Excellency remarked, "my having had imposed on me, personally, as her Majesty's representative, administrative functions, independent of my responsible advisers. There are, of course, political duties which the governor, as holding the balance between contending parties, must always, necessarily, perform upon his own independent judgment, such, for example, as the refusal or acceptance of the resignation of the ministry; the selection of a new premier; and the granting or refusal of a dissolution, when asked for. But the late discussions in parliament have, I think, clearly shown that no possible advantage which can be gained by requiring the governor personally to take the initiative in ordinary administrative acts can compensate for the animadversions to which his proceedings must, in such case, be exposed in the popular branch of the legislature."

"There is only one way," his Excellency adds, "in which the governor's action can be kept out of the heated atmosphere of parliamentary discussions, and that is by relieving him, as far as possible, from the duty of taking the initiative in the transaction of administrative business. His action, as

[e] Commons Papers, **1875**, vol. liii. pp. 680-683.
[f] See *ante*, p. 96.

regards such details, should, I think, be limited to accepting or rejecting the advice of his ministers. The importance of maintaining this principle appears to have been recognized and acted upon to a greater extent in the neighbouring colonies than it has been in New South Wales."[g]

In acknowledging the receipt of this despatch, the secretary of state accepted, without hesitation, the governor's explanation of his conduct, to which exception had been taken in the House of Assembly, and stated that he should present all the papers on the subject to the Imperial Parliament.[h] After they were so submitted, a debate arose upon the general question in the House of Lords, wherein a decided concurrence of opinion was expressed in favour of maintaining the ministerial doctrine, as to the right and duty of the governor to exercise a final and independent judgment, as an imperial officer, upon all questions arising out of the exercise of the prerogative of mercy; but only after he had fully and freely considered the advice of his ministers upon each particular case.[i]

Case of Louisa Hunt.

In 1877, the exercise of the prerogative of mercy by the governor of Tasmania, on behalf of a convict named Louisa Hunt, upon the advice of his ministers, and in accordance with the revised instructions issued by her Majesty's colonial secretary, was censured by both houses of the local parliament. Papers on the subject were presented to the parliament in answer to addresses. Whereupon in each chamber, it was resolved, that "the advice tendered by his ministers to his Excellency, and which led to the release of the prisoner Louisa Hunt, was improper, and such as to tend to subvert the administration of justice." The cabinet, however, did not make this "a ministerial question." They did not dispute the competency of the houses to pronounce upon their conduct in the matter, and they accepted the censure; but did not, on that account, resign office. The ministry was weak in parliamentary support, and it fell shortly afterwards, because of the rejection by the Assembly of their financial policy. But ministers did not consider that the disapproval

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[g] Commons Papers, **1875**, vol. liii. pp. 680–685.

[h] *Ibid.* vol. liii. p. 685.

[i] Hans. Deb. vol. ccxxiii. p. 1065.

by the houses of the advice they had given upon a question the final disposal of which was vested in the governor, necessitated their resignation of office.[j]

There is another question of considerable interest and importance, in connection with the administration of the prerogative of mercy, which should be noticed: it is in regard to the right of a governor to issue a proclamation of general amnesty to political offenders.

Proclamations of general amnesty.

In the circular despatch addressed by the Earl of Kimberley to colonial governors on Nov. 1, 1871, which treats of the powers vested in the governor of a colony to grant pardons, it is intimated that, inasmuch as in England a pardon is not granted before the trial of an offender, so, with respect to "the promise of pardon to political offenders or enemies of the state, her Majesty's government are of opinion that, for various reasons, it would not be expedient to insert the power of granting such pardons in the governors' commissions; nor do they consider that there is any practical necessity for a change. If a governor is authorized by her Majesty's government to proclaim a pardon to certain political offenders or rebels, he can do so. If he is not instructed from home to grant a pardon, he can issue a proclamation, as was done in New Zealand in 1865, by Sir G. Grey, to the effect that all who had borne arms against the queen should never be prosecuted for past offences, except in certain cases of murder. Such a proclamation would practically have the same effect as a pardon."[k]

The issue of a proclamation of amnesty or oblivion for past offences against the Crown and government

[j] Tasmania Legislative Council Journals, **1878**, appx. nos. 35, 36. The "Hunt case" gave rise to a sharp and acrimonious correspondence between the governor and the chief-justice of the colony, copies of which were transmitted to her Majesty's secretary of state, and elicited a rebuke from that officer to both parties in the controversy. *Ibid.* **1878-79**, no. 118.

[k] Commons Papers, **1875**, vol. liii. p. 634.

of the realm is within the undoubted prerogative of the Crown; and an amnesty or pardon may thus be granted by the sovereign either before or after attainder or conviction;[l] and also by a colonial governor, acting under instructions from the Crown.[m]

Special law in Upper Canada.

In Upper Canada, after the insurrection of 1837, the provincial parliament passed an act to empower the lieutenant-governor, upon the petition of any person charged with high treason before his arraignment, praying for a pardon, to grant him (by and with the advice of the executive council) a conditional pardon; which should nevertheless have the effect of an attainder for high treason, so far as concerned the forfeiture of his property.[n]

We must now revert to the general question as to the constitutional method of exercising the prerogative

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[l] 1 Inst. 120 *a*, note 4; 3 Inst. 233. Bishop, Criminal Law, c. 59, on "Pardon."

[m] Forsyth, Constitutional Law, p. 113. Proclamations of amnesty were issued by Lord Durham, governor-general of Canada, in 1838; by Sir George Grey, governor of New Zealand, in 1865; by Sir G. F. Bowen, governor of New Zealand, in 1871; and by Lord Dufferin, governor-general of Canada, in 1875. (See the Canada Official Gazette, of April 24, 1875.) This proclamation granted a full amnesty to all persons concerned in the insurrection in the North-west, in 1869 and 1870, excepting that the amnesty to Louis Riel and Ambroise Lepine was made conditional on five years' banishment from her Majesty's dominions; and that W. B. O'Donohue was not included in the grant of amnesty. But on Nov. 22, 1877, Lord Dufferin approved of a recommendation from his ministers in council that a pardon, conditional on five years' banishment, from April 23, 1875, should be granted to O'Donohue. On Nov. 27, the governor-general enclosed to the secretary of state for the colonies a copy of the order in council, and of the official gazette containing the proclamation which he had caused to be issued for the purpose of giving effect to this act of mercy. Canada Sess. Papers, **1878**, no. 55.

[n] U. C. Stat. 1 Vict. c. 10. See Lieut.-Governor Arthur's despatch, of Aug. 29, 1838, in relation to this statute; which is specially noteworthy as commenting upon the apparently conflicting claims of the governor-general of Canada and the lieutenant-governor of Upper Canada to the exercise of the prerogative of mercy, under their several commissions from the Crown and instructions from the secretary of state. Upper Canada Assembly Journals, **1839**, appx. vol. ii. pt. 2, p. 625. Since confederation, the administration of this prerogative has been withdrawn from the lieutenant-governors of the Canadian provinces, and vested solely in the governor-general of the dominion. Canada Sess. Papers, **1869**, no. 16.

of mercy in a British colony, for the purpose of pointing out the special instructions which have been given to the governor-general of the dominion of Canada on this subject.

Its exercise in Canada.

Prior to the confederation of the British North American provinces in 1867, and up to the time of the appointment of the Marquis of Lorne to be governor-general in 1878, the instructions to the governors-general of Canada were identical with those given to other colonial governors. By virtue of these instructions, the governor was understood to be bound to consult his ministers in all cases of application for the mitigation or remission of sentences, but he remained at liberty to disregard their advice and to exercise the royal prerogative according to his own judgment and upon his own personal responsibility as an imperial officer.

Patterson's case.

Thus, in September, 1861, the governor-general, Sir Edmund Head, after fully considering in council the case of one Patterson, convicted of murder and sentenced to death, resolved to grant him a reprieve, notwithstanding that the attorney-general and other members of the executive council were adverse to the commutation of the sentence and in favour of permitting the law to take its course. The reasons which actuated the governor in this decision were duly recorded in the minutes of council.[o]

Lepine's case.

Again, on January 15, 1875, the Earl of Dufferin, governor-general, informed the dominion minister of justice that, after a "full and anxious consideration" of the evidence and other papers concerning the trial of Ambroise Lepine for the murder of Thomas Scott, he had decided to commute the capital sentence passed upon Lepine to two years' imprisonment, together with

[o] See the Quebec Morning Chronicle, Sept. 7, 1861. And see Canada Assembly Journals, **1858**, appx. no. 17.

the permanent forfeiture of his political rights. In dealing with this case "according to his independent judgment and on his own personal responsibility," the governor reported his reasons for the same to her Majesty's secretary of state.[p] Although there appears to have been no formal record in a minute of council of this proceeding, "full and ample communications" passed between the governor-general and his ministers on the subject, and his conduct was entirely approved by the imperial government.[q]

In November, 1875, the correspondence above cited between the colonial secretary and the governor of New South Wales, in reference to the exercise of the prerogative of mercy, was transmitted to the governor-general of Canada and laid before the Canadian parliament.[r]

Proposed change in the governor's powers.

This official communication led to a careful examination of the question by the dominion minister of justice (Mr. Blake); and the expediency of some further alteration of the terms of the governor's commission, and of the royal instructions applicable to the administration of this prerogative, was one of the matters of public interest and importance upon which Mr. Blake proceeded to England in June, 1876, at the request of Lord Carnarvon, for the purpose of having a personal conference with her Majesty's ministers.[s]

At this conference, Mr. Blake submitted various reasons, resulting from the growing importance of the dominion of Canada and its relation as a self-governing community to the mother country, which, he contended, would justify the allowance of a larger discretion in the determination of cases by the prerogative of pardon in Canada than would be suitable in Australia or elsewhere. He was of opinion that

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[p] Canada Gazette extra, Jan. 19, 1875.

[q] Hans. Deb. vol. ccxxiii. p. 1075.

[r] Canada Sess. Papers, **1876**, no. 116.

[s] See *ante*, pp. 78–80.

this prerogative should be exercised in Canada, as a general rule, precisely as it is administered in England; namely, pursuant to the advice of the dominion ministers as well in capital as in non-capital cases. Mr. Blake admitted the difficulty, if not the impossibility, of formulating a special rule on the subject, because cases might occur which would involve imperial as well as Canadian interests. Such cases, however, would be rare and exceptional, and might be disposed of as they arose by mutual adjustment, in which due regard should be had to the constitutional powers and relations of the Crown, the governor-general, and the Canadian privy council.

These suggestions were frankly accepted by the colonial secretary, and he expressed his readiness to advise an amendment of the governor-general's commission and instructions in general agreement with Mr. Blake's proposals.[t]

After Mr. Blake's return to Canada, further correspondence ensued between the imperial and dominion governments upon this subject. Drafts of the proposed alterations in the commission and instructions were considered and agreed upon between the ministers of the Crown in Canada and the home government. It was decided, however, to await the appointment of a new governor-general before giving full effect to the intended changes.

New instructions to governor-general of Canada.

Upon the expiration of Lord Dufferin's term of service, he was replaced by the Marquis of Lorne. The new commission and instructions issued upon this occasion were framed in accordance with the conditions agreed upon between the dominion and imperial governments. As regards the prerogative of pardon, the directions therein contained do not materially differ

[t] Canada Sess. Papers, **1877**, no. 13.

from those embodied in the revised letters-patent issued in 1877, on behalf of South Australia, and which have been already noticed.[u] The variations, however, in Lord Lorne's commission and instructions — coupled with the assent expressed by her Majesty's government to the proposition that, in all cases of a merely local nature, the advice of the Canadian ministers in respect to the exercise of the prerogative of pardon, should not only be taken, but should prevail — suffice to extend to the Canadian government, upon such questions, the same freedom of action as in all other matters which concern solely the internal administration of the affairs of the dominion.[v]

The new letters-patent constituting the office of governor-general of Canada contain no reference to the exercise of the prerogative of pardon; but the accompanying draft of instructions includes the directions heretofore distributed between the commission and instructions, in the following terms: —

"We do further authorize and empower our said governor-general, as he shall see occasion, in our name and on our behalf, when any crime has been committed [for which the offender may be tried within our said dominion[w]], to grant a pardon to any accomplice, not being the actual perpetrator of such crime, who shall give such information as shall lead to the conviction of the principal offender; and, further, to grant to any offender convicted of any crime in any court, or before any judge, justice, or magistrate, within our said dominion, a pardon, either free or subject to lawful conditions,

[u] See *ante*, p. 82.

[v] See the correspondence between the government of Canada and the government of the United Kingdom, upon the subject of the Royal Instructions, prior to Oct. 5, 1878. Canada Sess. Papers, **1879**, no. 181.

[w] Heretofore, in lieu of the words in brackets, the instructions had said "within our said colony," or "dominion." But, by the change introduced in the revised instructions, the power to grant a pardon to accomplices is extended to cases where the crime has been committed outside of the limits of the dominion, but for which the offender may be tried therein. This alteration was suggested by Mr. Blake, in 1876. See his Report to the Canadian Privy Council, p. 4.

or any respite of the execution of the sentence of any such offender, for such period as to our said governor-general may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to us. Provided always, that our said governor-general shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from, or shall absent himself from, our said dominion.[x] And we do hereby direct and enjoin that our said governor-general shall not pardon or reprieve any such offender without first receiving, in capital cases, the advice of the privy council for our said dominion, and in other cases the advice of one at least of his ministers,[y] and in any case in which such pardon or reprieve might directly affect the interests of the empire, or of any country or place beyond the jurisdiction of the government of our said dominion, our said governor-general shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration, in conjunction with such advice as aforesaid.[z]

Effect of new instructions.

By this last section, the independent judgment and personal responsibility of the governor-general of Canada, as an imperial officer, are relied upon to decide finally, after consultation with his ministers, in all cases of imperial interest, or which might directly affect any country or place outside of Canada; while he is at

[x] This clause does not appear in earlier instructions; but it was deemed by the secretary of state to be obviously wrong to thrust upon other communities a criminal who was regarded as unfit to remain at large in his own country. (See *ante*, p. 263.) In this opinion Mr. Blake fully concurred, while he suggested "that it may be just and convenient that the restriction should not be applicable to the cases of political criminals, to whose offences as a rule the considerations which make such a condition obnoxious hardly apply, while public convenience and the tranquillity of the country may occasionally be best consulted by so disposing of them." (Report in 1876, p. 5.) The colonial secretary approved of this exception. See the correspondence laid before the dominion parliament in 1879.

[y] In practice, this minister is understood to be the minister of justice; but for obvious reasons the limitation to any particular minister is not insisted upon. See the correspondence above referred to.

[z] For the Marquis of Lorne's commission and instructions, see Commons of Canada Sess. Papers, **1879**, no. 14.

liberty to defer to the judgment of his ministers in all cases of merely local concern.

In any case where the governor-general is authorized to act independently of his ministers, he may, if he thinks fit, remit the matter to the consideration of the secretary of state for the colonies, for the purpose of ascertaining the opinion of her Majesty's government thereon. This was done in 1877, by decision of "the governor in council," in the case of Peter Martin.[a]

Imperial Dominion exercisable over Self-governing Colonies:

i. *In military and naval matters.*

Our observations on this head will be suitably prefaced by the following extracts from the "Revised Regulations for the Colonial Service," issued in 1879:—

§ II. *Authority of the Governor in relation to her Majesty's Troops.*

Imperial regulations for colonial governors.

10. The governor of a colony, though bearing the title of captain-general or commander-in-chief is not, without special appointment from her Majesty, invested with the command of her Majesty's regular forces in the colony. He is not, therefore, entitled to receive the allowances annexed to that command, or to take the immediate direction of any military operations, or, except in case of urgent necessity, to communicate officially with subordinate military officers, without the concurrence of the officer in command of the forces. Any such exceptional communication must be immediately notified to that officer.

11. Except in the case of invasion or assault by a foreign enemy, it is the duty of the governor to determine the objects with which and the extent to which her Majesty's troops are to be employed. He will, therefore, issue to the officer in command of the forces directions respecting their distribution

[a] Confidential report of the dominion minister of justice (Mr. Blake), dated March 5, 1877, in correspondence concerning the royal instructions. Canada Sess. Papers, **1879**, no. 181.

and their employment on escort and other duties required for the safety and welfare of the colony. In all these matters, however, the governor will consult as far as possible with the officer in command, and will incur special responsibility, if he shall direct the troops to be stationed or employed in a manner which that officer shall consider open to military objection.

12. The governor, as the queen's representative, will give the "word" in all places within his government.

13. On the other hand, the officer in command of the forces will determine all military details respecting the distribution and movement of the troops and the composition of the different detachments, taking care that they are in conformity with the general directions issued to him by the governor.

14. The officer in command of her Majesty's land forces is alone charged with the superintendence of all details connected with the military department in a colony, the regimental duty and discipline of the troops, inspections, and summoning and holding courts-martial, garrison or regimental, and the granting leave of absence to subordinate military officers.

15. He carries into execution, on his own authority, the sentences of courts-martial, excepting sentences of death, which must first be approved, on behalf of the queen, by the officer administering the civil government.

16. He makes the officer administering the civil government returns of the state and condition of the troops, of the military departments, of the stores, magazines, and fortifications within the colony, and furnishes duplicates of all such returns of this nature as he may be required or may see occasion to send to the military authorities at home, or to any officer under whose general command he is placed.

17. On the receipt of the annual mutiny act, the officer in command of her Majesty's land forces communicates to the civil authority the "general orders" in which it may be promulgated.

18. And in the event of the colony being invaded or assailed by a foreign enemy, and becoming the scene of active military operations, the officer in command of her Majesty's land forces assumes the entire military authority over the troops.

19. The above regulations will hold good, though the governor may be a military officer senior in rank to the officer in command of the forces.

20. If several colonies are comprised in one military command, the officer in command of the whole may transfer troops from one colony to another on an application from the governor of the colony to which the troops are sent, transmitted to him either through the governor of the colony in which he is serving, or through the officer commanding the forces in the colony for which troops are required. But the officer in command must, in all cases, consult with the governor of the colony from which the troops are sent, and will incur a special responsibility if he sends them away without that governor's consent.

21. Except in the case of the North American colonies, colonies comprised under one government-in-chief are to be treated, for military purposes, as a single colony. Natal, for the same purpose, will be considered part of the government of the Cape of Good Hope.

§ III. *Military Correspondence.*

Military correspondence with Imperial government.

197. The governors of colonies, commanding her Majesty's troops therein, must separate their correspondence with the secretary of state for the colonies, and the secretary of state for war, in the following manner: —

198. Whatever relates to the discipline of the troops, or to the employment of them in any ordinary and established service, or to the relief of the troops after their time of local service shall have expired, or to the interior economy of her Majesty's land forces, will properly form the subject of correspondence with the secretary of state for war exclusively.

199. In the event of actual hostilities with any foreign enemy, or of any extraordinary employment of the troops for the maintenance of the public peace, such occurrences must be reported both to the secretary of state for war and to the secretary of state for the colonies.

200. In the event of its being thought necessary to make or to advise any military convention with the officer in command of the troops of any foreign power, a governor commanding her Majesty's troops will, at the same time, report to the secretary of state for the colonies, and to the secretary of state for war, the measures which he may have so taken, or those which he may wish to recommend for adoption.

201. In case it should be necessary, in order to render the

governor's military reports intelligible, to make reference, in his correspondence with the secretary of state for war, to topics connected with his civil authority, he will in every such case at the same time bring under the notice of the secretary of state for the colonies the questions of civil government to which he may thus have had occasion to advert.

202. As any attempt to define the limits of a governor's civil and military correspondence may, from the nature of the case, be imperfect, and may omit to provide for some unforeseen exigency, he will best fulfil the joint pleasure of the secretary of state for war and of the secretary of state for the colonies by conducting his civil correspondence exactly as he would conduct it if he possessed no military command, and *vice versa*. The two functions of governor and of commander of the forces, though for the time combined in the same person, should be regarded in this respect as entirely separate, and the reports made by the governor in each capacity should be made precisely in the same manner as if that combination of powers did not exist.

203. The preceding instructions will apply also to the governor's correspondence respecting the service of the commissariat.

204. The respective officers employed under the war office are in all cases without exception to give timely notice to governors of any communications which they may intend to send home, affecting such governors or the orders given by them, so that her Majesty's government may be simultaneously made acquainted with the opinions of the governors, and with the opinion of those officers on any matter on which it is requisite that the views of both should be known.

205. When the civil governor of a colony shall have occasion to report upon, or bring under the consideration of the secretary of state for the colonies, matters which involve military as well as civil considerations, or which require the decision or concurrence of the secretary of state for war, the governor will first communicate with the officer in command of the forces in the colony respecting the matters in question; and, having obtained that officer's opinion or observations thereupon, he will transmit the same with his own report to the secretary of state for the colonies.

206. The officer in command of the forces is similarly in-

structed to obtain the opinion of the governor before reporting to the secretary of state for war, or to any officer under whose general command he is placed, on any matter which involves civil as well as military considerations, or which cannot be decided without reference to the secretary of state for the colonies.

207. The officer in command of the forces has been instructed to send to the governor duplicates of all reports on whatever subjects, other than those relating to discipline and the routine of the service, which he may have occasion to send to the secretary of state for war or to any officer under whose general command he is placed. In case the governor considers that these reports require the consideration of the secretary of state for the colonies, he is to forward the duplicates with his observations by the same mail which conveys the original report to the secretary of state for war.

§ IV. *Naval Correspondence.*

Naval correspondence.

208. Governors of colonies should communicate with officers of her Majesty's navy, and should convey notices of different kinds to commanders of foreign vessels in colonial waters, in the following mode: —

209. The governor will write in his own name to any senior naval officer (that is to say, the senior officer then within his immediate reach), holding the rank of flag-officer, captain, or commander, but will communicate with any senior officer of lower rank through his private secretary. In no case will he communicate through the colonial secretary, whose functions are of a different character, and whose office should not be the place of deposit for communications between the governor and officers in command of her Majesty's naval forces.

210. Any notice or direction, conveyed by the governor's authority to the commander of any foreign vessel, should be conveyed through the officers of the colonial government, and not through the officers of her Majesty's navy, whose intervention should not be applied for, unless the directions conveyed through the ordinary channel should fail to produce their effect.

The constitutional principles asserted in the preceding regulations were not ascertained and put into force

until the necessity for strict rules upon the subject had become unmistakably apparent.

Origin of existing rules.

During the progress of the Maori war in New Zealand in the years 1865 and 1866, differences occurred between the governor of the colony and the colonel commanding one of the queen's regiments therein, which were seriously aggravated in consequence of the defective rules then in operation in regard to military correspondence between army officers and the Horse Guards during the existence of a state of war in a colony. This case has been recorded in a previous section.[b] It led to the adoption of the revised rules above set forth, which are sufficiently comprehensive and explicit to meet all contingencies.

Position of a governor in military matters.

Another question, more momentous in its scope and consequences, has arisen in several British colonies. It is to determine the exact relation of the governor, in a colony possessing "responsible government," towards the imperial authorities on the one hand, and towards the local administration on the other, in the control of military matters. Difficulties have presented themselves in different places upon this question, but they have been generally surmounted, and a good understanding now prevails everywhere upon the subject.

By virtue of his commission from the Crown, a colonial governor is usually and appropriately invested with the position of commander-in-chief of all local forces raised within the colony. His relation to her Majesty's regular army or navy depends upon the nature of his instructions from home, as hereinbefore provided. If a military officer commissioned with supreme command be in the colony, he necessarily controls all military operations, though he is bound to act in co-operation

[b] See *ante*, p. 101.

with the governor, and in certain matters to acknowledge his superior authority. These points, however, have all been definitely arranged by the above-mentioned official regulations.

The governor's military powers in New South Wales.

In New South Wales, pursuant to the Volunteer Force Regulation Act of 1867 (31 Vict. no. 5), which is still in operation, the governor is appointed to be commander-in-chief of the colonial volunteers; and certain specified duties are imposed upon him, in relation to the volunteer force.

In 1869, Sir William Manning, the colonial attorney-general, gave it as his opinion that the governor was required under this statute "to act prerogatively on her Majesty's behalf," and to exercise the functions assigned to him "upon his own responsibility," without reference to his executive council, — upon the ground that the duties in question were analogous to those which in England appertained to the commander-in-chief, and not to the secretary of state for war.[c]

Case of Rossi.

In 1873, Captain F. R. Rossi, a volunteer officer of this force, was complained of before the Legislative Assembly, for conduct unbecoming in a man intrusted with the command of a body of citizen soldiers. He was tried for his offence, by a select committee of the house, who recommended that he should be dismissed from office.[d] The house concurred in this report, and transmitted it to the governor for his consideration and approval. The governor (Sir Hercules Robinson) replied by message, in which he declined to carry out the recommendation of the committee, inasmuch as its proceedings were contrary to law. His Excellency pointed out that the volunteer act provided that any inquiry into the conduct of a volunteer officer should be conducted by a court assembled by direction of the governor, and composed exclusively of volunteer officers. He added that he had carefully investigated the charges against Captain Rossi, and had embodied his conclusions upon the case in a minute, which he had laid before his responsible advisers. Acting by their advice, as well as on his own behalf as commander-in-chief, he was prepared to direct the assembling of a court of in-

[c] New South Wales, Votes and Proceed. Legislative Assem. **1873–74**, vol. iii. p. 69.

[d] New South Wales, Assem. Jour. **1872–73**, vol. i. pp. 314, 1325.

quiry, under the statute, to examine the complaint against this officer. Whereupon, after a protracted debate, the Legislative Assembly rescinded their resolution for the adoption of the report of the select committee.[e]

In the course of debate on this question, Governor Robinson's conduct was animadverted upon; and he was charged with having put himself into collision with the house. His Excellency took no notice of these observations at the time; but afterwards, when writing to the secretary of state for the colonies (the Earl of Carnarvon), on Nov. 30, 1874, upon a kindred topic, he referred to these injurious reflections, and justified the course he had adopted upon this occasion.

Commenting upon the incongruity of devolving upon the governor personally the duty of taking the initiative in the transaction of any sort of administrative business, while he owed no personal responsibility to the local parliament, his Excellency remarks that "it seems somewhat inconsistent to intrust to her Majesty's representative, who is not responsible to parliament, certain special duties apart from his advisers, and then, when he exercises his functions in the manner which in his judgment best accords with the honour and dignity of the Crown, to complain that his view does not command the unanimous approval of the popular branch of the legislature."[f]

Governor's powers in Victoria.

In the same despatch, Governor Robinson points out that, elsewhere, — "in Victoria, for example, — the volunteer act imposes the duties which here devolve personally upon the governor as commander-in-chief upon the governor, with the advice of his executive council; so that responsibility for the exercise of functions in military, as in all other local, matters devolves there upon the ministers."[g] Practically, the governor exercises no more authority, in military business in Victoria, than he does in the routine of any other department of local administration.

In New South Wales, the reorganization of the volunteer forces is now in contemplation. When such a measure is introduced, there can be no doubt that the constitutional rela-

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[e] New South Wales, Assem. Jour. **1873–74**, vol. i. pp. 170, 220, 249.
[f] Commons Papers, **1875**, vol. liii. p. 684.
[g] *Ibid.* p. 685.

tions which exist in other parts of the British colonial empire between the governor as commander-in-chief, the local defence forces, and the ministry, will be duly recognized, and the letter of the law brought into harmony with the spirit of the Constitution.

Military powers of the governor in Canada.

In Canada, from the period of confederation, this question has received a satisfactory solution.

Pursuant to the fifteenth section of the British North America act of 1867, "the command-in-chief of the land and naval militia, and of all naval and military forces of and in Canada, is vested in the queen, and shall be exercised and administered by her Majesty personally, or by the governor as her representative." [h]

This is the first clause in the Canada militia act of 1868; and it secures the exercise of all powers under that act in a constitutional manner. Those matters which are of imperial direction, and concern the queen's regular army or navy, whilst serving in Canada, are subject to the control of the imperial authorities; whilst those which concern the disposition and management of local forces are regulated by the governor-general, with the advice and consent of his privy council or cabinet.

These principles are embodied in the Canada militia act, which likewise provides for the occurrence of actual hostilities, and insures unity of action in such an emergency by the following enactment: that, "whenever the militia or any part thereof are called out for active service, by reason of war, invasion, or insurrection, her Majesty may place them under the orders of the commander of her regular forces in Canada." [i] This has always been done, upon the occurrence of any serious disturbances in the dominion; although the clause does not make the practice obligatory.

Minister of militia.

The act aforesaid authorizes the appointment by the governor of Canada of "a minister of militia and defence, who shall be charged with and be responsible for the administration of militia affairs, including all matters involving expendi-

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[h] Canada Militia and Defence Act 1868, 31 Vict. c. 40.

[i] *Ibid.* sec. 61 (3). And see the Regulations and Orders for the Militia of the Dominion of Canada. Published by authority. Ottawa. Oct. 1, 1879.

ture, and of the fortifications, gunboats, ordnance, ammunition, arms, armories, stores, munitions, and habiliments of war, belonging to Canada." This minister "shall have the initiative in all militia affairs involving the expenditure of money." He is assisted by a deputy minister, and subordinate officers.

General commanding Canadian militia.

By a subsequent amendment of the law, passed in 1875,[1] it is enacted that "there shall be appointed to command the militia of the dominion of Canada an officer holding the rank of colonel or superior rank thereto in her Majesty's regular army, who shall be charged, under the orders of her Majesty, with the military command and discipline of the militia, and who, while holding such appointment, shall have the rank of major-general in the militia." On Oct. 1, 1874, the governor-general conferred this appointment upon Major-General (afterwards Lieutenant-General Sir) E. Selby Smyth. The duties of this officer are analogous to those performed in England by the commander-in-chief of the British army; and he is, in like manner, subordinate to the civil power, and subject to the direction of the governor-general through the minister of militia and defence.

Co-operation between imperial and colonial troops.

In the event of the occurrence of actual hostilities, necessitating the active service of the Canadian militia and the joint action of the local forces of the dominion with her Majesty's regular troops, the foregoing provisions of the Canada militia law, taken in connection with the imperial regulations above cited, would suffice to secure harmonious co-operation between both forces. It only remains to consider the most suitable method of giving practical effect to these general principles. This we may learn from the following remarkable case, wherein the whole question of military discipline and subordination was thoroughly sifted and accurately determined: —

In November, 1877, the colony of the Cape of Good Hope was threatened with disaster, from a war which had broken

[1] 38 Vict. c. 8.

Cape of Good Hope.

out on her northern frontier with certain Kaffir tribes, and also from the simultaneous existence of a Kaffir rebellion in the eastern provinces. In this emergency, the governor (Sir Bartle Frere) was of opinion that it was necessary to aid the colonial volunteer force by additional imperial troops. Accordingly, he addressed a minute on the subject to his ministers, in which he pointed out the need for reinforcements, and likewise the importance of an improved organization and control of the colonial military establishment.

Pretensions of the Cape ministers.

The colonial premier (Mr. Molteno), in reply to the governor's memorandum, asserted his belief that the colonists were able to help themselves, without assistance from her Majesty's regular army, whose presence in the colony tended, he thought, to depress the spirit of the people, from a dread of military, or rather of imperial, domination. He therefore advised the withdrawal of her Majesty's troops from the colony. He insisted, moreover, upon the right of the colonial cabinet to undertake the entire management of the colonial forces; to place the same in charge of a colonial commandant-general, who should be uncontrolled by any imperial military authority; and that the governor himself should refrain from interference, inasmuch as he "has no special powers over colonial forces as commander-in-chief." This arbitrary assumption of power was accompanied by an intimation to the governor that one of the ministry (the commissioner of crown lands) had been deputed to act as commandant-general, in command of all colonial forces whatsoever, "under the sole control and direction of the colonial government."

In answer to these pretensions, the governor denied the existence of the alleged dissatisfaction in the colony at the presence therein of an imperial military force; he protested against the scheme of his ministers for the direction of the local volunteers, &c., as being illegal and unconstitutional; and he referred to the reasonable and constitutional practice which had hitherto prevailed since the outbreak of hostilities, whereby "the governor and commander-in-chief" was in the habit of meeting the general commanding the forces, and two or three of the responsible ministers, for daily consultation and agreement, so that by their joint action and concert all necessary military measures might be authorized and determined upon. The governor furthermore contended that

the distinction drawn by Mr. Molteno between imperial and colonial forces was entirely imaginary, because while serving in the colony all her Majesty's forces whether colonial or imperial are subject to the authority of "the governor and commander-in-chief," who is the chief military executive, and who is himself bound, on all questions affecting the colony, to receive the advice of his responsible ministers, and not to act in opposition thereto without valid reasons, which he must place on record. The governor is also bound to warn his ministers of the consequences of any advice they may offer, when he sees danger from proposed changes, and to report to the secretary of state any important changes in contemplation.

"Admitting to the fullest practical extent that 'the governor acts solely by and with' the 'advice' of his ministers," Governor Frere declared his conviction that if, under present circumstances, he should accept the advice tendered to him, to send away the imperial troops and to trust for the suppression of the rebellion entirely to volunteers, with the idea "that such advice was in accordance with the wishes of parliament, or would be approved by the parliament of this colony," he "would be fitter for a lunatic asylum" than for the office he had the honour to fill.

But ministers still persisted in adhering to their expressed opinions in this matter and proceeded to carry them out, by directing certain military operations, without the sanction either of the governor or of the general in command. The general, however, entered a formal protest against this proceeding.

Ministers also caused to be inserted in the official gazette divers military appointments and promotions which had not been previously submitted for the governor's approval. At first these appointments were made in the governor's name; subsequently they were gazetted without any reference to his authority.

After repeated remonstrances with his ministers for their illegal and unwarrantable conduct, and after ascertaining that they persisted in continuing in office, declaring that they were only accountable to parliament for their public conduct, the governor at length, on Feb. 2, 1878, notified the premier (Mr. Molteno), by a letter sent through a principal officer

Dismissal of ministry by Governor Frere.

of the civil service, that he could no longer consent to retain them as his advisers, and that they would remain in office only until their successors were appointed.

Freely admitting that the governor, in his capacity of commander-in-chief, "is bound on military matters, as on all others, to take the advice of ministers, who have practically the same power of control as her Majesty's ministers exercise over the army in England;" and that "through the governor and regular gradation of military subordination, every one of her Majesty's officers and soldiers on active service in the country," "without distinction between 'colonial' and 'imperial' troops," "is accountable to ministers and directly controlled by them," — his Excellency nevertheless protested against the assumption by one of his ministers, without the sanction of the Crown or of the colonial parliament, of the position and powers of a "minister of war, irresponsible to the governor, and as a general directing forces in the field uncontrolled by and irresponsible to any military authority." [k]

On Feb. 5 and 11, Governor Frere addressed despatches to her Majesty's secretary of state for the colonies, in which he narrated the preceding events, and mentioned that he had entrusted Mr. J. G. Sprigg, the leader of the opposition in the Assembly, with the task of forming a new administration.

In his reply, dated March 21, the colonial secretary expressed his full reliance on the governor's judgment, and did not question the propriety of his conduct in dismissing his late ministers, a step which appeared to have been unavoidable. Whilst endorsing the opinions expressed by the governor, in denying the right of his ministers to appoint an officer unknown to the constitution, unauthorized by parliament, and in opposition to the judgment of the governor, and to assign to him functions which would give him paramount authority, greater than that of the governor himself, in military matters, the secretary proceeded to point out that the peculiar position occupied by the governor, as the queen's high

[k] The points included in the above pages are extracted and epitomized from the voluminous correspondence on the subject which was presented to the Imperial Parliament in July, 1878. (Commons Papers, **1878**, C. 2079, 2100, 2144), and to the Cape Assembly, in May of the same year. Cape Assembly Votes, **1878**, annex. A. 2, 4–6.

commissioner, with powers in respect to adjacent territories which were not limited by the system of responsible government, as established at the Cape,[1] entitled him to special consideration and authority, in respect to his lawful endeavours to preserve peace in her Majesty's possessions in South Africa, and to prevent any irruption of hostile tribes into those possessions. It was therefore the more surprising that, when differences of opinion arose as to the proper conduct of the war, the local ministry should have hesitated to yield their opinions to those expressed by the governor.

"In civil matters lying entirely within the Cape colony, I desire of course that the responsibility of your ministers, for the time being, should be as full and complete as in other colonies under the same form of government, but in affairs such as those in which you have been recently engaged, your functions are clearly defined by the terms of your commission." In conclusion, the secretary of state declared it to be "of the first importance that the earliest possible opportunity should be taken of affording such full explanations to your parliament as may enable a clear and impartial judgment to be formed upon the course adopted." [m]

In the opinion of the governor, concurred in by his new ministers, the state of public business did not admit of parliament assembling before May 10. This day was accordingly chosen. On the very day parliament opened, papers and correspondence respecting the dismissal of the Molteno ministry were laid before the Cape parliament.

Harmony restored by new ministry.

Meanwhile, the new premier, Mr. Sprigg, in his address to his constituents upon his acceptance of office, justified the act of the governor in dismissing the preceding administration, on the ground that, in the opinion of his Excellency, they were endeavouring to carry on the government by un-

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[1] The office of queen's high commissioner for South Africa, as we have elsewhere shown, was held by the governor of Cape Colony under a separate commission, which vested peculiar and very extensive powers in the holder thereof. (See *ante*, p 72.) This office was not necessarily conferred upon the governor of the Cape: in May, 1879 (Sir Bartle Frere continuing in office as governor and high commissioner of the Cape of Good Hope and adjacent territories), General Sir Garnet Wolseley was appointed high commissioner for the eastern portion of South Africa. See *post*, p. 294.

[m] Commons Papers, **1878**, C. 2079, p. 124.

constitutional means, to which he could not assent; — "that while acknowledging the governor to be commander-in-chief of the imperial troops in the colony, it was contended that his Excellency did not hold that position with reference to the colonial forces, and that the ministry were entitled to direct the movements of the colonial forces, not by way of advice to the governor, but upon their own responsibility alone, so that the governor and the general commanding her Majesty's forces were kept in ignorance of the proposed movements of the colonial forces, no joint action taking place, but each branch of the military forces in the country working in ignorance of the plans and intentions of the other."

Mr. Sprigg declared his conviction "that the only chance of carrying on the war successfully was by the different branches of the government working in harmony." For his own part, he said, that he was in unison with the governor "as to the proper and constitutional course to be pursued." The future conduct of the war would rest with himself, as premier; the governor had placed in his hands the imperial equally with the colonial troops. To ensure unity of action, he had adopted the following method. He meets the governor and the general commanding the forces in the executive council, from time to time. The heads of the colonial forces are invited to assist in these deliberations; and, upon the joint authority of the governor and of the premier, the general is instructed what to do. The general is placed in chief command over the colonial as well as the imperial troops. All military reports are made to the general, who communicates the substance of them to the premier. The commander of the colonial forces reports direct to the premier. This arrangement, he believed, would ensure harmonious co-operation between the civil and military authorities in a constitutional manner.[n]

It should be added that, in conformity with the "Regulations of the Colonial Service," above cited,[o] the general commanding her Majesty's forces reports direct to the secretary of state for war upon questions concerning the imperial troops under his command; but that he afterwards sends a copy of his

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[n] Commons Papers, **1878**, p. 101.

[o] See *ante*, p. 276.

despatches on military operations in the colony to the governor, for his consideration and approval.[p]

Conduct of Governor Frere impugned.

The papers transmitted to the Cape parliament by the governor, in explanation of the events which led to the dismissal of the Molteno ministry, were far more detailed and complete than would be desirable under ordinary circumstances, or than was in accordance with English precedent. But the new ministry were of opinion that a full and unreserved publication of this correspondence was necessary, in order to justify their own act, in coming forward, at a very serious crisis and at great disadvantage to themselves, to save the colony from the most serious disasters. Moreover, no form of proceeding is followed in the Cape legislature analogous to an address in reply to the speech from the throne, nor any similar convenient opportunity afforded for ministerial explanations or for preliminary trials of party strength.[q]

After the presentation of these papers to the Cape Assembly, Mr. Merriman, a prominent member of the late ministry, moved to resolve: (1.) That, in the opinion of this house, the control over the colonial forces is vested in his Excellency the governor only acting under the advice of ministers; (2.) That it was not within the constitutional functions of his Excellency the governor to insist on the control and supply of the colonial forces being placed under the military authorities, except with the consent of ministers; (3.) That the action taken by his Excellency the governor in that matter has been attended with results prejudicial to the colony, and has delayed the termination of the rebellion.

This motion led to a protracted debate, at an early stage of which Mr. Speaker called attention to it, and ruled "that the second and third paragraphs thereof could not be entertained by the house in the form in which they were presented, it being contrary to constitutional principle and parliamentary practice to move any direct censure on his Excellency the governor as the representative of the sovereign, and it being held, by the authorities on parliamentary government, that the ministry in office are responsible for the action of his Excellency the governor." After discussion, the order of the

[p] Commons Papers, **1878**, C. 2079, p. 111; C. 2100, p. 19.
[q] *Ibid.* C. 2079, p. 175.

day for resuming the debate on Mr. Merriman's motion was read, whereupon Mr. Speaker stated that, according to the ruling he had just submitted to the house, only the first paragraph of the said motion was at present before it. The debate on the first paragraph was then resumed.[r]

At a later sitting of the Assembly, leave was obtained by Mr. Merriman to amend his motion, by the reintroduction of the second paragraph (merely changing the word "was" into "is"), and by substituting for the third paragraph the following in lieu thereof, "That the assumption of the command of colonial forces by Sir A. Cunynghame [her Majesty's general in command of the regular troops in South Africa] in January last, contrary to the advice of ministers, was not justified or advisable under the existing circumstances." To this motion, an amendment was moved to resolve that "the house, having before it the papers connected with the late change of ministry, does not see that the doctrine that the governor controls the colonial forces under the advice of his ministry has been called in question by the governor, but, on the contrary, is strongly affirmed; and the house is of opinion that, under all the circumstances of the case, the removal from office of the late ministry was unavoidable."[s]

On June 6, 1878, the foregoing amendment was agreed to, on a division, by a vote of thirty-seven to twenty-two; a vote which was the more decisive in recording the sense of the house in favour of the new administration, from the fact that, in the preceding session, the Molteno ministry had been able to command a good working majority.[t]

Mr. Merriman's motion ingeniously evaded the actual facts of the case in relation to the dismissal of the Molteno ministry. It made no reference to the avowed reasons which had induced the governor to change his constitutional advisers, and refrained from raising a distinct issue condemnatory of the circumstances under which the new administration had accepted office. This issue was, however, directly embodied in the words of the amendment, agreed to by the house, which declared that, "under all the circumstances of the case, the removal from office of the late ministry was unavoidable."

His action approved by the Cape assembly.

[r] Cape Assembly Votes and Proceedings, May 29, **1878**.
[s] Commons Papers, **1878**, C. 2144, p. 196.
[t] Cape Assembly Votes, **1877**, *passim*; *ibid.* **1878**, p. 94.

Governor Frere's sentiments in respect to Mr. Merriman's resolutions are expressed in his despatch to the colonial secretary, dated May 21, 1878. These resolutions, he observes, "are well calculated to embarrass the present ministry, whilst raising no issue directly implicating them. To the first resolution no reasonable objections can be offered on constitutional grounds: . . . it is a simple truism. It may be said that the second resolution is a necessary corollary from the first, provided the true version of the facts which took place be accepted. But I have no reason to suppose that this is the meaning intended by the framer of the resolutions. He probably intends to imply that the governor insisted on the control and supply of the colonial forces being placed under military authorities, without the consent of ministers, and that in so doing the governor exceeded his constitutional functions. This would, however, be quite inconsistent with facts, as I read them. It is, I believe, the constitutional duty of the governor and commander-in-chief to guard against such a dangerous anomaly as a divided command of military forces, operating for a common object, in one area of operations, and if ministers insisted on such a divided command, it would, I believe, be the governor's duty to prevent, by all constitutional means in his power, their imperilling the safety of the state by any such division of authority and responsibility. But, as a matter of fact, in what was actually done by the governor in the present case, I can see no unconstitutional proceeding whatever, unless Mr. Merriman is prepared to deny the constitutional power of the governor to inform ministers that they have lost his confidence, and to summon other ministers to office, subject to the necessity of their securing the support of parliament."[u]

From the first outbreak of the war, the command of all colonial forces in the field was, with the consent of ministers, vested in General Sir Arthur Cunynghame. It was not until four months afterwards that the governor had any formal and conclusive intimation of their intention to adopt a different course of proceeding. He "then exercised his undoubted constitutional function of informing ministers that they had lost his confidence, and that they only held office until their

[u] Commons Papers, 1878, C. 2079, p. 240.

successors could be appointed. Their successors were appointed, and entirely concurred in the" action taken by the governor.[v]

In a subsequent despatch to the colonial secretary, dated June 18, 1878, Governor Frere reported the decision of the Cape Assembly upon Mr. Merriman's resolutions, and made mention of the general approval expressed by the colonial press of the result, which amply justified "the position of the Assembly as the constitutional guardian of the rights of the colony." He adds: "After such a decisive expression of the opinion of the Assembly and of the country, it is hardly necessary that I should further discuss the constitutional question. Her Majesty's government will, I trust, be now satisfied that, in the extreme step taken, I did not go beyond what, in the estimation of the colony and its representatives, was necessary to uphold the authority of the Crown, as constitutional head of all the armed forces of the colony, and guardian of the rights of the people against unconstitutional encroachments of any kind, when circumstances did not admit of an immediate appeal to the parliament of the colony."[w]

Governor Frere's action approved by colonial secretary.

In reply to the foregoing despatch, the secretary of state for the colonies, in a despatch dated July 25, 1878, states that he "learns with much satisfaction that the colonial parliament has expressed, in a decisive manner, its approval of the action which, reluctantly, and under very peculiar circumstances, you had found yourself obliged to take with respect to your late ministry." He concludes by saying: "It affords me great pleasure to convey to you, on the part of her Majesty's government, their warm approval of your conduct, both generally and in this particular case, and their thanks for your unceasing and successful efforts to reduce to order that administrative system which you found wholly unequal to the requirements of a grave emergency."[x]

Apart from the value of the preceding case, in the light which it reflects upon the constitutional relations of a governor towards his responsible advisers, it is also

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[v] Commons Papers, **1878**, pp. 240, 241. And see the Nineteenth Century for December, 1878, p. 1069.

[w] Commons Papers, **1878**, C. 2144, p. 197.

[x] *Ibid.* p. 243.

useful as indicating the proper steps which should be taken to "uphold the authority of the Crown as constitutional head of all the armed forces" in a British colony.

Supremacy of the Crown in military matters.

In affairs of peace and war, which are essentially of imperial concern, the supremacy of the Crown must be everywhere maintained inviolate. The governor in every colony is the representative of the sovereign in the administration of this prerogative; but he himself must be careful that he acts in such matters in obedience to his instructions from her Majesty's government.

Sir B. Frere and the Kaffir war.

Not long after the satisfactory conclusion of the controversy between Sir Bartle Frere and his ministers, another difficulty presented itself between the governor and the secretary of state.

The Kaffir war had assumed larger dimensions. Other warlike tribes had engaged therein, and Governor Frere had, of his own accord, assumed the responsibility of measures which precipitated a conflict with the Zulu tribes on the northern frontier of South Africa.

Great loss of life, and a frightful expenditure of public money had been incurred in this war, and the prospect of a speedy and successful termination of it appeared to be remote and uncertain.

At this juncture, the attention of the Imperial Parliament was aroused to the perils of the situation. Votes of censure upon Sir Bartle Frere and upon the government who were responsible for his continuance in office, were proposed in both houses, and though they were negatived, — in the House of Lords by an overwhelming majority, and in the House of Commons by a majority less than that which the administration generally commanded, — yet ministers were obliged to admit that Sir Bartle Frere had taken upon himself a responsibility in excess of, if not contrary to, his instructions, in virtu-

ally declaring war against the Zulu king without the previous consent of the imperial government.[y]

Under these circumstances, her Majesty's government, whilst fully appreciating the great experience, ability, and energy, which had been displayed by Sir Bartle Frere in the execution of the extensive powers entrusted to him as her Majesty's high commissioner in South Africa, were constrained to express their regret at his failure to secure the previous sanction and authority of the imperial government to his proceedings; a course which they deemed to be peculiarly incumbent upon him, in view of the extraordinary difficulties which had unexpectedly presented themselves in the prosecution of the war. Without desiring in the existing crisis of affairs, to withdraw the confidence hitherto reposed in Governor Frere, — a confidence which heretofore, as a general rule, had been amply justified, — the secretary of state was obliged to address him in terms of rebuke, and to express the desire of her Majesty's government that he should regulate his future actions in strict accordance with the instructions he had received from the Crown in relation to affairs in South Africa.[z]

Appointment of General Wolseley.

Subsequently, in order to the more energetic conduct of the war against the Zulus, and the speedy restoration of peace upon terms approved by her Majesty's government, Lieutenant-General Sir Garnet Wolseley was sent to South Africa, with the local rank of general in command of all the forces therein, and to act as governor of Natal and the Transvaal, with a special commission appointing him queen's high commissioner in those colonies and in the lands adjacent, in place of Sir

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[y] Hans. Deb. vol. ccxliv. pp. 1606, 1865.

[z] See Sir M. Hicks-Beach's Despatches to Governor Frere, of April 4, **1878**: March 19, and April 10, **1879**: Commons Papers, **1878**, C. 2100, p. 39; *ibid.* **1879**, C. 2260, p. 108, C. 2316, p. 36.

Bartle Frere, who retained his position as governor of the Cape colony and queen's high commissioner elsewhere.[a] This change was eminently successful. The war was brought to a speedy close by the complete triumph of the British arms; and at the same time, the object persistently aimed at by Sir Bartle Frere, namely, to obtain adequate security for the protection of the British colonies in South Africa against native aggression, was achieved by the entire subjugation of the hostile tribes.

Within the past twenty years a fundamental change has been effected in the administration of the British colonies by the withdrawal of the imperial troops, previously scattered throughout every part of the empire, and the consequent devolution upon the self-governing colonies of the responsibility of self-defence. Colonial military defence.

This important reform originated in the report of a departmental committee in 1859, which consisted of Mr. Hamilton of the treasury, Mr. Godley of the war office, and Sir T. Elliot of the colonial office. The year preceding the appointment of this committee, our military expenditure in the colonies amounted to nearly four million pounds sterling, to which the colonies contributed something under £380,000, and few of the colonies had any effective militia or local force of their own.

The report of this committee ably pointed out the injurious consequences entailed by this policy, in the burden which it imposed upon the imperial treasury, and in its hindering the development in the colonies of a proper spirit of self-reliance, and a willingness to share in the responsibility of maintaining intact their free institutions and their national existence.[b]

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[a] Hans. Deb. vol. ccxlvi. pp. 1204, 1262. Commons Papers, **1879**, C. 2318, appx. and C. 2374, p. 10.

[b] Commons Papers, **1860**, vol. xli. p. 573. Adderley's Colonial Policy, p. 380.

The departmental committee, however, were unable to agree upon any definite conclusions on this question. Accordingly, in 1861, upon the motion of Mr. Arthur Mills, the House of Commons appointed a select committee of their own, to inquire and report whether any and what alterations might be advantageously adopted in regard to the defence of the British dependencies, and the proportions of cost of such defence as now defrayed from imperial and colonial funds respectively. The government gave a reluctant consent to the appointment of this committee, which, after taking voluminous evidence, reported before the close of the session.[c]

Their report, likewise, was not conclusive. In fact, the labours of the committee were aptly characterized as being chiefly valuable in furnishing information, promoting discussion, and exhibiting the discordance and inconsistency of opinion on the subject, rather than as advising any practicable policy.[d]

Military defence of the colonies.

The House of Commons, however, on March 4, 1862, upon motion of Mr. Arthur Mills, resolved, without a division, "that this house (while fully recognizing the claims of all portions of the British empire to imperial aid in their protection against perils arising from the consequences of imperial policy) is of opinion that colonies exercising the rights of self-government ought to undertake the main responsibility of providing for their own internal order and security, and ought to assist in their own external defence."

Thenceforward, the principle embodied in the foregoing resolution was adopted by every successive administration as the settled policy of the empire.[e] It has been generally agreed that a steady endeavour to

[c] Commons Papers, **1861**, vol. xiii. p. 69.
[d] See Todd, Parl. Govt. vol. i. p. 275.
[e] Adderley, Col. Policy, pp. 36, 40, 388.

throw more and more upon the colonies the obligation of defending themselves, was a policy which Parliament would support and the nation approve, and one, moreover, that would eventually be accepted as the best both for the colonies and for the mother country.

Now undertaken by themselves.

Accordingly, in debates upon this subject which arose in Parliament annually from 1867 to 1870, ministers were in a position to state that the troops were being gradually withdrawn from all the leading colonies in North America, Australia, and elsewhere, until, in 1873, the under-secretary of the colonies was able to announce "that the military expenditure for the colonies was now almost entirely for imperial purposes."[f]

The fears entertained by many that the withdrawal of the British regiments would operate disastrously in the colonies, by engendering a spirit of discontent and disaffection, have not been realized. Throughout the colonies generally, much has been done for the organization and training of local military forces and for efficient protection from foreign aggression. More than this, both in Canada and in Australia a spirit of loyalty and of patriotism has increased rather than diminished since the necessity for local self-defence has been imposed on these flourishing communities. Canada, for example, has successfully repelled repeated invasions of lawless Fenians from the adjacent states; and when it became needful for Great Britain to put forth her strength in the war with Russia in 1854–55, and in the Eastern war in 1878, voluntary offers were sent from Canada and from Australia to raise and equip regiments for imperial service.[g]

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[f] Hans. Deb. vol. ccxiv. p. 1531.

[g] See Canada Sess. Papers, **1871**, no. 7; and no. 12, p. 41. Within the past three years, a royal military college has been established in Canada, for the purpose of securing such a complete military and scientific education to young men belonging to the country as would qualify them to fill all the higher positions in the Canadian military service. The training and general branches

Imperial aid towards colonial defence.

On the other hand, whilst giving effect to this altered policy in respect to the military defence of the colonies, her Majesty's government were not unmindful of their duty to aid the colonies in assuming this new responsibility of organizing such military and naval forces as might be adequate for their protection and defence. The barracks and fortifications vacated by the imperial troops, together with the landed property of the war department attached to them, and the arms and munitions of war in actual use, were handed over to the colonial authorities; but with this condition, that, if at any future period troops should be sent to the colony at their request or in furtherance of colonial interests, suitable accommodation should be provided for them, to the satisfaction of her Majesty's government. This condition was accepted, and the transfer was made accordingly.[h]

Furthermore, the imperial government have been sedulous to secure the efficient defence of all the British colonies from external attack. Eminent engineer officers have been employed by the war office on this special service, in different parts of the empire.

In 1863, Colonel (afterwards Major-General Sir) W. F. D. Jervois was sent to Canada, New Brunswick, Nova Scotia, and Bermuda, to report on the state of the defences of those colonies; and again in the following year to confer with the Canadian government on that subject. His proposals were approved by the imperial and colonial governments, and have since been partially carried out.[i]

In 1865, at the invitation of her Majesty's govern-

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of education taught at this institution are admirably suited to qualify graduates to fill other positions in the public service, when military service is not required. See the official standing-orders for the regulation and government of the college, issued in July, 1879.

[h] Canada Sess. Papers, **1871**, no. 46.

[i] Colonial Office List, **1879**, p. 374.

ment, a deputation of four Canadian ministers proceeded to England to confer with the imperial government on the subject of the defence of Canada. Certain conclusions were arrived at; but it was agreed to defer any action thereupon, until the settlement of the then pending question of the confederation of British North America, when it would become the duty of the government and parliament of the new dominion to make adequate provision for the defence of the country.[j] Defence of Canada.

In 1875, the governments of New South Wales, South Australia, Victoria, and Queensland, applied to the imperial government for professional advice and assistance in military engineering, for the purpose of their common security, in the event of war between Great Britain and any foreign power. Whereupon, Sir W. F. D. Jervois and Lieutenant-Colonel Scratchley were authorized to examine the existing fortifications, ports, harbours, and coast defences, in the several Australian colonies; with instructions to consult with the local governments as to the most practicable means of putting the same into a state of efficiency. This service has been ably fulfilled, and in each colony it has become the duty of the local government to recommend to the local parliament the necessary appropriations for the purchase of war-vessels, the erection of fortifications, the improvement and defence of harbours, or otherwise, as the case may be, pursuant to the recommendations of these distinguished and experienced officers.[k] Australian defence.

In October, 1877, Sir William F. D. Jervois (who, in addition to his duties in connection with the special engineering service above mentioned, had been appointed governor of South Australia) intimated to the governor of New Zealand

[j] Canada Leg. Assem. Journals, Aug. 9, **1865**.

[k] See South Australia Parl. Pro. **1877**, vol. i. p. 2, and appx. no. 240. New South Wales, Leg. Assem. Votes, &c. **1877–78**, vol. iii. p. 295. Victoria Parl. Papers, **1877–78**, vol. iii. no. 73; *ibid.* **1878**, vol. iii. nos. 77 and 81.

Defence in New Zealand.

(the Marquis of Normanby) his purpose of visiting that colony, upon a tour of inspection of the coasts and harbours thereof, pursuant to the desire expressed by the preceding administration. To assist him in this undertaking, Sir W. Jervois requested that a government steamer might be placed at his disposal.

Lord Normanby referred this request to Sir George Grey, the premier of New Zealand, in order to ascertain the answer which ministers desired should be given to it. Whereupon, his Excellency was informed that the government steamer was required for other purposes, and could not be spared. This "curt answer" was afterwards explained to mean that, in the present state of the colonial finances, ministers deemed it to be inexpedient to incur the expense attending the proposed examination of the harbours, and preferred that the inspection should be postponed. The governor consented to convey this conclusion to Sir W. Jervois, but expressed his deep regret that his ministers should have acted, in a matter of public importance, in a manner so "little calculated to raise the credit of the colony abroad." He also requested that the correspondence between himself and the premier, on this subject, should be communicated to parliament without delay; a request which was immediately complied with.[l]

On December 5, following, a motion was made, in the Legislative Council, that it is desirable that the Council should be informed what are the duties for which the government steamer would be required, so as to render it impossible to place it at the disposal of Sir William Jervois, for the proposed examination of the colonial harbours. In amendment, it was proposed to add words, expressing regret that the present government has declined to give effect to the arrangement made by the governor, on the advice of the preceding administration, to obtain a report on the defence of the colony from Sir. W. Jervois. Both motions, however, were by leave withdrawn.[m]

No action was taken by the House of Representatives upon the governor's message. But, on December 10, the governor

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[l] New Zealand House of Representatives, Journals, **1877**, appx. vol. i. A. 6.

[m] New Zealand Leg. Coun. Jour. **1877**, p. 234.

wrote to the secretary of state for the colonies, enclosing the correspondence with his ministers, and justifying his own action by expressing a wish that Sir W. Jervois's visit should be postponed, indefinitely, rather than that his work should not be facilitated, and due consideration manifested towards him. This course was approved by the colonial secretary.[n]

However, in May, 1878, in view of the menacing aspect of affairs in Europe, the New Zealand ministers applied to the home government for a suitable armament, for the defence of the principal harbours of the island, to be supplied at the expense of the colony, the total cost of which was estimated at forty-four thousand pounds. The local parliament were duly informed of this proceeding at the opening of the following session, on July 26,[o] and from the last report of the minister of defence, dated July 10, 1879, it appears that the volunteer spirit has spread widely through the colony, and that military organization was being placed upon a more satisfactory footing.

Naval defence of the colonies.

In connection with the new imperial policy which requires the colonies of Great Britain to undertake the responsibility of their own defence, an act was passed by the Imperial Parliament in 1865, "to enable the several colonial possessions of her Majesty the queen to make better provision for naval defence, and to that end to provide and man vessels of war, and also to raise a volunteer force to form part of the royal naval reserve, established under the act of Parliament of 1859 (22 and 23 Vict. c. 40), and accordingly to be available for general service in the royal navy in emergency."[p]

This act empowers the colonial legislatures to provide at their own cost, vessels of war, weapons, seamen, and volunteers, for their own defence; and permits the colonies to place at the disposal of the Crown ships of war and seamen for imperial service.

The whole cost of such defensive operations to be

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[n] New Zealand Official Gazette, 1878, p. 912.

[o] New Zealand Jour. July 26, 1878, appx thereto, vol. i. A. 3. And see New Zealand Parl. Deb. vol. xxx. p. 843.

[p] 28 Vict. c. 14.

undertaken by the colonies, but the proposed arrangements to be made by them in connection with the home government by means of orders in council.

In Australia.

The colonies of New South Wales and of Victoria have appropriated considerable sums of money for the purchase of ships and munitions of war, and also for the formation of a volunteer naval brigade; but, as yet, very little has been done in the colonies generally to carry out the objects contemplated by the colonial naval defence act.[q]

In Canada.

The Canadian government possess some small steam vessels, capable of service in the Gulf of St. Lawrence, for the protection of the dominion fisheries against encroachments by unlawful depredators. The enormous number of seafaring men — estimated at not less than eighty-seven thousand — employed in these fisheries would, if enrolled in the naval reserve of the empire, contribute greatly to the national strength. But hitherto no practical measures have been taken to organize this valuable material, and to train it for effective service, as contemplated by the imperial act of 1859.[r]

The colonial defence committee of the imperial war office have advised the purchase by the dominion government of heavy artillery, to be mounted on defensive works at the principal Atlantic seaports. And the general officer in command of the Canadian militia (Sir E. Selby Smyth), in his fifth annual report to the minister of militia, dated Jan. 1, 1879, urges upon the government of Canada the expediency of passing an act through the dominion parliament, in pursuance of the provisions of the colonial naval defence act, above

[q] See Lord Norton's paper, in the Nineteenth Century, for July, 1879, p. 177. And the instructive paper on a Colonial Naval Volunteer Force, read by Thomas Brassey, Esq., M. P., before the Royal Colonial Institute, on June 7, 1878.

[r] See the important suggestions in Mr. Brassey's paper, referred to in the previous note, and in the discussion which ensued upon it. Proceedings Royal Col. Inst. vol. ix. pp. 355-385.

mentioned. He also recommends the purchase of the armament suggested by the colonial defence committee, — remarking that the imperial authorities had already contributed liberally to the defence of the Pacific coast of British Columbia; and that, if the dominion government would complete the work on the Atlantic seaboard, "the gates of Canada, from both the Atlantic and Pacific oceans, would be pretty well locked and bolted."[s] In the same report, this able and experienced officer recapitulates various suggestions — for the permanent organization of the Canadian militia force, and in regard to works of defence — which he had made in previous years, with a view to solicit "the grave consideration of what is due to that state of military preparation which the teaching of history proves to be incumbent upon all nations."[t]

Royal commission on colonial defence.

On Sept. 12, 1879, a royal commission was appointed to inquire into the condition and sufficiency of the means, both naval and military, provided for the defence of the more important seaports within our colonial possessions and their dependencies, and to report as to the stations which may be required in our colonies for refitting or repairing the ships of the navy, and protecting our commerce. The report of this commission will be awaited with great interest, especially in colonial and military circles.

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[s] See his report, Canada Sess. Papers, **1879**, no. 5, p. xxiii.

[t] *Ibid.* p. xvii. See also valuable papers, by Capt. J. C. R. Colomb, read before the Royal Colonial Institute, in 1873, on Colonial Defence; and in 1877, on Imperial and Colonial Responsibilities in War: and the ensuing discussions thereon. Likewise an elaborate paper, reviewing the naval and military resources of the colonies, read before the Royal United Service Institution, by Capt. J. C. R. Colomb, in March and April, 1879, and the discussion thereon, by eminent naval and military officers, in the Journal of the institution, vol. xxiii. pp. 413–479.

Imperial Dominion exercisable over Self-governing Colonies:

j. *By the supremacy of the Crown, and of the civil power in ecclesiastical matters.*

Royal supremacy in England.

In England, the supreme human authority, under Christ, in all jurisdiction which is of a coercive character, whether spiritual or temporal, over all persons and in all causes, ecclesiastical as well as civil, is vested in the sovereign.[u]

The canons framed by the Established Church, in her convocation and synods, have no obligatory force until they receive the assent of the sovereign, by whose public authority, as soon as they are confirmed and ratified by Parliament, they become law, and are binding upon the subject. And not only are all laws in England which have any exactive and coercive authority, whether civil or ecclesiastical, acknowledged by the most eminent theologians to be the laws of the sovereign; but all courts wherein the law is administered, whether ecclesiastical or civil, are, strictly speaking, courts of the Crown. This is declared by the statute 1 Edward VI., and is fully set forth in Bishop Sanderson's "Episcopacy not prejudicial to Royal Power."[v]

The royal prerogative in relation to the established Church in England is subject, however, to the control of Parliament. Nothing can be done by the sovereign, either with or without the consent of the clergy, to alter the jurisdiction or internal government of the Established Church, except by the sanction and co-operation of Parliament.[w]

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[u] Church of England Articles, no. 37; Canons, nos. 1, 2, and 36. Montagu Burrows, Parliament and the Church of England, 1875. Gladstone on the Royal Supremacy, 3d ed. 1877.

[v] Printed in London, 1673, p. 47. Bishop Wordsworth, of Lincoln, letter in "Guardian," Jan. 17, 1877, p. 86.

[w] See Todd, Parl. Govt. in England, vol. i. p. 305.

Parliamentary control in ecclesiastical matters.

And it is the duty of Parliament to see that the laws for the settlement and discipline of the national church are duly enforced; and to protect the church from innovations within its pale, as well as from injuries without. But, hitherto, Parliament has refrained from any intrusion into doctrinal matters, which are obviously beyond the province of the legislature to discuss or determine.[x]

The rule of constitutional law which requires that the prerogative of the Crown, in matters ecclesiastical, shall be exercised within the limits prescribed by Parliament applies with equal force to any action of the Crown in relation to the national church in the colonies.

But, in conformity with the principle of religious equality which is now recognized as governing all public acts of the Crown and Parliament which affect the colonies of Great Britain, the Church of England cannot be regarded as an "established" church in any British colony. It can claim no superiority, in the eye of the law, over other religious denominations; but, equally with them, must be considered as a voluntary association, possessing such coercive authority only over its members as may be expressly conferred by legislative enactment, or obtained by common agreement with them or with any of them who are placed in ministerial office.

Clergy reserves in Canada.

Formerly, a different relation existed between church and state in the British colonies. In Canada, by the Imperial Act 31 Geo. III. c. 31, passed in 1791, the Church of England was partially established, and the "Protestant clergy" thereof partially endowed, by grants of land reserved for their support.

But this gave rise to much strife and controversy. Presbyterians and other non-episcopal communions

[x] See M. Burrows on Parliament and the Church of England, pp. 97, 101, 129. Lord North, Parl. Hist. vol. xvii. p. 272.

claimed equal rights, both civil and religious, in the British colonies; and this claim could not be withstood or gainsaid. In 1840, the judges of England gave a unanimous opinion to the House of Lords "that the words 'a Protestant clergy,' in the Statute 31 Geo. III. c. 31, are large enough to include, and that they do include, other clergy than those of the Church of England."[y]

This opinion of the judges was followed by the Imperial Statute 3 and 4 Vict. c. 78, to provide for the sale of the clergy reserves in Canada, and the distribution of the proceeds thereof; and, in 1853, by another act (the 16 Vict. c. 21), which empowered the Canadian legislature to alter the appropriation of the clergy reserves under the act aforesaid, and to make such other provisions as might seem meet; provided only that the life-interests of existing incumbents should be respected.

The church disestablished and disendowed in the colonies.

Accordingly, in the following year, the legislature of Canada passed an act (the 18 Vict. c. 2) which, after making provision for the payment of the annual stipends and allowances hitherto charged on the clergy reserves, during the lives or incumbency of the existing recipients, enacted that the unappropriated balance should be divided among the several municipalities throughout the province, according to population. This was avowedly done in order "to remove all semblance of connection between church and state" in Canada.[z]

The same principle of disestablishment and disendowment was afterwards enforced in other British colonies.

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[y] Mirror of Parliament, May 4, 1840.

[z] 18 Vict. c. 2, sec. 3. See Religious Endowments in Canada. The Clergy Reserve and Rectory Questions; a Chapter of Canadian History. By Sir Francis Hincks, London, 1869. And see a paper by the Rev. Edwin Hatch, "A free Anglican Church;" in Macmillan's Magazine, vol. xviii. p. 449.

Consequent upon the decision of the Privy Council, in March, 1865, in the case of Bishop Colenso, which declared that the sovereign had no power to issue letters-patent, professing to create episcopal sees, or to confer diocesan jurisdiction or coercive legal authority in colonies that were in possession of legislative institutions, the imperial government determined to issue no more letters-patent of this description.[a] Colenso case.

Wherever, throughout the British dominions, it has been found practicable to carry out the principle of religious equality, — by the disestablishment of any churches previously placed by law upon a footing of preference or superiority over other religious bodies, and by refraining from any exercise of prerogative for the creation of ecclesiastical offices or the appointment to vacant bishoprics, — this has since been done.

In 1869 and subsequent years, the imperial government notified the governors of the colonies in the West Indies, in Gibraltar, in Australia, in the Mauritius, and elsewhere, of their intention to enforce the same principle of religious equality, notwithstanding that it might not have been specially sought after in particular colonies. Thus, in Jamaica, where the majority of the population objected on principle to state endowments in aid of religion, they have been entirely withdrawn; whilst in Trinidad, Barbadoes, Gibraltar, and the Mauritius, where there has been a general disposition to retain them, the government have acquiesced therein, provided that the endowment should be distributed equally amongst all denominations who were willing to receive them. This policy is now strictly adhered to; and all state connection in any colony, either with Episcopal, Presbyterian, or other churches, conferring

[a] See Todd, Parl. Govt. vol. i. p. 309.

upon them a preference over other denominations, has ceased.[b]

Episcopal organization in the colonies.

It now devolves upon the clergy and laity of the Anglican communion in the several British colonies — either with or without assistance derived from local legislation, as the case may be — to make their own arrangements for securing an effective episcopal organization of their respective churches. Synods of colonial churches, moreover, cannot without statutable authority assume any jurisdiction beyond that which they may exercise by the voluntary consent of their own members and of the members of the congregations in their respective communions. In order to clothe church synods with necessary corporate powers, it is customary to apply to the local legislatures for acts of incorporation.[c]

Consecration of colonial bishops in England.

While the Crown has withdrawn from any interference in the choice and appointment of colonial bishops it is still necessary to obtain a mandate from the sovereign where it is proposed to consecrate a colonial bishop in England by bishops of the established church. This mandate, however, confers no territorial title or jurisdiction upon the bishop whose consecration it sanc-

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[b] Commons Papers, **1871**, no. 269; *ibid.* **1873**, nos. 195, 259; *ibid.* **1874**, no. 257; *ibid.* **1877**, no. 123. And see Hans. Deb. vol. ccxx. p. 700; vol. ccxxviii. p. 767; vol. ccxxx. p. 1399. In 1873, the imperial government, in accordance with their policy in regard to religious endowments, resolved to sever the connection which heretofore existed between the Crown and chaplains at consular stations abroad, by withdrawing the allowance in aid of their support granted under the Act 6 Geo. IV. c. 87. This determination met with much opposition. In 1874, a committee of the House of Commons was appointed to consider the case, and on July 9, 1875, the attention of the house was called to the report of this committee, and it was moved to resolve that the adherence of the government to this policy, in respect to consular chaplains, was uncalled-for and inexpedient, and ought to be reconsidered. But, after debate, the motion was negatived. *Ibid.* vol. ccxxv. p. 1250.

[c] See Todd, Parl. Gov. vol. i. p. 313. Several acts incorporating the synods of the various dioceses of the Church of England in Canada, have been passed by the legislatures of the Canadian provinces since confederation. Similar acts have also been passed on behalf of the Presbyterians, Wesleyan Methodists, and other denominations.

tions; but leaves all such questions to be disposed of by those who may voluntarily submit themselves to his jurisdiction.[d]

Episcopal Church in Australia.

On Jan. 10, 1872, the bishop of Sydney (Australia) addressed a letter to the secretary of state for the colonies, expressing the earnest desire of the Episcopal Church in Australia to maintain, as far as possible, its connection with the mother church in England. To this end, he proposed that while colonial synods should continue to nominate clergy to fill vacant sees, her Majesty should be advised to grant license to the archbishop of Canterbury to consecrate, and therein to name the diocese to which the bishop should be assigned. Of late years, the royal license had merely specified that "the party is to be consecrated to be a bishop in such or such a colony, or sometimes, in her Majesty's colonial possessions." This had given rise to a difficulty respecting the succession, by an incoming bishop, to church property held by his predecessor.

This letter, moreover, pointed to the need of imperial legislation to define and regulate the status of priests and deacons ordained in the colonies.

In other colonies.

The under-secretary of state, in reply, informed the bishop that Lord Kimberley was not prepared to recommend a departure from the course hitherto observed and approved by the law officers of the Crown, under which, in conformity with the decision of the privy council, above mentioned, her Majesty would be advised to refrain in future from appointing a bishop, in any colony possessing legislative institutions, without the sanction of the legislature. She will, however, be advised, at the request of the archbishop of Canterbury, to issue mandates to authorize episcopal consecrations, by bishops in England, without assigning any particular

[d] Commons Papers, **1873**, vol. xlviii. p. 907.

diocese to the new bishops. Bishops may be consecrated in the colonies without a royal mandate; and the colonial episcopate must secure their position, in respect to endowments and otherwise, by voluntary agreement, or local legislation, as may be most convenient and practicable.

Colonial episcopal clergy.

As concerning the status of colonial clergy, the government intimated that they would not object to the colonial clergy being placed on a similar footing to the clergy of the Scottish Episcopal Church, under the Act 27 and 28 Vict. c. 94; but they were not then prepared to propose legislation on the subject.[e]

Imperial church legislation for the colonies.

In 1873, Lord Blachford (formerly Sir F. Rogers, and under-secretary of state for the colonies) introduced a bill into the House of Lords, to continue the ecclesiastical corporations previously established in any British colony, "by enabling the future *elected* bishops to succeed to the endowments" of the bishops appointed under letters-patent; and also to remove the legal disability of clergy ordained in the colonies from officiating or holding preferment in other parts of the empire.[f] This bill passed the Lords, but was dropped in the Commons. In 1874, it was again introduced, and became law; but with the omission of the clauses affecting the devolution of church property, which it was agreed could be more suitably dealt with by the local legislatures.[g]

It is unlikely that the Imperial Parliament will entertain any further proposals for legislation affecting ecclesiastical questions in the colonies.

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[e] New Zealand Parl. Papers, **1872**, A. no. 1, *a*, p. 31. For particulars of previous action to the same effect, which proved unsuccessful, see Todd, Parl. Govt. vol. i. p. 314; Hans. Deb. vol. clxxxvii. pp. 256, 762; Adderley, Colonial Policy, pp. 395–404.

[f] Hans. Deb. vol. ccxvi. p. 484.

[g] *Ibid.* vol. ccxviii. p. 1804. Act 37 and 38 Vict. c. 77. Corresp. on Fiduciary Property of Colonial Bishops, Commons Papers, **1874**, vol. xliv. p. 463.

Episcopal Church in New Zealand.

Meanwhile, — as is declared in the address of the Bishop of Wellington, at the opening of his diocesan synod, in 1873, — the church of England in New Zealand — or as it is now designated, the Church of the Ecclesiastical Province of New Zealand — "is a branch of the Catholic Church, independent of all control from any other branch of the church whatever. No other church has any right to legislate for it. No appeal from its decisions can be carried to the courts of any other church. It is in the same relation to the church of England as the church of Ireland or the church of America." It is, in fact, entirely autonomous and free, subject neither to the authority of church or state in the mother country: or even to the decisions of the judicial committee of the privy council; save only to the extent, presently to be considered, to which even nonconformist congregations in all parts of the empire are amenable to that tribunal. This definition of the actual status of the Anglican Church in the colonies is correct and explicit. The free constitution framed for its own governance by the Episcopal Church in New Zealand, in communion with the mother church in England, has been since copied by the Episcopal Church in Australia, and will doubtless form a model for all the churches of the reformed Anglican confession throughout the empire.[h]

Inasmuch as it is the undoubted prerogative of the Crown to entertain appeals in all colonial causes, any ecclesiastical matters in dispute in any colony, which, prior to the Act 25 Henry VIII. c. 19, would have been referred to the pope, — and any doctrinal matter upon which judgment had been pronounced by a colonial

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[h] See the London Guardian, Aug. 11, 1875, p. 1025. Tucker's Life of Bishop Selwyn, of New Zealand and Lichfield, vol. ii. c. 3. "Ecclesiastical Organization;" Phillimore, Ecclesiastical Law, vol. ii. part 10, c. 3; "The Church in the Colonies."

Ecclesiastical questions before the privy council.

law court, — is capable of being adjudicated upon by the judicial committee of the privy council, in the shape of an appeal from the decision of the inferior court. But such an appeal "must come as a civil question, raised on a point of fact, brought from the civil courts in the colonies" to the supreme legal tribunal in the mother country.[i]

No ecclesiastical body in the empire may deny the authority of the civil courts to inquire whether, in a particular case, the acts of that body have been in conformity and agreement with its own laws, or whether such acts have infringed upon some civil right or interest, recognized by those laws or by the laws of the land, and a right of appeal to the privy council, from the decisions of the local court, upon any such question, must equally exist.[j]

Jurisdiction of courts in ecclesiastical cases

In respect to non-established churches, the interference of the civil power is justifiable in two distinct classes of cases. Firstly, with a view to the settlement of questions affecting the exercise of civil rights in the religious body itself. Secondly, in order to prevent any encroachment, by one religious society, upon the rights of other portions of the Christian community.[k]

So far as temporal and civil rights are concerned, the courts of law have jurisdiction over non-established churches; and the control of the civil power, as exercised through the administration of the judicial office, may be properly invoked to decide questions arising

[i] Hans. Deb. vol. clxxxvi. pp. 374–382. The case of Long *v.* The Bishop of Cape Town was an appeal to the privy council from the supreme colonial court, Moore, P. C. Cases, N. S. vol. i. p. 411. See also the Guibord Case, Brown *v.* Curé, &c., de Montréal, P. C. Appeals, vol. vi. pp. 157, 207.

[j] See *ante*, pp. 220–224.

[k] See Imperial Act 34 and 35 Vict. c. 40, to regulate the proceedings and powers of the Primitive Wesleyan Methodist Society of Ireland. And see Forbes *v.* Eden, 1 House of Lords Cases (Scotch Appeals), 568; J. Johnston *v.* The Minister and Trustees of St. Andrew's Church, Montreal, 1 Supreme Court of Canada Rep. 235; Deeks *v.* Davidson, Grant, Chancery Rep. (Ontario), vol. xxvi. p. 488.

out of the operation of rules agreed upon for the government of any religious society. The fact that some question of spiritual rights may run parallel with the civil question cannot exonerate the courts from the duty of adjudicating upon matters which may indirectly, but in supposable cases must substantially, involve the interpretation of the ecclesiastical laws of the particular community.[l]

Royal supremacy.

The source of the authority of the Crown in ecclesiastical matters, and of its jurisdiction in the last resort all over ecclesiastical causes that may come before any civil court within the realm, is to be found in the doctrine of the royal supremacy. This doctrine is a foundation principle of the British Constitution. It was authoritatively asserted by Parliament at the era of the Reformation, and it is interwoven with the very essence of the monarchy itself; for, by the act of settlement, the succession to the Crown of England is expressly limited to Protestant members of the Church of England; while, by previous enactment, ecclesiastical supremacy had been conferred upon the Crown, as a perpetual protest against the assumption, by any foreign priest or potentate, of a right to exercise coercive power or pre-eminent jurisdiction over British subjects.[m]

[l] See Mr. Gladstone on the Functions of Laymen in the Church, reprinted in his "Gleanings of Past Years," vol. vi. p. 1; and cases cited in Chitty's Equity Index, ed. 1853, *verbo* "Dissenters." American law, as administered in the several states of the Union, and by the federal courts, is equally decided in claiming complete and exclusive jurisdiction over all religious societies, upon questions of life, liberty, and property, — whether real or personal estate, or money, in the hands of ecclesiastical associations, — whilst it leaves all spiritual questions — whether of worship, doctrine, discipline, or membership — to the exclusive decision of the religious body itself; save only where it may be necessary to deal with such questions, in order to decide upon a matter of civil rights. See Greene's American edition of Brice on Ultra Vires. And an able article in the British Quarterly Review, October, 1876, Art. V.

[m] 12 and 13 Will. III. c. 2. Bailey, Succession to the English Crown, p. 227. This principle is formally enunciated in the oaths required to be taken in the various colonies of Great Britain by the governor or other chief magistrate, and the members of the legislature. See Commons Papers, 1866, vol. l. p. 525.

Papal claims abjured in British empire.

The Statute of 1 Eliz. c. 1, known as the Act of Supremacy, declares that no foreign prince, person, prelate, or potentate, spiritual or temporal, shall henceforth use, enjoy, or exercise any power, jurisdiction, or authority within the realm, or within any part of the queen's dominions; and that all such power or authority heretofore exercised shall be for ever united and annexed to the Imperial Crown of this realm.

This declaration remains in force to the present day,[n] and it is the statutory warrant for the supremacy of the Crown, in all matters and causes, civil or ecclesiastical, throughout the British Empire, as well as for the renunciation of the papal claims therein.

Within our own day, this principle has been reasserted by the Imperial Parliament in an emphatic and unmistakable manner.

Ecclesiastical titles act.

In September, 1850, the pope of Rome issued a brief, dividing the United Kingdom into dioceses, over each of which was placed an archbishop, or bishop, with territorial jurisdiction, and an ecclesiastical title, derived from some city or town in Great Britain. This proceeding excited great indignation in the country; and an act of Parliament was passed, by large majorities, declaring all such briefs, and all jurisdiction pretended to be conferred thereby, unlawful and void, and prohibiting the assumption of ecclesiastical titles in respect of any places within the United Kingdom.[o] The ecclesiastical titles act was in substance a declaration of the common law, which was affirmed before the Reformation, and ratified by Parliament some five hundred years ago. It was intended, however, as a measure of defence, not of aggression, and no attempt was ever made to enforce its prohibitions or to levy the penalties which it imposed. But it would be erroneous to infer from this, that the act was

[n] See the Revised Statutes, 1 Eliz. c. 1, secs. 16, 17. Remarks on the Royal Supremacy; as it is defined by Reason, History, and the Constitution: by Rt. Hon. W. E. Gladstone, M. P. Third edition, 1877, reprinted in his "Gleanings of Past Years," vol. v. p. 173.

[o] Act 14 and 15 Vict. c. 60. And see Martin, Life of the Prince Consort, vol. ii. p. 335.

either ineffectual or unnecessary. On the contrary, it was intended to be "a plain and emphatic assertion by the legislature of the constitutional authority and supremacy of the sovereign, and there has not since 1851 been any general or ostentatious infraction thereof by those against whom it was directed." [p]

Repeated attempts were made in 1867, and following years to 1870, to induce Parliament to repeal this statute, and in 1867 a committee of the House of Commons reported in favour of its abrogation; but these attempts were unsuccessful.[q]

At length, in 1871, Parliament consented to repeal the act of 1851, which in its restrictions had been practically a dead letter, and in so far to legalize, on behalf of Roman Catholics in the United Kingdom, those local and territorial arrangements for assigning to the clergy and ecclesiastical hierarchy of the Roman Church therein special districts for spiritual service. It was admitted to be inexpedient "to impose penalties upon those ministers of religion who may, as among the members of the several religious bodies to which they respectively belong, be designated by distinctions regarded as titles of office, although such designation may be connected with the name of some town or place within the realm." [r]

But it was at the same time provided that the repeal of the aforesaid act of 1851 "shall not, nor shall anything in this act contained, be deemed in any way to authorize or sanction the conferring or attempting to confer any rank, title, or precedence, authority or jurisdiction, on or over any subject of this realm, by any person or persons in or out of this realm, other than the sovereign thereof." [s]

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[p] Report, Committee of House of Lords, June 16, 1868; Lord's Papers, **1867-68**, vol. xxx. pp. 573, 678.

[q] Hans. Deb. vol. clxxxvi. pp. 363, 706; vol. clxxxvii. p. 564; vol. cxc. p. 992; vol. cxci. p. 239; vol. cxcii. p. 1982; vol. cxciv. p. 186; vol. cxcvi. p. 261; vol. cxcvii. p. 1169; vol. cciii. p. 1683.

[r] Act 34 and 35 Vict. c. 53.

[s] *Ibid.* In accordance with the principle above set forth, the Roman Catholic bishops in Great Britain and Ireland (prior to the promulgation of the Syllabus by Pope Pius IX.) declared that they recognized their paramount obligations to the British Crown, in all civil matters. (See Mr. Gladstone on the Vatican Decrees, in their bearing on civil allegiance, London, 1874.) But in the Syllabus and Encyclical Letter of Pius IX. issued on Dec. 8, 1864, as endorsed and supplemented by the decrees of the Vatican Council, in 1870, the supremacy of the church over the state, in civil as

The Jesuits.

The Roman Catholic relief act, of 1829, contained a clause similar in principle to the act of 1851, forbidding the assumption of the name, style, or title of any archbishop, bishop, or dean, in England or Ireland, by any person other than the lawfully appointed incumbent of the same; and likewise another clause, forbidding any member of the order of Jesuits to "come into this realm."[t] These provisions of the statute soon ceased to be operative, and are not now enforced. But, so far as the clause relating to the Jesuits is concerned, the House of Commons was assured, in 1875, that it is not looked upon by her Majesty's government as being obsolete, but, on the contrary, "as reserved powers of law of which they will be prepared to avail themselves if necessary."[u]

Roman Catholic religion in Canada.

Upon the cession of Canada to the British Crown, while entire freedom of religion was guaranteed to the French Canadian population, the principle of the royal supremacy was distinctly maintained. By the fourth article of the treaty of 1763, his Britannic Majesty agreed to grant "the liberty of the Catholic religion to the inhabitants of Canada," and promised to "give the most effectual orders that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Romish Church, as far," it was significantly added, "as the laws of Great Britain permit." The Quebec act, passed in 1774, ratified and secured to the inhabitants of that province the free exercise of their religion, pursuant to the treaty of 1763, with a proviso that the same should be "subject to the king's supremacy, declared and established by an act, made in the first year of the reign of Queen Elizabeth, over all the dominions and countries which

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well as in spiritual matters, is asserted, and the supremacy of the pope, and his claim to the obedience of his spiritual subjects, is affirmed, as an article of faith. See Gladstone's Vatican Decrees, ed. 1875, p. 43. And his Vaticanism, an answer to Reproofs and Replies, published in February, 1875.

[t] Act 10 Geo. IV. c. 7, secs. 24, 29.

[u] Mr. Disraeli, Hans. Deb. vol. ccxxiv. p. 1622. And see *ibid.* vol. ccxxv. p. 1058.

then did, or thereafter should belong to the Imperial Crown of this realm." [v]

It is noteworthy, in this connection, to observe that in the royal instructions to the Duke of Richmond, on his appointment in 1818 as governor-in-chief in and over the provinces of Upper and Lower Canada, it is stated, with reference to the inhabitants of Lower Canada, "that it is a toleration of the free exercise of the religion of the Church of Rome only to which they are entitled, but not to the powers and privileges of it as an established church, that being a preference which belongs only to the Protestant Church of England." And "it is our will and pleasure that all appeals to a correspondence with any foreign ecclesiastical jurisdiction, of what nature or kind soever, be absolutely forbidden under very severe penalties." [w]

And although, by subsequent legislation, as we have seen, every vestige of preference, on the part of the state, for one religious denomination over another has been abolished in Canada, so that no special powers or privileges can be claimed by any religious society, under pretence of being "an established church," yet the absolute supremacy of the Crown, in all causes and matters ecclesiastical, as opposed to claims and pretensions of the pope of Rome to jurisdiction over British subjects, is the law in Canada, as unreservedly as in all other parts of the queen's dominions.

Supreme court on papal pretensions.

In conformity with this constitutional doctrine, the Canadian Supreme Court decided, in 1877, that a certain election of a member to serve in the dominion parliament was void, because Romish priests had been guilty of undue influence thereat; having, under colour of the performance of spiritual functions, interfered with the free exercise of the elective franchise, in violation of the civil rights of the electors. This

[v] 14 Geo. III. c. 83, sec. 5.
[w] Commons Papers, 1837–38, vol. xxxix. no. 94, pp. 71, 72.

timely judgment struck at the root of the ultramontane claims of the supremacy of the church over the state, — claims which had been vehemently urged by ecclesiastical dignitaries of the Romish Church in Canada, — and vindicated the true doctrine of the supremacy of the law. It was a unanimous decision of the court, which, to their honour be it said, included learned judges of French origin, and of the Roman Catholic faith.[x]

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[x] Brassard *et al.* v. Langevin, Canada Supreme Court Rep. vol. i. p. 145. See the North American Review, vol. cxxv. p. 557, on the ultramontane movement in Canada. And Rome in Canada, by Charles Lindsey. Toronto, 1877.

CHAPTER IV.

PART II.

DOMINION EXERCISABLE OVER SUBORDINATE PROVINCES OF THE EMPIRE BY A CENTRAL COLONIAL GOVERNMENT.

WITHIN the past quarter of a century, a novel principle has been introduced into the colonial polity of Great Britain, whereby the imperial government has relinquished the direct supervision and authority over provinces which are included within the limits of larger colonies, and the responsibility of exercising a general control over such subordinate provinces has been vested in a central colonial government.

This transference of imperial control is a natural consequence of the most ample recognition of the doctrine of local self-government. But, practically, such concession of imperial rights to the highest local authority in the particular colony has varied according to the circumstances in which each colony is placed. In New Zealand, which is the earliest example of such a form of administration, the provinces were directly and unreservedly subordinated to the central authority. In the later instances of the Canadian and South African colonies, local rights were expressly reserved, and the principle of federation introduced, with the assignment of limited powers only to the federal government. Invariably, however, certain reservations and restrictions have been imposed upon the central authority by the wisdom of the Imperial Parliament.

Since the year 1852, three jurisdictions of this descrip-

tion have been established by imperial legislation, — in the respective colonies of New Zealand, of Canada, and of South Africa.

Federal and provincial jurisdictions.

But, inasmuch as the only example of subordinate provincial governments now in active operation in the empire is to be found in British North America, it may be better to depart from the strict chronological order in describing the working of these local institutions, and to consider briefly the special peculiarities of the Australasian and South African provincial systems; and then to examine in detail the questions that have arisen out of the formation of subordinate provinces in the dominion of Canada.

a. *Provincial governments in New Zealand.*

In New Zealand.

In 1851, whilst Earl Grey held the seals of office as her Majesty's secretary of state for the colonies, a scheme for the future government of New Zealand was elaborated by the imperial government. It was proposed to grant a representative constitution to this rising colony with a General Assembly, to be composed of two legislative chambers, and to divide the colony into five (afterwards changed to six) provinces, each of which should be governed by a superintendent with an elected provincial council: these councils to be empowered to legislate on all subjects of a local nature not directly reserved for the consideration of the General Assembly; such provincial enactments to be assented to, in the first instance, by the superintendent, but to be subject to disallowance by the paramount authority of the Crown conveyed through the governor of New Zealand, in like manner as laws passed by the General Assembly.

In February, 1852, before Earl Grey's scheme had been submitted to Parliament, a change of ministry

occurred. Sir John Pakington, who succeeded to the office of colonial secretary, nevertheless introduced the New Zealand government bill of his predecessor into the House of Commons, but with one important alteration. He proposed that, in view of the limited powers of the provincial councils, the superintendent should have authority to assent to the laws passed therein, on behalf of the governor of the colony and subject to instructions to be received from him. And the governor was further empowered to disallow any local act so assented to, within *two years*. This provision was made in order to enable the governor, in any special case, to refer for instructions to her Majesty's secretary of state. By this means the colonial office was enabled to exercise a control over all provincial legislation. But, during the progress of the discussion on this bill in Parliament, the government were induced to amend it, at the suggestion of Mr. Gladstone, so as practically to abandon the imperial veto on acts passed by the provincial councils. This was effected by reducing the period within which it should be competent to the governor to disallow any such act from *two years* to *three months* after his receipt of the same.[a]

When this measure came before the House of Lords, Earl Grey expressed great regret that the power of the Crown to disallow acts passed by a provincial legislature had been, for the first time, formally abandoned. Admitting that, owing to the limited powers of the provincial councils, it might have been rarely necessary to exercise the control of the Crown over their enactments, yet he was of opinion that, inasmuch as under the municipal reform act of 1835 the Crown was invested with authority to disallow corporation by-laws, so the

[a] See Hans. Deb. vol. cxxi. pp. 114, 923, 962, 978. *Ibid.* vol. cxxii. p. 1149. Act 15 and 16 Vict. c. 72, secs. 18–31. Adderley, Colonial Policy, p. 140.

same power should have been retained over the larger and more important sphere of legislation entrusted to these provincial councils.[b]

The provincial councils, however, were absolutely subordinate under their constitution to the central legislature, which was at liberty to control or supersede any of their laws; and, further, to modify the powers of the provincial councils themselves without reference to the Imperial Parliament. And the relation in which the governor stood towards the provincial councils was substantially the same as that occupied by the Crown itself towards colonial legislatures.[c] In these important particulars, the provincial governments in New Zealand differed materially from the local governments, subsequently introduced into British North America.

Abolition of provincial governments in New Zealand.

But these provincial governments were very short lived. In 1875, by an act of the General Assembly,[d] they were abolished; and the powers previously exercised by the superintendents and councils were transferred back to the central executive and legislature, which afterwards established local boards throughout New Zealand for local purposes.

b. *Provincial governments in South Africa.*

South African federation.

In 1877, a permissive act was passed by the Imperial Parliament to provide for the union, under one government, of the British colonies and states in South Africa.[e] This act appears to contemplate the establishment of a federal union; but it merely defines the general princi-

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[b] Hans. Deb. vol. cxxii. p. 1166.

[c] Secretary Labouchere's despatch to Governor Browne, of Dec. 10, 1856; Commons Papers, **1860**, vol. xlvi. p. 480.

[d] New Zealand Act, 39 Vict. no. 21. As to the competency of the colonial legislature to pass this act, see Lord Carnarvon's despatch of Dec. 20, 1877, in New Zealand Parl. Papers, **1878**, appx. A. 2, p. 6.

[e] 40 and 41 Vict. c. 47.

ples intended to regulate the future constitution of the proposed union in its executive and legislative capacity. The details of the scheme are to be provided for by an order in council, to be issued so soon as the legislatures of the several colonies and states included in the act of union shall have agreed upon the same.

In one important particular, however, the proposed confederation will probably differ from that which has been established in British North America, inasmuch as it has been agreed to retain the ultimate jurisdiction and supremacy of the queen in council, not only over the legislation of the union parliament, but also over all laws which may be passed by the provincial legislatures.

In the original draft of this permissive statute, as framed by the imperial government and submitted for the consideration of the local authorities in South Africa in December, 1876, it was provided by section fifty-six that "every law made by a provincial council shall be forthwith transmitted to the governor-general, who shall, according to his discretion, allow or disallow the same." And the twelfth section of the bill enacts that "where 'the governor-general' alone is mentioned, the provision shall be construed as referring to the governor-general acting on his own discretion and without advice" from his privy council.[f] But in the bill, as it became law, this section is materially changed, and it is provided that "every law made by a provincial council shall be forthwith transmitted to the governor-general, who shall proceed with regard to such law in the same manner as is hereinbefore provided with respect to bills passed by the union parliament;"[g] that is to say, not merely to decide upon the expediency of assenting to or of withholding his assent from the same,

[f] Commons Papers, **1877**, C. 1732, pp. 21, 26.
[g] 40 and 41 Vict. 47, sec. 38.

Powers of the Crown in South Africa.

but also, according to his discretion and subject to his instructions from the Crown, to reserve any such bills for the signification of the royal pleasure. Furthermore, in the case of all bills assented to, the governor is required to forward copies thereof to the secretary of state, in order that they may be subject to disallowance by the queen in council within a period of two years, in like manner as in the case of laws passed by the union parliament.[h]

We have no clew, in the papers submitted to the Imperial Parliament, as to the reasons which influenced the imperial government in approving of this material alteration in the first draft of their measure, excepting in the following observations of the secretary of state for the colonies, in his despatch dated Aug. 16, 1877, forwarding to the governor of the Cape of Good Hope the act of union. Adverting to the fact that this act was so framed as to enable the Crown, upon ascertaining the wishes of the communities who should desire to confederate under its authority, to assign to the provincial councils the exact degree of jurisdiction and power which might best accord with the well-understood wishes and interests of these communities, the colonial secretary proceeds to state that, "if it should be decided, either at first or at any later time, to concentrate all the principal powers and functions of government closely under one chief legislature, the provincial councils can become similar to the ordinary municipal organizations for managing local affairs; while, on the other hand, if, in order to satisfy local sentiments or requirements, it should seem desirable to entrust the higher responsibilities of government, in a large degree, to the provinces, this also will be easily feasible."[i]

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[h] Commons Papers, **1878**, C. 1980, pp. 37, 39.
[i] *Ibid.* p. 22.

Meanwhile eschewing the limitation of imperial control, which, as will be presently shown, the rigid application of the principle of local self-government to provincial legislation has effected in Canada, and which once conceded it is difficult if not impossible to withdraw, the imperial parliament has expressly retained to the Crown the right of supervision over all legislation affecting the welfare of British subjects in South Africa, whether such legislation shall have emanated from the union parliament or from the provincial councils. The earnest desire which is uniformly exhibited by the mother country to conciliate her colonies, and to make use of every prerogative of the Crown to foster their best interests, is a sufficient guarantee that this reserved right will be moderately and beneficently exercised.

c. *Provincial governments in Canada.*

Canadian federation.

Following the order observed in the first part of this chapter, our observations upon the powers of the local governments established in Canada, under the provisions of the British North America act of 1867, will be divided into two heads. We will first consider the extent of dominion control over the several provinces in matters of legislation; and afterwards the control exercisable by the dominion government over the provinces in administrative matters.

1. *Dominion control in matters of legislation.*

Under British North America act.

The British North America act of 1867 was a formal compact, the terms of which had been previously considered and agreed upon by representatives, on behalf of the several provinces about to be confederated, and which set forth, by the supreme authority of the Imperial Parliament, the mutual relations to be hereafter

Distribution of legislative powers.

observed between these provinces and the dominion government.

The original parties to the compact were the provinces of Upper and Lower Canada (afterwards termed Ontario and Quebec, respectively), Nova Scotia, and New Brunswick. Subsequently, other provinces were added to the confederation, under the provisions of the imperial statute aforesaid.[j]

For the purpose of enabling the central government to undertake the supreme authority of control and general legislation in and over the entire dominion of Canada, the provinces surrendered to the federal parliament the exclusive right to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects assigned (by the British North America act) exclusively to the legislatures of the provinces. And for greater certainty, and yet not so as to restrict the generality of the legislative powers so surrendered and conferred upon the central government, the act proceeds to specify certain subjects which, if they concern individuals (as naturalization or marriage) are of general operation, or which would concern or affect the whole community, and declares that "the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects" therein enumerated.

On the other hand, "all matters of a merely local or private nature in the province," particularly if they relate to certain specified classes of subjects of local concern enumerated in the imperial act aforesaid, are assigned to provincial control, and "in each province the legislature may exclusively make laws in relation to" the same.[k]

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[j] See *post*, p. 388.

[k] Imp. Act 30 Vict. c. 3, secs. 91, 92. As to the precise meaning of the term "exclusively" in these

Concurrent powers of legislation are likewise conferred, both upon the dominion parliament and the provincial legislatures, in relation to agriculture and to immigration; but no provincial law on these subjects may be repugnant to any act of the dominion parliament. And, under certain circumstances, the parliament of Canada is authorized to make remedial laws for the due execution of particular rights in respect to education, guaranteed under the British North America act, to denominational or separate schools which have been provided on behalf of either the Protestant or Roman Catholic minority of the inhabitants in each and every province.[l]

"The relation of the dominion and provincial authorities to each other" has been thus defined by a learned judge of the Court of Common Pleas in Ontario (who has since been transferred to the Supreme Court of the dominion): "The imperial or sovereign power has created several governments, one of which is made superior, to which all the others are subordinate, carved, as it were, out of the superior one, and has conferred upon the several subordinates certain municipal powers in relation to certain matters specifically enumerated, reserving to the superior, which it has designated the dominion government (so long as the Imperial Act remains unrepealed), all those powers which are necessary to be enjoyed for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects assigned by the act exclusively to the provincial legislatures; and, consistently with this subordination of the provincial to the dominion government, the laws of the provincial legislatures only obtain their validity by the assent of the dominion government."[m]

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sections, see *ante*, p. 190. And see Gray's History of the Confederation of Canada, vol. i. p. 56.

[l] Imp. Act 30 Vict. c. 3, secs. 93–95.

[m] Mr. Justice Gwynne, Ont. Com.

Control over legislation in Canada by the Crown.

The precise intent of the Imperial Parliament in regard to the powers to be exercised by the Crown, for the supervision and control of provincial legislation in Canada, is not very distinctly expressed in the British North America act. The constitutional doctrine on this subject may, however, be inferred by reference to the ninetieth section, which enacts that the provisions of this act relating to "the assent to bills, the disallowance of acts, and the signification of pleasure on bills reserved," in the case of bills passed by the dominion parliament, "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; with the substitution of the 'lieutenant-governor of the province' for the 'governor-general,' of the 'governor-general' for the 'queen and for a secretary of state,' of 'one year' for 'two years,' and of 'the province' for 'Canada.'"

The procedure upon bills passed by the dominion parliament is regulated by sections 55 to 57 of the aforesaid statute. Section 55 provides that, where a bill passed by both houses is presented to the governor-general for the queen's assent, he shall, according to his discretion, but subject to the provisions of this act and to her Majesty's instructions, declare either that he assents thereto in the queen's name, or that he withholds the queen's assent, or that he reserves the bill for the signification of the queen's pleasure.

Section 56 provides that, where the governor-general assents to a bill in her Majesty's name, he shall, as soon as may be, send a copy of the act to her Majesty's secretary of state, and if the queen in council,

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Pleas Rep. vol. xxix. p. 274. And see Mr. Justice Fisher's observations in Steadman *v.* Robertson, Pugsley and Burbidge, New Brunswick Reports, vol. ii. p. 593.

within two years after the receipt thereof, thinks fit to disallow the act, such disallowance shall be duly notified to the proper authorities, and shall forthwith annul the same.

Section 57 provides that a bill reserved for the signification of the royal pleasure shall have no force unless and until, within two years therefrom, the assent of the queen in council shall be promulgated.

Control over provincial legislation by dominion government.

In applying these provisions to the case of bills passed by the provincial legislatures, constituted under the authority of the British North America act, we arrive at the following conclusions:—

(1.) That inasmuch as the act empowers "the lieutenant-governor" of each province, "in the queen's name, by instrument under the great seal of the province," to "summon and call together" the provincial legislature,[n] and as it is a well-understood principle that all parliaments, whether federal or provincial, are opened in the queen's name, and by her governors; and that "legislation is carried on in her name even in provinces, as in Canada, which are directly subordinate to a federal government, instead of to imperial authority,"[o] it necessarily follows that the constitutional practice which for the most part prevails in the several provinces of the dominion, whereby the lieutenant-governor assents to or withholds his assent from bills passed by the provincial legislature, "in her Majesty's name," is correct; and that, in this particular, we are not warranted in substituting the name of "the governor-general," for that of "the queen."[p]

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[n] B. N. A. Act, sec. 82.

[o] Mr. Disraeli, Hans. Deb. vol. ccxxviii. p. 280.

[p] It should be observed, however, that in the provinces of Nova Scotia, New Brunswick, and Prince Edward Island, bills are not enacted in the name of the sovereign, but as by "the lieutenant-governor, the Council, and Assembly." This was the practice in these colonies prior to confederation, and it has since continued unchanged. But in the provinces of Quebec and Ontario (as well before as since confederation), and also in

(2.) That nevertheless, whenever, "according to his discretion," the lieutenant-governor shall see fit to "reserve" a bill presented to him for the royal assent, he should declare that he reserves the same "for the signification of the pleasure of his Excellency the governor-general," inasmuch as, in such a case, it is manifestly intended by the British North America act that the term "governor-general" should be substituted for that of "the queen," as indicating the functionary by whom, under such circumstances, the assent or dissent of the Crown is to be declared. This is the interpretation which is put upon the act by constitutional practice in all the dominion provinces.[q] And the soundness of this conclusion is confirmed by the obvious intendment of the act, in regard to the disallowance of provincial acts as hereinafter stated.

(3.) That, whenever the lieutenant-governor shall have assented in the queen's name to a bill passed by the provincial legislature, it becomes his duty promptly to forward a copy thereof to the governor-general, in order that if the governor-general in council should see fit, within one year after the receipt of the said act, to disallow the same, such disallowance may be duly notified to the provincial authorities concerned therein. This also is in accordance with constitutional practice in the dominion provinces.[r]

(4.) And finally, with respect to provincial bills which

British Columbia and Manitoba, the queen's name is used in the enacting clause of the acts passed by the provincial legislatures; a proceeding which, as suggested in the text, is constitutionally correct, and in accordance with the spirit of the British North America act, and which ought therefore to be uniformly observed throughout the whole dominion. In the north-west territories, which are more directly subordinated to the governor-general of the dominion in council, ordinances are enacted by "the lieutenant-governor," "by and with the advice and consent" of his "council." See further, in regard to the diversity of practice in British North America, Fennings Taylor's Are Legislatures Parliaments? pp. 193–195.

[q] Ontario Leg. Assembly Jour. **1873**, p. 374. Nova Scotia Assembly Jour. May 7, **1874**.

[r] Ont. L. A. Jour. **1869**, p. 126.

have been reserved for the signification of the governor-general's pleasure, it is clear that no such bill can have any force, or go into operation, unless and until, within one year from the date of its being reserved by the lieutenant-governor, the governor-general shall intimate that the same has received the assent of the governor-general in council; and an entry of such formal announcement shall be kept in the records and legislative journals of the particular province.

Powers of governor-general over provincial legislation.

We have still to consider whether the governor-general, in determining, according to his discretion, what shall be the judgment of the Crown in respect to bills passed by the provincial legislatures, and whether they shall be disallowed or confirmed, fulfils this function as an imperial officer and subject to instructions received from the secretary of state, or whether he is bound to be guided by the advice of his ministers, who are themselves responsible to the dominion House of Commons.

This question is not without difficulty, as well in relation to the general principles of responsible government, as in its bearing upon those sections of the British North America act which confer upon each province of the dominion exclusive powers of legislation, in regard to certain specified matters of local concern. In fact, it has given rise to an interesting controversy between the imperial government and the advisers of the Crown in Canada. A brief review of the progress and termination of this controversy may enable us to arrive at a definite conclusion upon this vital and important subject.

Shortly after the confederation of the provinces of British North America had been accomplished, and after the close of the first session of the newly established provincial legislatures, this question presented itself for practical solution. The minister of justice for the dominion 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 first report on this 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 colonial legislatures, have 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." [s]

How to be exercised.

The importance of establishing a correct constitutional practice, in the exercise of the weighty and 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 a despatch dated March 11, 1869, he noticed that, while the union act provided that the lieutenant-governor of each province might reserve bills for the consideration of the governor-general, there was no provision requiring the governor-general to take her Majesty's pleasure on such legislation. The royal instructions are also silent on this point. Sir John Young, therefore, presumed that he "should exercise the power of assent to, or reservation of, bills under the advice of the privy council of this dominion." But bearing in mind the necessity for arriving at some principle of action which should be approved by her Majesty's government, and steadily adhered to, he submitted that it was desirable, in a public point of view, that he

[s] Memorandum from the minister of justice (Sir J. A. Macdonald), dated June 8, 1868. Canada Sess. Papers, **1870**, no. 35, p. 6.

should receive some specific instructions, as an imperial officer, as to his course, in such a contingency.

Controversy between imperial and dominion governments concerning provincial legislation.

In reply to this despatch, Earl Granville pointed out 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 are 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." [t]

This despatch appeared, at the time, to be so satisfactory to the dominion government, that by an order in council, dated July 17, 1869, the secretary of state for the provinces was directed to forward the same, together with a paragraph from the royal instructions to the governor-general, — in reference to the assent, disallowance, and reservation of bills presented for his sanction, — to the lieutenant-governors of the several provinces of the dominion.[u]

In conformity with this interpretation of the duty of the governor-general, in dealing with provincial acts, it was stated by the registrar of her Majesty's privy council, in an official letter which, on Dec. 13, 1872, he addressed to the under-secretary of state for the colonies, 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

[t] Canada Sess. Papers, **1870**, no. 35, pp. 3, 4. [u] *Ibid.* pp. 25–27.

North America act of 1867] in the governor-general of the dominion of Canada, acting "*under the advice* of his constitutional advisers;" and that her Majesty in council has no jurisdiction therein.[v]

Subsequently, however, the Earl of Kimberley, — the then secretary of state for the colonies, — in a despatch to the governor-general of Canada, dated June 30, 1873, in reference to the proposed disallowance of certain acts of the New Brunswick provincial legislature, passed in 1873, in relation to common schools, and which were within the competence and jurisdiction of that body, declared "that this is a matter in which you must act on your own individual discretion, and on which *you cannot be guided by the advice* of your responsible ministers."[w]

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 or of disallowance to 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 by the governor-general.

The Earl of Carnarvon, who had succeeded Lord Kimberley as colonial secretary, was not disposed to accept this principle. But, in a despatch to the governor-general, dated Nov. 5, 1875, he states that, should it become a matter of practical urgency to decide the point, it could be finally decided only upon an appeal

[v] Canada Sess. Papers, **1876**, no. 116, p. 85.
[w] *Ibid.* **1874**, no. 25, p. 13.

to the judicial committee of the privy council from the judgment of a colonial court upon the construction of the imperial statute. He nevertheless expressed his opinion that it would be more in accordance with the spirit of the Constitution that no rigid rule of action, in such cases, should be laid down; but that, in conformity to the instructions given to the governors in Australia, in the exercise of the prerogative of mercy, "the governor-general, after having had recourse to the advice of his ministers, — whom the [dominion] parliament holds answerable for advising him as to all his public acts (though not, in all cases, for the acts themselves), — may properly be required to give his own individual decision as to allowance or disallowance."

Ministerial responsibility.

"The constitutional remedy for any prolonged difference of opinion between the governor-general and his advisers would be the same in this as in any other case of a similar nature. Holding, as I have already explained, the opinion that the constitution of Canada does not contemplate any interference with provincial legislation on a subject within the competence of the local legislature by the dominion parliament, — or, as a consequence, by the dominion ministers, — I assume that those ministers would not feel themselves justified in retiring from the administration of public affairs on account of the course taken by the governor-general on such a subject; it being one for which the dominion parliament cannot hold themselves responsible, although it may demand to know what advice they gave."[x]

The foregoing despatch was referred by the governor-general in council to the minister of justice (Mr. Edward Blake) for his consideration. On Dec. 22, 1875, Mr. Blake submitted an elaborate report to council,

[x] Canada Sess. Papers, **1876**, no. 116, pp. 83, 84.

which traversed the whole ground taken by the colonial secretary. It denied the applicability of his argument from the analogous position of a governor administering the prerogative of mercy; inasmuch as the powers of provincial legislatures are strictly limited to certain subjects of a domestic character, so that their legislation can only affect provincial, or at most Canadian, interests. And, if they transcend their constitutional competence, any acts in excess of their powers are inoperative *ab initio*.

Disallowance of provincial statutes.

Mr. Blake, moreover, contended that inasmuch as, by the British North America Act, the power of disallowing provincial enactments is expressly vested in "the governor-general in council," in substitution for the jurisdiction which was exercised by the Crown over legislation in the same provinces, when they were directly subordinate to "the queen in council," it follows that the Canadian ministers must be directly and exclusively responsible to the dominion parliament for the action taken by the governor, in any and every such case; 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, on the other hand, ministers who think it necessary that a provincial act should be disallowed must resign, unless they can secure the consent of the governor to its disallowance; ministers being in every case responsible to parliament for the advice given, and for the action consequent on such advice.[y]

This report from the minister of justice was concurred in by the cabinet, and approved by the governor-general in council on Feb. 29, 1876. And on April 6, 1876, it was forwarded by his Excellency for the consideration of the imperial government.

[y] Canada Sess. Papers, **1876**, no. 116, pp. 79, 83.

The secretary of state for the colonies in acknowledging, on June 1, 1876, the receipt of this report, reiterated his convictions that an authoritative decision, upon the difficult question at issue between the imperial and colonial governments, could only be obtained through the instrumentality of the judicial committee of the privy council, in giving a judgment on appeal upon the construction of the British North America act.

Ministerial responsibility in disallowing provincial acts.

Meanwhile he invited the Canadian ministers to consider another aspect of the question, but which he did not now wish to press, in opposition to their views. In sections ten and thirteen of the act aforesaid, a distinction is drawn between "the governor-general" and "the governor-general in council," which distinction is observed throughout the statute. It might then be urged that inasmuch as "the governor-general" alone is charged in the ninetieth section with the duty of deciding upon the allowance or disallowance of provincial acts, it was the intention of the Imperial Parliament that the exclusive responsibility of determining such questions should devolve upon the governor-general personally; for, if his ministers had power to control his decisions upon provincial acts, it would be tantamount to a repeal of that portion of the British North America act which confers an exclusive right to legislate upon certain matters on the provincial legislatures.

This despatch was referred by the Canadian cabinet to the minister of justice. Upon his report, a minute of council was passed, and approved on Sept. 19, 1876, by the governor-general, to the following purport.

It was unlikely that the question of ministerial responsibility in connection with the disallowance of provincial acts could be brought on appeal before the privy council, unless the governor-general should claim to disallow an act independently and without the

agency of his ministers; in which case it might be questioned whether the act was effectually disallowed.

The colonial secretary's suggestion that by the omission of the words "in council," in the ninetieth section, the act meant to confer an independent power upon the governor-general, is at variance with the general intention of the clause. It is more reasonable to suppose that these words were omitted for the sake of brevity, and to avoid unnecessary repetition.

As to the apprehension expressed that the Canadian ministers might abuse the power of controlling by their advice the decisions of the governor-general upon provincial acts, no such consideration would be valid against the true construction of the statute, although it might be a reason, if well founded, for a change in the law. But, in fact, the Canadian ministers representing the several provinces of the confederation, and dependent for their continuance in office upon their retaining the confidence of the confederate parliament, are most unlikely to disregard provincial rights under any circumstances; and any such abuse of power would be quickly followed by disastrous consequences to themselves. We have, indeed, a greater security that this power will be wisely exercised, upon the advice of the Canadian ministers, than exists in the exercise by the queen in council of the power of disallowing acts of the dominion parliament, because for any such proceeding in Canada ministers would be held responsible to the Canadian people.

The governor-general cannot be supposed to be capable of determining such questions upon his own unaided judgment; neither ought he to act upon the counsel of persons who are not his constitutional advisers, or upon instructions from the colonial office, which would render the imperial authorities responsible in the case. The important and difficult questions arising

out of the exercise of this prerogative can, therefore, be prudently and wisely solved by the governor-general only as he acts upon the advice of his responsible ministers, who, whether they be more or less accountable for the same, will naturally influence his decision very materially.

This report was duly transmitted to the colonial secretary, who in a despatch to the governor-general of October 31, 1876, commented thereon. He acknowledged the force of Mr. Blake's arguments, and the propriety of his conclusions in general, — which, he allowed, were sustained by high authorities in England, — but still inclined, for his own part, to prefer a construction of the British North America act which would permit of the governor-general acting independently of his ministers in deciding upon the allowance or disallowance of provincial acts.

Admitting that the governor-general could not and ought not to act upon his own unaided judgment, the colonial secretary suggested that he should invariably have recourse to the advice of his ministers before deciding upon such questions. He would then be acting *under* the advice of his ministers, although he might not be willing to act *according* to their advice.

But this conclusion failed to satisfy Mr. Blake. In a further report, in answer to the aforesaid despatch, the minister of justice demurs to the assumption that the governor-general is aided by his ministers' advice, when he arrives at a decision adverse thereto, which must be based upon opposite considerations, entertained solely by himself. And he reaffirms the position for which he had contended throughout this controversy, "that, under the letter and spirit of the constitution, ministers must be responsible for the governor's action." "He regrets that the discussion has not resulted in an agreement, but ventures to hope that it has, at any rate, decreased

the probability of future difficulty on a question of very grave importance." This report was approved by the governor-general in council, on Nov. 21, 1876, and ordered to be transmitted to the secretary of state for the colonies. On Jan. 4, 1877, its receipt was acknowledged by the colonial secretary, but without further comment or observation.[z]

Settlement of controversy between imperial and dominion governments.

In reviewing this ably conducted correspondence, we may remark that the controversy between the imperial and dominion governments took a different shape as the discussion proceeded. 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.

Further points.

It would seem, however, that some points, which are material to the solution of the question, were overlooked on both sides. They may be stated as follows:

(1.) The ninetieth section of the British North America act, which substitutes "the governor-general" for

[z] Canada Sess. Papers, **1877**, no. 89, pp. 449–458.

"the queen," as the executive authority which is ultimately empowered to give or withhold the assent of the Crown to bills passed by the provincial legislatures, and which the secretary of state for the colonies would construe as applying to the governor-general, acting independently of his ministers, refers not merely to the allowance or disallowance of provincial enactments, but likewise to the action of "the governor-general" in relation to appropriation and tax bills, and in the recommendation of money votes. All these matters are embraced in the same category, and if the governor-general can act, under the powers conferred upon him by this clause, independently of his ministers, in the one case, he can do so, of equal right, in all the cases enumerated. This would be obviously unconstitutional, which plainly shows that the secretary of state's interpretation of the clause is untenable. It is then more reasonable to infer that the term "governor-general," in this clause, was not made use of simply for the sake of brevity, and to avoid needless repetition, which would be an unwarrantable excuse for obscure phraseology in such an important and authoritative document, but as being a sufficient and appropriate antithesis to the term employed to designate the imperial executive authority in the fifty-sixth clause (which is intended to be read in connection with clause ninety) and where the term "queen in council" is used in reference to the disallowance of dominion acts. Of course the queen, in declaring her approval or disapproval of such enactments, can only do so "in council." In the corresponding action of the governor-general, in reference to provincial legislation, it is equally clear that he should act "in council:" inasmuch as his functions are performed, in a colony where responsible government prevails, under the same constitutional restrictions as those of the sovereign,

in relation to bills passed by the Imperial Parliament.[a]

(2.) 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 a 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.

(3.) If, on the contrary, the governor-general had assumed that he was competent to act in such cases independently of his ministers, it could only have been in virtue of his position as an imperial officer, himself responsible to his sovereign, and for whose acts in that capacity the queen's ministers were directly accountable to the Imperial Parliament. But it has been distinctly and repeatedly declared by her Majesty's government (as will be seen in the precedents hereinafter cited) that the queen in council claims no jurisdiction over provincial legislation; that the only tribunal before which any provincial enactment could be questioned was that of the governor-general; and that no

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[a] Since these pages were written, I observe this point ably stated by the premier of the dominion, Sir John A. Macdonald, in a recent official memorandum. He says: "Long before confederation, the principle of what is known as 'responsible government' had been conceded to the colonies now united in the dominion. . . . Whether therefore, in any case, power is given to the governor-general to act individually or with the aid of his council, the act, as one within the scope of the Canadian constitution, must be on the advice of a responsible minister. The distinction drawn in the statute between an act of the governor and an act of the governor in council is a technical one, and arose from the fact that in Canada, for a long period before confederation, certain acts of administration were required by law to be done under the sanction of an order in council, while others did not require that formality. In both cases, however, since responsible government has been conceded, such acts have always been performed under the advice of a responsible ministry or minister." Commons Papers, **1878–79**, C. 2445, p. 109.

imperial secretary of state would undertake to advise an interference by the Crown with the action or determination of the governor-general in such matters. Should there be an apparent failure of justice by reason of a provincial act being left to its operation, redress could only be obtained upon application to the provincial legislature from whence the act had emanated; or, in the event of a presumption that a particular statute had been illegally enacted, by recourse to a court of competent jurisdiction to decide whether or not the statute was valid and effectual.

On this head, it has been pertinently remarked by an eminent Canadian judge, that "it is not to be expected that the governor-general in council will be so far able to examine all acts passed by the provincial legislatures as to foresee all possible constitutional difficulties that may arise on their construction; and, therefore, an omission to disallow is not to be deemed in any manner as making valid an act, or a part of an act, which is essentially void, as being against the constitution." [b]

Constitutional powers of governor-general.

In deciding upon the validity or expediency of provincial enactments, the governor-general in council has no arbitrary discretion. The decision of the dominion government upon all such questions must be in conformity with the letter and spirit of the British North America act. That statute has been correctly termed "the great charter of our constitution." It recognizes and guarantees to every province in the confederation the right of local self-government, in all cases within the competency of the provincial authorities. And it does not contemplate or justify any interference with the exclusive powers which it entrusts to the legislatures of the several provinces; except in regard to acts which transcend the lawful bounds of provincial

[b] C. J. Harrison, in Leprohon *v.* the City of Ottawa (citing the Queen *v.* Wood, 5 E. & B. 49, 55), 40 U. C. R. 490.

jurisdiction, or which assert a principle, or prefer a claim, that might injuriously affect the interests of any other portions of the dominion, or, in the case of acts which diminish rights of minorities in the particular province in relation to education, that had been conferred by law in any province prior to confederation.[c] These principles must be studiously kept in view, and steadily maintained, whenever the legislation of any province is submitted to the constitutional criticism of the governor in council. Otherwise, there would be a danger not merely of the infraction of local rights guaranteed by the Imperial Parliament, but as a necessary result of any such violation of the principle of local self-government, of a disruption of the bond which unites together the several portions of the Canadian dominion. And these considerations should equally influence the two houses of the dominion parliament whenever they are invited to express an opinion upon questions which it may appertain to the provincial authorities to determine.

It is, indeed, a supposable case, that a provincial act might come under review by the dominion governor in council which should be found to contain provisions "of an extraordinary nature and importance,"—such as, if the bill had been enacted by the dominion parliament, the governor under the royal instructions would be required to reserve it for the signification of the royal pleasure thereon,—and that the Canadian privy council might deem it expedient to advise that this particular measure should be permitted to go into operation, contrary to the opinion of the governor-general.

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[c] British North America Act, 1867, secs. 92–95. And see memorandum of Sir John A. Macdonald (minister of justice) of Aug. 26, 1873, in reference to certain Orange Society incorporation acts, passed by the Ontario legislature: Ontario Sess. Papers, First Session, **1874**, no. 19. And Earl Carnarvon's despatch to Earl Dufferin, of Nov. 5, 1875. See further on this point, *post*, pp. 349–352.

Constitutional powers of governor-general.

Whatever proceedings the governor-general might be competent to take in such a contingency in order to vindicate his own judgment in the matter, it is obvious that under the British North America act he would not be at liberty to reserve the bill for the consideration of the Crown, unless upon the advice and with the consent of his ministers for the time being, inasmuch as it has been authoritatively stated, on behalf of her Majesty's government, that "the power of confirming or disallowing provincial acts is vested by statute in the governor-general of the dominion, acting under the advice of his constitutional advisers;" and that that statute does not confer upon "her Majesty in council any jurisdiction over" such questions, though "it is conceivable that the effect and validity of" any provincial enactment might at some future time "be brought before her Majesty on an appeal from the Canadian courts of justice." [d]

Precedents on this question.

Before we proceed to consider the constitutional practice which regulates the exercise by the dominion government of its lawful control over provincial legislation, we may suitably direct attention to a series of precedents which confirm and establish the points we have already ascertained; namely, that under the British North America act the control of the Crown over the provinces of the Canadian dominion is now exercised not directly by imperial authority, but indirectly through the instrumentality of the dominion government, and that it is incumbent upon the governor-general in council, in the exercise of his constitutional supremacy, to respect the rights of the provinces in matters of local legislation, so far as the same are defined by the British North America act.

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[d] Opinion of the lord president of the privy council (the Marquis of Ripon), in December, 1872, quoted in Canada Sess. Papers, **1876**, no. 116, p. 85. The extent to which the legal right of interpretation and control over provincial legislation is exercised by the courts of law is elsewhere considered. See *post*, p. 375.

New Brunswick school act.

In 1871, an act passed by the provincial legislature of New Brunswick, in relation to common schools, came under review by the dominion government. Numerous petitions, from the Roman Catholic inhabitants of the province, were presented to the governor-general, praying that this act might be disallowed, as being an infringement upon the rights which they enjoyed, as a religious denomination, at the time of confederation. But whereas the provincial legislatures possess, under the ninety-third section of the British North America act, exclusive powers of legislation in educational matters, — subject only to the right of the dominion parliament to make remedial laws, under certain specified circumstances, — the governor-general was advised by the minister of justice, on Jan. 20, 1872, that he had no right to intervene, and should allow the act in question to go into operation. If any religious body was aggrieved thereby, they "should appeal to the provincial legislature, which has the sole power to grant redress."

However, on May 30, 1872, a motion was made in the dominion House of Commons for an address to the governor-general, praying him to disallow the aforesaid statute. To this motion an amendment was proposed, deprecating such a proceeding, on the ground that the act was strictly within the competence of the provincial legislature, whose powers ought not to be impaired by the dominion parliament. It was then proposed, as an amendment to this amendment, to address her Majesty in favour of the amendment of the British North America act, so as to secure to every religious denomination in New Brunswick the rights which they enjoyed at the time of the union with Canada in regard to schools. These several motions were negatived, and a resolution agreed to, expressing regret that the aforesaid New Brunswick statute should have proved unsatisfactory to the Roman Catholics in that province, and a hope that it might be so modified at the next session of the provincial legislature as to remove any just cause of discontent; and declaring that it is expedient to obtain the opinion of the crown law officers in England (and if possible of the judicial committee of the privy council), as to the right of the New Brunswick legislature to make such changes in the school law as would deprive Roman Catholics of the privileges they possessed, prior to the

union, in respect of religious education; so as to determine whether the parliament of Canada would be warranted to intervene, under the fourth sub-section of the ninety-third clause of the British North America act, with remedial legislation in their behalf.

Application was accordingly made, through the governor-general, for the opinion of the imperial crown law officers on this question. Amongst the papers submitted to these officers was a memorandum from the Executive Council of New Brunswick, dated Dec. 23, 1872, protesting against any interference, by the dominion House of Commons, with the exclusive powers assigned to the provincial legislature by the confederation act, and deprecating any reference of the case to the law officers of the Crown in England. The competency of the New Brunswick legislature exclusively to frame laws on this subject was afterwards affirmed by the unanimous judgment of the Supreme Court in that province, who further held that the dominion parliament possessed no power of remedial legislation in the matter.[e]

Meanwhile, in compliance with the aforesaid resolution of the Canadian Commons, the crown law officers, as well as the lords of the privy council, were applied to, by the governor-general, for their opinion upon the case. On Nov. 29, 1872, and on Feb. 12 and April 7, 1873, the law officers of the Crown reported that, upon full consideration of the question before them, they agreed with the dominion minister of justice that the provincial legislature was competent to pass the school act, and that no case had been made out to warrant an interference with that statute; or that would "bring into operation the restraining powers, or the powers of appeal to the governor-general in council, and the powers of remedial legislation in the parliament of the dominion, contained in the ninety-third section" of the British North America act. The lord-president of the council, under date of Dec. 13, 1872, declined to interfere, for the reason already stated; namely, that the power of confirming or disallowing provincial acts was vested by law absolutely and exclusively in the governor-general in council.[f]

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[e] Pugsley, New Brunswick Reports, vol. i. p. 273.

[f] Canada Sess. Papers, **1877**, no. 89, pp. 343–428. And see *ante*, p. **330.**

New Brunswick school act.

Upon the Commons of Canada being notified of this result, they agreed to another resolution, on May 14, 1873, wherein they declared their opinion that the parties aggrieved by the New Brunswick school act of 1871, should have an opportunity of bringing the matter judicially before the privy council; and that meanwhile the governor-general should be advised to disallow certain acts passed at the last session of the New Brunswick legislature, to legalize assessments made under that statute, and to amend the same. This resolution was carried against ministers. His Excellency, however, being advised that the aforesaid statutes sought to be disallowed were, equally with the act of 1871, within the competence of the provincial legislature, authorized the minister of justice to inform the House of Commons that he was not prepared at present to comply with their request; but that, in accordance with the advice of his ministers, he should submit the question for the consideration of the imperial government.

The Supreme Court of New Brunswick having, as we have seen, affirmed the constitutionality of the act of 1871, and no appeal from their judgment having as yet been made to the privy council, notwithstanding that the dominion parliament had granted moneys to defray the cost of an appeal, the Executive Council of New Brunswick, on May 19, 1873, addressed a further protest to the governor-general against the interference of the House of Commons in the matter. The Council claimed for the dominion government entire freedom in dealing with questions expressly reserved to the control of the provincial legislatures, and asserted that the House of Commons ought to abstain from endeavouring to control the government in cases wherein the dominion parliament had no right to legislate. They declared that the establishment of a contrary principle would destroy the federal character of the union and the independence of the local legislatures.

The governor general reported these particulars to the secretary of state for the colonies on May 27, 1873, with a request for instructions as to the course he should pursue. The colonial secretary in his reply, dated June 30, 1873, informed the governor-general that the acts in question, being within the powers of the local legislature and in agreement with the general spirit of the act of confederation, ought to be allowed

to remain in force, and could not constitutionally be interfered with by the House of Commons. Otherwise, the exclusive right of legislation in such questions, conferred by the act of union upon the provincial legislature, would be virtually annulled.[g]

At this juncture, another occasion arose for testing the legality of the common-school acts before the courts of law, and of obtaining, as the result proved, a decision of the judicial committee of the privy council thereon. In Hilary term, 1873, a Mr. Maher, a Roman Catholic resident in the town of Portland, New Brunswick, who had been assessed under the said acts, applied to the Supreme Court for a rule *nisi*, calling on the town council to show cause why a writ of *certiorari* should not be issued to bring the order of assessment into court, with a view to its being quashed; on the ground that the act under which the assessment was made was *ultra vires*, and in contravention of the British North America act. The court, however, upheld the legality of the statutes, and of the assessments made under the same. An appeal was then brought before the judicial committee of the privy council from this decision. It was argued in July, 1874; but their Lordships, without calling upon the respondents, gave judgment confirming the decision of the court below, and dismissing the appeal with costs.[h]

The exclusive jurisdiction of the New Brunswick legislature in the disposal of this question having been thus acknowledged, as well by the imperial and dominion governments as also by the privy council, no alternative remained to the dissentients but to appeal to the New Brunswick Assembly. Accordingly, in the years 1873 and 1874, numerous petitions were presented to that body, asking for such an amendment of the common-school act of 1871, as would secure to Roman Catholics in that province "separate schools." But, after careful inquiry and consideration, the House of Assembly on March 4, 1874, resolved, that it was inexpedient to grant special rights and privileges, in respect to denominational

[g] Canada Sess. Papers, **1874**, no. 25, pp. 8–13.

[h] *Ex parte* Maher is an unreported case. The judgment of the judicial committee is also unreported, but will be found in the London "Times," of July 18, 1874, p. 11, col. 4; also in the Toronto "Globe," of July 31, 1874.

New Brunswick school act.

education, to any class of persons. The house also protested against any attempts, either by the Imperial Parliament or by the dominion government, to impair or curtail the privileges and powers of the provincial legislature, without its own previous consent and the sanction of the people.[i]

On March 10, 1875, the dominion House of Commons addressed the queen, representing the inexpediency and danger of any imperial legislation that would encroach upon the powers reserved to the provinces by the British North America act; but expressing regret that their anticipations (on May 29, 1872) that the New Brunswick school act would be so modified by the provincial legislature as to remove any just ground of discontent had not been realized; and praying her Majesty to exert her influence with that legislature to bring about the desired result. This address was forwarded to the queen through the proper channel.

On Oct. 18, 1875, a reply to this address was embodied in a despatch from the colonial secretary (Lord Carnarvon), which concurred in the opinion that imperial legislation to curtail the powers vested by law in the provincial legislature would be an undue interference with the local constitutions and with the terms of union. But equally the secretary was unable to advise her Majesty to take action upon this address; inasmuch as her direct intervention in the matter would be liable to the same objections. He could only express a strong hope that the ruling majority in New Brunswick might be disposed so to exercise their undoubted rights as to remove all reasonable causes of complaint, and so avoid the "serious inconvenience [of] bringing under public discussion in the dominion legislature a controverted question which may possibly engender much heat and irritation, and over which it has no jurisdiction."[j]

This expectation, however, has not been realized; and separate schools are not yet established by law in New Brunswick.

A question, similar in principle to the foregoing, was raised in 1877, in regard to the public-schools act, passed in that year by the legislature of the province of Prince Edward Island.

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[i] Canada Sess. Papers, **1877**, no. 89, p. 430.
[j] *Ibid.* p. 434.

That act repealed all existing laws on the same subject, and made new provision on behalf of education in the island. But, according to the law of the province, the system of education had always been non-sectarian; and, in this respect, the new law made no change. Prince Edward Island school act.

Nevertheless, in practice, certain exceptional advantages had been enjoyed under the old law by various French schools in the island, wherein the Roman Catholic minority had gradually introduced books not legally authorized to be used. Inasmuch as such exceptional practices could not be continued under the new act, the Roman Catholic bishop of the island memorialized the lieutenant-governor to reserve the bill for the consideration of the governor-general in council, on the ground that it interfered with the rights of the French Roman Catholic population to possess "separate" schools, — which rights, he claimed, were intended to be secured to them, under the ninety-third section of the British North America act.

The lieutenant-governor declined to reserve the bill, but undertook to forward any memorial against it to the dominion government, by whom it could, if illegal or unjustifiable, be disallowed.

In transmitting petitions against the act to the governor-general, the lieutenant-governor also forwarded a report from his executive council on the question, wherein the constitutionality of the act was affirmed, and the claims urged against it for separate and exclusive rights to the French Roman Catholics were shown to be unwarranted by law, and contrary to the policy of free, non-sectarian education, heretofore established in the island.

The minister of justice for Canada, in a careful review of the case, dated Nov. 8, 1877, affirmed the legality of the public-schools act, and denied that the French schools above referred to by the Roman Catholic bishop "were denominational by law, whatever may have been the course of instruction carried on in them;" or that any denomination had the right, under the previous laws, "to establish a separate or denominational school, not under the control of the board of education."

Admitting that some of the provisions of the new act appeared to be severe and somewhat arbitrary, and recommending that the attention of the lieutenant-governor should be called to them, to consider the expediency of certain amend-

ments thereto, the minister of justice was nevertheless of opinion that the act should be left to its operation; and that it was not "proper for the federal authority to attempt to interfere with the details or accessories of a measure of the local legislature, the principles and objects of which are entirely within their province." This report was approved by the governor-general in council, and the act permitted to continue in operation.[k]

Prince Edward Island formed no part of the dominion of Canada, under the British North America act of 1867. In May, 1873, however, the legislature of that colony passed addresses to her Majesty, expressing their desire to be admitted into the confederation; and, as speedily as possible, their application was complied with.

Charlottetown park bill.

In the same session in which these addresses were agreed to, a bill was passed by the island legislature, to vest a certain crown reserve in the city of Charlottetown for the purposes of a public park. This bill, at the close of the session, in June, 1873, was reserved by the lieutenant-governor for the signification of the queen's pleasure.

But, in view of the approaching inclusion of Prince Edward Island as a province in the dominion of Canada, her Majesty was advised to take no action on this bill, but to refer it to the consideration of the dominion government, to report on the propriety of its receiving the royal assent. Upon the report of the Canadian minister of justice, the governor in council, on April 3, 1874, advised that her Majesty should be humbly requested not to assent to the bill.[l]

Prince Edward Island land acts.

For upwards of half a century, the "land question" had been a fruitful source of agitation in Prince Edward Island. Bills to settle this question were repeatedly passed by the island legislature, on a basis which was deemed objectionable by the imperial government, and from which, accordingly, the assent of the Crown was withheld.

In August, 1873, the secretary of state for the colonies wrote to inquire of the governor-general of Canada whether a certain bill on this subject, passed by the island legislature in the previous session, had been passed before or after the

[k] Prince Edward Island Assem. Journals, **1878**, p. 2, and appx. A.
[l] Canada Sess. Papers, **1877**, no. 89, p. 29.

admission of the island into the dominion. "In the latter event," the secretary observed, "it would devolve upon your Lordship, to give or withhold the royal assent." In reply, the governor-general stated that this bill was passed prior to the union with Canada. Whereupon, it was confirmed and assented to by the queen in council.[m]

In 1874, an act to amend the land act of 1873 was introduced into the legislature of the province of Prince Edward Island. Certain parties, interested therein, petitioned the secretary of state for the colonies that the royal assent might be withheld from this measure. Whereupon the colonial secretary forwarded this petition to the governor-general of Canada, "for the careful consideration of his ministers."[n] Some time after, the colonial secretary wrote to the governor-general, in regard to delays in deciding upon the fate of this bill, that "although it is as a rule desirable that the governor-general should act with the concurrence of his ministers in respect of the allowance or disallowance of provincial bills, yet, as this measure relates to a question which had been repeatedly and fully considered before the admission of Prince Edward Island into the dominion, there may not be the same necessity as in cases originating subsequently to the union, for your taking the opinion of your ministers respecting it." He therefore suggested that the governor-general might, in concert with the other parties interested in the settlement of the question, agree to refer it to a committee of arbitrators, with an umpire selected by himself.[o] The governor-general, however, would not assume the responsibility of personal action on this occasion, but in conformity with the invariable practice in such cases, and pursuant to an order in council approving a report by the minister of justice, advising him not to assent to this bill, he withheld the royal assent from it.[p]

The propriety of this course was admitted by the imperial government, by whom certain interested parties, who had petitioned the Crown on the subject, were informed that this question was "not one with which the secretary of state is

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[m] Commons Papers, **1875**, vol. liii. p. 737.
[n] *Ibid.* p. 743.
[o] *Ibid.* p. 746.
[p] *Ibid.* pp. 758–764. See also Canada Sess. Papers, **1875**, no. 61; **1877**, no. 89, p. 77.

authorized to deal, by the constitution of Canada; but the decision in the matter rests with the governor-general."[q]

Prince Edward Island land acts.

In their own discretion, the dominion government afterwards approved of the suggestion made by the colonial secretary for the appointment of arbitrators to determine land claims; and subsequently upon their recommendation an act was passed by the island legislature in 1875, to erect a land court to arbitrate in the settlement of such questions, which was assented to by the governor-general in council.[r]

Certain of the resident land-owners in the island, memorialized the queen to disallow this act. But upon the petition being forwarded to the secretary of state for the colonies, through the governor-general, they received for answer that the secretary had not felt at liberty to advise her Majesty to interfere with the course taken in regard to this act by the governor-general of Canada.[s]

In 1876, the provincial legislature of Prince Edward Island passed an act to amend the land-purchase act of 1875, and to validate certain proceedings had under it. This act was reserved for the consideration of the governor-general's pleasure. Interested parties petitioned against it. They admitted the competency of the local legislature to pass the act of 1875; but sought the interference of the governor-general to save them from the effects of what they deemed to be in its operation an unjust and oppressive measure. On a report from the minister of justice, the act of 1876 was disallowed, as being retrospective in its action, and as dealing with the rights of parties now in litigation.[t]

The same question — as to the right of the imperial government to interpose, whether by action or by advice, in the settlement of questions within the undoubted jurisdiction and competency of the provincial legislatures to determine — was raised in the case of two acts passed by the Ontario legislature in 1874, respecting the union of the Presbyterian churches in that pro-

[q] Commons Papers, **1875**, vol. liii. p. 750. And see Hans. Deb. vol. ccxxvi. pp. 4, 7.

[r] Commons Papers, **1875**, vol. liii. p. 764.

[s] *Ibid.* **1875**, vol. liii. pp. 766–768.

[t] Canada Sess. Papers, **1877**, no. 89, pp. 120–134.

vince, and in relation to the Presbyterian college at Kingston, commonly called Queen's College.[u]

Ontario legislation on Presbyterian questions.

Petitions addressed in the first instance to the governor-general, and afterwards to her Majesty's secretary of state, representing the serious and unprecedented infringement of rights, both spiritual and temporal, and the setting aside of a royal charter, passed under the Great Seal, proposed to be effected by these local acts, and praying that they might not receive the royal assent, were presented to the governor-general, and by him referred to the consideration of the minister of justice.

On Nov. 23, 1875, upon the recommendation of the minister of justice, it was decided by the governor-general in council, in the case of one of the acts aforesaid (38 Vict. c. 75), that it should be left to its operation, inasmuch as it dealt with matters within the competency of the local legislature; save only in respect to the seventh clause, which professed to deal with Presbyterian colleges at Montreal and Quebec, and with certain funds which are outside of the province of Ontario. These provisions appeared to be *ultra vires*, and inoperative; although the disallowance of the whole act could not be advised, on this account.

By a further minute of the governor in council, dated March 6, 1876, upon a report from the minister of justice, it was decided that, while the petitions aforesaid and the papers in connection therewith might suitably be forwarded to the secretary of state for the colonies, as requested by the petitioners, yet it should be distinctly observed "that, by the British North America act, the power of disallowance [of provincial acts] does not reside in the imperial authorities; that it can only be exercised [by the governor-general in council] within twelve months; that that time has elapsed; and that there is, consequently, no power to interfere with the operation of the acts in question, so far as they are within the powers of the local legislature, a question which can be raised in the courts alone."

On March 13, 1876, the governor-general transmitted the petitions and papers aforesaid to the colonial secretary. In

[u] Ontario Stats. **1874**, cc. 75, 76.

reply, the secretary of state requested that the memorialists might be informed that he concurred in the opinion expressed by the governor-general in council; that the acts in question are now in full operation; and no appeal can be brought against them, unless upon the plea that the provincial legislature was incompetent to pass them, — in which case, it would be open to test that question in a court of law.[v]

By way of further protest against these Ontario statutes, a Presbyterian minister, on May 9, 1876, enclosed to the secretary of state for the colonies a pamphlet he had written to expose the injuries inflicted by these acts upon the Presbyterian body in Canada who desired to retain their connection with the Church of Scotland, and earnestly besought for permission to appeal to her Majesty's privy council for redress. The colonial secretary simply transmitted a copy of this letter to the governor-general without comment.[w]

The complainants then availed themselves of the suggestion of the dominion government, and applied to the Court of Chancery in Ontario to decide upon the validity of the provincial act for the union of the Presbyterian churches. Judgment was rendered by the court, in exact accordance with the opinion pronounced upon the act by the dominion minister of justice. The validity of the act itself was confirmed, save only as respects so much of the seventh section as claimed to deal with institutions and property outside of the limits of Ontario. This portion of the act was declared to be *ultra vires:* but it was shown that, by legislation in the province of Quebec, this defect could be remedied; which removed all ground of objection to the legality of the statute, and to the agreement between the churches, based thereupon.[x]

Orange society in New Brunswick.

In July, 1878, Isaac Butt, Esq., M. P., forwarded to the secretary of state for the colonies (Sir M. E. Hicks-Beach), for presentation to her Majesty, a petition from twenty-five thousand Irish-Canadian Catholics, residing in the province of Ontario, complaining that an act giving special privileges to the Orange Society in the province of New Brunswick had received from the lieutenant-governor of that province the royal assent, and praying that her Majesty would be pleased

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[v] Canada Sess. Papers, **1877**, no. 89, pp. 435–447

[w] *Ibid.* p. 448.

[x] Cowan *v.* Wright. Grant's Chancery Reports, vol. xxiii. p. 616.

to forbid the governor-general of the dominion, and the lieutenant-governors therein, to sanction by the royal assent any enactment giving a charter to the Orange Society. In reply, Mr. Butt was informed that, in accordance with the standing rules of the colonial service, all communications from the colonies should be transmitted to the colonial office through the governor of the colony from whence they proceed, in order that they may be duly verified and reported upon by the responsible authorities; that, therefore, the petition accompanying his letter would at once be forwarded to the governor-general of Canada, for the information of the dominion and provincial authorities; "but, in the mean time, I am to intimate that the question to which it relates would appear, under the provisions of the British North America act, 1867, to fall within the exclusive powers of the provincial legislatures of the dominion, and that it is contrary to established constitutional procedure for her Majesty's government to interfere, unless in very special circumstances, with such legislation as is within the competency of a provincial legislature."

On Aug. 2, 1878, copies of the foregoing correspondence were transmitted by the colonial secretary to the governor-general of Canada, with a request for "such observations as the dominion and provincial authorities may think proper to make in the matter." [y] But, inasmuch as the opinion of the dominion minister of justice had been already expressed [z] (in the case of the Orange Society bill, passed by the Ontario legislature, in 1873) that it was within the competency of provincial legislatures to decide according to their own discretion whether or not they would confer special privileges upon such

[y] Commons Papers, **1878**, no. 389. The opinion entertained by the imperial government upon the abstract question of the propriety of granting special privileges to Orange Societies, in British North America, may be inferred from a despatch from the colonial secretary (the Duke of Newcastle) to Lieutenant-Governor Dundas, of Prince Edward Island, dated Sept. 21, 1863, intimating that he had felt it impossible to advise her Majesty to assent to a bill, passed by the Island legislature, with a suspending clause, "to incorporate the Grand Orange Lodge of Prince Edward Island, and the subordinate lodges in connection therewith." His Grace expresses his "deep regret that the legislature should have given its sanction to a class of institutions which all experience has shown to be calculated (if not actually intended) to embitter religious and political differences, and which thus must be detrimental to the best interests of any colony in which they exist." Commons Papers, **1864**, vol. xl. p. 708.

[z] Ontario Sess. Papers, 1st Sess. **1874**, no. 19.

Orange societies in Canada.

associations, the department of justice, in 1879, addressed a circular to the several provincial governments, intimating that they must severally determine upon their own responsibility how they would deal with the question of Orange Society incorporations.

The foregoing precedents establish the principle that no interference on the part of the Crown with the action of provincial authorities in Canada, upon any question exclusively within their legislative competence, would be accounted as justifiable, or would be approved by the imperial government, unless under very special and extraordinary circumstances, which could scarcely be anticipated and could not possibly be defined beforehand.

Jurisdiction of dominion and local authorities.

The supervisory control of the Crown, over all acts of legislation within the jurisdiction of the constituted authorities in any province which forms a part of the dominion of Canada, has been delegated to and is now solely exercised by the governor-general in council; that is to say, by the governor-general acting under the advice of ministers responsible to the dominion House of Commons. It is to this tribunal that appeal should be made for the disallowance of provincial enactments.

On the other hand, the redress of grievances arising out of the operation of provincial laws can only be constitutionally afforded by the provincial legislatures by which such laws have been enacted; except in cases wherein the acts complained of have been unlawfully passed, or are open to objection upon grounds that would justify the interference of the governor-general in council, or the dominion parliament, with the same.

It is true that every British subject retains the right to petition the queen in council for reparation of injuries, whether they be real or imaginary, and that the prerogative right of the Crown to interpose — at least to the extent of recommendations or suggestions to any

subordinate or inferior government or legislature throughout the empire — remains unimpaired, notwithstanding the concession thereto of local self-government. Moreover, in the precedents which illustrate this portion of our inquiry, we observe repeated instances wherein appeals have been made, as well by the dominion as by the provincial authorities in Canada, to her Majesty's government to interfere for the promotion of harmony, or for the settlement of disputes, between conflicting jurisdictions. But in all such cases the principle is affirmed, that no interposition to the detriment, in any degree, of the established principle of self-government in matters of local concern, would be permitted or approved, whether on the part of the imperial or dominion governments, in their several and appropriate spheres of action, in matters within the acknowledged competency of either tribunal. This broad principle admits of but one exception; namely, a reserved right of interference by the Crown itself, under exceptional and undefinable circumstances and as a last resort, or at the formal request of the particular governments concerned.

Appeals for redress of grievances.

The following precedent is in point in this connection: —

In 1875, Mr. G. H. Ryland petitioned the governor-general, complaining of a bill then pending in the Quebec legislature, and that afterwards became law; which, he alleged, was to the detriment of his vested rights and interests in respect to the registrarship of Montreal, which had been conferred upon him, by the imperial government, in lieu of a patent office formerly held by him under the Crown in Canada. Certain inhabitants of Montreal likewise petitioned the governor-general for the disallowance of this statute.

Ryland's case.

These petitions were referred to the minister of justice, who recommended that the provincial legislature of Quebec should be invited to give further consideration to Mr. Ryland's just claims, before the question of disallowing this act should be entertained. The lieutenant-governor of Quebec,

in reply to this suggestion, declared that these claims had been thoroughly examined; and that it behooved Mr. Ryland to address any remonstrance he desired to make thereupon to the provincial legislature, which had acted within its constitutional limits in passing this law. Consideration for its own dignity and rights would not permit of the question of repealing the act being entertained by that body. The dominion government, satisfied with these assurances of the willingness of the provincial government to render justice to Mr. Ryland, and fully recognizing that it was for that government to decide upon the merits of the case, recommended that the act should not be disallowed. Upon being informed of this decision, Mr. Ryland protested against it, as overriding and nullifying the authority of the British Crown in Canada. But no action was taken upon his remonstrance.[a]

Practice in supervising provincial legislation.

Let us now inquire into the constitutional practice, authoritatively established in Canada, to regulate the exercise by the governor-general in council of that supervision and control over provincial legislation which has been assigned to the dominion government by the British North America act.

Upon the first occasion wherein the acts passed by the legislatures of the Canadian provinces came under the review of the central government, the dominion minister of justice, in a report to the privy council for Canada, dated June 8, 1868, submitted the following rules for adoption on this subject: —

That while, under the present constitution of Canada, the general government will be called upon to consider the propriety of the allowance or disallowance of provincial acts with greater frequency than her Majesty's government has been with respect to colonial enactments, it is "of importance that the course of local legislation should be interfered with as little as possible, and the power of disallowance exercised with great caution, and only in cases where the law and the ge-

[a] Canada Sess. Papers, **1877**, no. 89, pp. 254–269. And see *ibid.* **1879**, no. 165.

neral interests of the dominion imperatively demand it." And "that where a measure is considered only partially defective, or where it is objectionable as being prejudicial to the general interests of the dominion, or as clashing with its legislation, communication should be had with the provincial government with respect to such measure, and that in such case the act should not be disallowed, if the general interests permit such a course, until the local government has an opportunity of considering and discussing the objections taken, and the local legislature has also an opportunity of remedying the defects found to exist."

Two possible grounds of objection to provincial enactments are noticed in the preceding report, namely: (1.) Where exception might be urged to "the law" itself, as being in excess of the constitutional powers of the local legislature, or at variance with dominion legislation; (2.) Where it might appear that proposed enactments were contrary to the policy which, in the opinion of the governor-general in council, ought to prevail throughout the dominion, in view of the general interests thereof.

Report thereon by minister of justice.

In order to facilitate the determination of the dominion executive upon such questions, it was advised that, upon the receipt by the governor-general of the acts passed by the legislature in any of the dominion provinces, they should be referred to the minister of justice, and that it should be his duty, as speedily as possible, to report in regard to such acts as may appear to him to be unobjectionable. If the governor-general in council concurred therein, their approval of these enactments should be forthwith communicated to the provincial government.

But it should be the duty of the minister of justice to report, separately and in detail, upon any acts which he may consider open to objection: —

(1.) As being altogether illegal or unconstitutional.

(2.) As being illegal or unconstitutional only in part.

(3.) In cases of concurrent jurisdiction, as clashing with the legislation of the dominion parliament.

(4.) As affecting the interests of the dominion generally.

This report from the minister of justice was approved by the governor-general in council on June 9, 1868, and was subsequently transmitted by a circular despatch from the dominion secretary of state to the lieutenant-governors of the several provinces.[b]

Instructions required by lieutenant-governors.

In forwarding these regulations to the lieutenant-governors, through the constitutional channel of the secretary of state for the dominion, it is obvious that instructions should likewise have been sent to these functionaries, for their general guidance in assenting, in her Majesty's name, to bills passed by the legislatures of their respective provinces, and in regard to their discretion in withholding the royal assent to bills or in reserving them for the signification of the pleasure of the governor-general, pursuant to the authority which is vested in provincial governors by the British North America act.[c] But, in point of fact, hitherto the lieutenant-governors (with the exception of the lieutenant-governor of the new province of Manitoba) have been left entirely without instructions in the fulfilment of these important functions. The commissions issued to the lieutenant-governors expressly refer to instructions as accompanying the same or as to be given, from time to time, "under the sign-manual of the governor-general," or by order of the privy council of Canada;[d]

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[b] Canada Sess. Papers, **1869**, no. 18.

[c] See *ante*, p. 329. For examples of the withholding of the royal assent to bills by lieutenant-governors of the Canadian provinces, and of the reservation of bills for the consideration of the governor-general, see *post*, p. 394.

[d] See a form of commission in Canada Senate Journals, **1878**, p. 175.

yet no instructions, of either an affirmative or a negative kind, have thus far been sent from the dominion government to these officers.[e] Nevertheless, the lieutenant-governors, as dominion officers, have in repeated instances very properly assumed the responsibility of reserving, for the consideration of the governor-general in council, bills which appeared to them to contain doubtful or objectionable provisions.

Disallowance of provincial statutes.

The power of disallowance of provincial acts has been freely exercised by the governor-general in council, from the confederation of the provinces to the present time. For the most part, this power has been resorted to only in cases wherein the provincial legislatures have passed acts which were unconstitutional, or beyond their legal competency to enact. But it has been sometimes invoked in respect to acts which contained provisions that were deemed to be contrary to sound principles of legislation, and therefore likely to prove injurious to the interests or welfare of the dominion.[f]

On the other hand, the dominion minister of justice has, in repeated instances, declined to advise the positive disallowance of provincial acts although they contained provisions that he regarded as *ultra vires*. Instead of a resort to the exercise of this statutory power, he has sometimes recommended confirmatory legislation by the dominion parliament; or he has merely called attention to the objectionable clauses, with a view to their being amended by the local legislature; or he has proposed to leave it to the courts of law to decide upon the validity of the particular statute, in the event

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[e] See Attorney-General Mowat's memorandum of Dec. 16, 1873, in Ontario Sess. Papers, 1st Sess., **1874**, no. 19; Lieutenant-Governor Morris's despatch of Feb. 12, 1876, in Canada Sess. Papers, **1877**, no. 89, p. 149; and see *ibid.* p. 172.

[f] See Canada Sess. Papers, **1877**, no. 89, *passim*. And see *post*, p. 371.

of any question arising thereupon for judicial determination.[g]

It has occasionally happened, in the case of a provincial bill, reserved for the consideration of the governor-general, that simply "no action was taken thereon." This course leaves the local government free to re-introduce the measure, at their discretion, with any suitable amendments.[h]

Lieutenant-governor calls attention to an act.

In 1876, Lieutenant-Governor Morris, of the province of Manitoba, refrained from reserving an act to abolish the Legislative Council of that province, because the constitutional competency of the legislature to pass it was undoubted. Nevertheless, in a despatch to the dominion secretary of state, he called attention to the questionable policy of the measure, and to considerations which seemed to affect its legality. The dominion government, however, decided to leave the act to its operation; being of opinion that, even if it were invalid, "it would be contrary to the spirit in which the power of disallowance has been exercised to interfere with the operation of the act." It would be for the legislature of Manitoba, if necessary, to move the proper authorities for legislation to remove any such doubts.[i]

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[g] See *post*, p. 375. For an example of the course adopted by a provincial government to bring particular legislation into harmony with the limitations imposed by the British North America act, see Nova Scotia Stats. **1877**, c. 4.

[h] Canada Sess. Papers, **1877**, no. 89, p. 154.

[i] *Ibid.* pp. 148–151. See also the case of the Goodhue estate act (34 Vict. c. 99), to confirm and validate a settlement of property under a will, but at variance with the intentions of the testator. This act was passed by the Ontario legislature in 1871, and assented to by the lieutenant-governor: although he afterwards forwarded to the governor-general a petition from parties concerned against the act, with a statement that he considered the principle involved in this act to be very objectionable, and as forming a dangerous precedent; but in the absence of instructions, and upon the advice of his ministers, he had concluded to assent to it. The dominion privy council, however, recommended that the act be left to its operation, as it was within the competence of the provincial legislature. (*Ibid.* pp. 180–191.) After being the occasion of much litigation, this act — though of doubtful expediency, and an unusual if not unprecedented interference with private rights — was, nevertheless, declared by the Ontario Court of Error and Appeal, in 1873, actually to be within the scope of provincial legislative authority, and yet to be virtually inoperative on account of certain defects and omissions therein. Grant, Chancery Rep. vol. xix. p. 366.

In the session of 1868–69, the Ontario legislature passed an act to define their powers and privileges, which sought to confer upon the Legislative Assembly and its members the same privileges as those enjoyed by the House of Commons of the dominion. The competency of the provincial legislature to pass this act was doubted; and, upon the recommendation of the dominion minister of justice, the question was referred to the consideration of the law officers of the Crown in England. They gave it as their opinion that, in view of sections 92–95 of the British North America act, this enactment was *ultra vires*. Whereupon, notwithstanding that the attorney-general of Ontario protested against this conclusion in an able memorandum, the statute was disallowed by the governor-general in council.[j] In 1876, another act on the same subject was passed by the Ontario legislature (the 39 Vict. c. 9), which conferred certain specified powers and privileges only upon the Legislative Assembly and upon its members. This act was also objected to by the dominion minister of justice, upon the assumption that it contained several provisions that were *ultra vires*. But inasmuch as a similar act, passed by the Quebec legislature in 1870, had been left to its operation, he advised that the same course should be pursued in regard to this statute, leaving it to the courts of law to decide upon any question that might hereafter be raised that should involve the consideration of the legality of this measure.[k]

Doubtful acts left to consideration of the courts.

With a view to impart to all the provincial governments the benefit of any decisions agreed upon by

[j] Canada Sess. Papers, **1877**, no. 89, pp. 202–211, 221.

[k] *Ibid.* pp. 108–114, 325. In 1878, the constitutional question as to the competency of the provincial legislatures to pass acts of this description came under the review of the Supreme Court of the dominion. The judgment of this court was in favour of the legislatures, and adverse to the opinion entertained by the dominion minister of justice. See *post*, p. 468.

the governor-general in council, in respect to the legality or otherwise of acts passed by any provincial legislature, and to afford to the newer provinces of the dominion the advantage of the legislation and experience of the older provinces, Lieutenant-Governor Morris, of Manitoba, advised in a despatch to the secretary of state for the dominion, dated Oct. 10, 1874, that "in the event of the disallowance of an act of a local legislature, the fact of the disallowance, together with its cause, should, in addition to the notice in the Canada gazette, be communicated to the other local governments." Governor Morris was informed that his suggestion was regarded as one that might well be adopted in future.[1] But as yet it does not seem to have been carried out.

Notice to local governments of dominion decisions.

As a rule, the dominion government refrains from any interference with provincial legislation, so long as the acts passed are clearly within the competency of the local authorities; unless they contain provisions which are open to objection upon general grounds of public policy, as being calculated to affect injuriously the interests of the dominion, or of any particular portion thereof. The reason of this cautious forbearance is not far to seek.

Acknowledging the constitutional supremacy of the Crown, and the indisputable right of the supreme authority in every state, to supervise and control all legislation therein, according to its discretion (a principle of much importance in this connection, to be presently adverted to); bearing in mind the fact that, under the British North America act, the governor-general in council is substituted for the queen in council, as the supreme authority entitled to ratify or disallow provincial acts, — considerations which would naturally

Cautious exercise of right of disallowance.

[1] Canada Sess. Papers, **1877**, no. 89, p. 43.

suffice to prevent the adoption of any stringent or inflexible rules for the exercise of this sovereign power on behalf of the Crown, in respect to acts passed by the provincial legislatures, — we must, nevertheless, admit, that the rights of local self-government heretofore conceded to the several provinces of the dominion are not, in any wise, impaired by their having entered into a federal compact, and that no infringement upon those rights which would be at variance with constitutional usage, or with the liberty of action previously enjoyed by the provinces when under the direct control of the imperial government, would be justifiable on the part of the dominion executive.

We have already seen that, in the colonies entrusted with "responsible government," the royal veto upon legislation is now exercised only within certain prescribed or easily ascertained limits;[m] and that no mere calculations of political expediency, or difference of opinion in regard to the policy of a colonial enactment, would suffice to induce the Crown to veto the same, provided only it was within the legislative competency of the colony, and did not injuriously affect the interests of other parts of the empire.

A similar restraint has been observed by the dominion government in its control over provincial legislation delegated to them by the Imperial Parliament.

Absolute rights of local legislatures.

There is, moreover, in the case of the Canadian provinces, an additional reason for the cautious and sparing exercise of a veto, by the governor-general in council, upon acts passed by the provincial legislatures; namely, that under their several constitutions, and pursuant to the ninety-second section of the British North America act, these local legislatures possess powers of legislation as complete and absolute within their exclusive jurisdic-

[m] See *ante*, p. 128.

tion, as those enjoyed by the dominion parliament, or even by the parliament of the mother country in their respective spheres. This argument was urged with much acumen by the learned judges of the Court of Appeal in Ontario in 1873, in adjudicating upon the constitutionality of a certain act of the local legislature, "to confirm the deed for the distribution of the estate of the late G. J. Goodhue." [n]

Judicial opinions thereon.

Thus, it was observed by Chief Justice Draper: "Conceding to the fullest extent that the powers of the legislature of Ontario are defined and limited by the British North America act of 1867, I conceive that, within those limitations, acts passed in the mode described by that statute are, as to the courts and people of this province, supreme." And by Chancellor Spragge: "The true principle I take shortly to be, that, under the confederation act, there has been a federal not a legislative union; that to the provincial legislature is committed the power to legislate upon a range of subjects which is indeed limited, but that, within the limits prescribed, the right of legislation is absolute." To the same effect, Vice-Chancellor Strong remarked, as to the power to pass private acts of parliament affecting property, "that the legislature have that power, in all cases where the property and rights sought to be affected are "in the province," to the same unlimited extent that the Imperial Parliament have in the United Kingdom, I have not the slightest doubt." [o]

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[n] Ontario Stats. 34 Vict. c. 99.

[o] *In re* Goodhue, Grant, Chancery Rep. vol. xix. pp. 386, 418, 452. These judicial opinions were cited, and their authority confirmed by Vice-Chancellor Blake, in 1876, in the case of Cowan *v.* Wright, *ibid.* vol. xxiii. p. 623. And the same principle was asserted by Mr. Justice Burton, in the Ontario Court of Appeal, in 1879, in the case of Parsons *v.* Citizens' Insurance Company. Ont. App. Rep. vol. iv. p. 100. See also Mr. Justice Fisher's able judgment in the supreme court of New Brunswick, in 1879, in Steadman *v.* Robertson; Pugsley Rep. vol. ii. p. 593. To the same effect, Attorney-General Mowat observed (in Severn *v.* The Queen, Canada Supreme Court Rep. vol. ii. p. 81), "where there is

Inherent power of control in the Crown.

But while we acknowledge the force of these conclusions, and their applicability to restrain the exercise of the veto power over provincial legislation, in respect to bills within the exclusive legislative authority of the local legislatures, there still remains in the Crown, by virtue of its authority as an essential component part of every legislative body in the empire, a reserved prerogative right of disallowance, which is capable of being exercised on all fitting occasions. The method of giving expression to this inherent and inalienable prerogative may vary, according to circumstances, and in conformity with the requirements of statute law. It may be exercised, as in England by the sovereign in person, acting in council; or, as in Canada, by the representative of the sovereign, in her name and behalf. But, in either case, the authority is identical, and it emanates from the same source; to wit, the prerogative of the Crown. For the sovereign, as the head of the body-politic, is a constituent part of Parliament; nay more, it is in the sovereign, and not in the body which the law assigns to advise and assist him, that all legislative authority is vested by the British Constitution, as the enacting clause of every act of Parliament declares.[p]

The occasions when this prerogative may be suitably invoked cannot of course be anticipated. It is not therefore possible to formulate a definition which should state explicitly the reasons that would justify the interposition by the Crown of a veto upon a colonial enactment. Suffice it to say, in answer to the objection that a power so great and indeterminate might be injuriously or unreasonably exercised, that it is subject to the same

jurisdiction, the will of the legislature is omnipotent, according to British theory, and knows no superior law." And see the Queen *v.* Burah, 3 App. Cas. 904.

[p] In the words of the old Year Book, of 23 Edward III., "the king makes the laws, by the assent of the peers, &c., and not the peers and the commune." Stubbs, Const. Hist. vol. ii p. 572. See Stephen's Blackstone, book iv. c. i.

restraints that are imposed upon all other actions of the sovereign in a constitutional monarchy: it can only be exercised upon the advice, and through the instrumentality, of responsible ministers. With this limitation, the royal veto upon colonial legislation remains as a reserved power ordinarily in abeyance, but capable of being resorted to, whenever, in the judgment of the Crown and its responsible advisers, the welfare of the particular colony or province, or the interests of the nation at large, may demand the interposition of the supreme authority.[q]

Judicial opinions on this subject.

Applying this doctrine to the control exercisable by the governor-general in council over provincial legislation, the judges of the Supreme Court of Canada have pertinently observed that there is "no doubt" of the prerogative right of the Crown to veto any provincial act, and that it "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;" not to dwell upon the possible consequences of a province choosing "to re-enact a law which had been disallowed." Moreover, the assertion of this prerogative right by the dominion government "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."[r]

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[q] See *ante*, p. 128.

[r] C. J. Richards, and Judge Fournier, in Severn *v.* The Queen, Canada Sup. Court Rep. vol. ii. pp. 96, 131.

Practical exercise of dominion control over provincial legislation.

The precise extent wherein the governor-general in council — in fulfilment of the powers conferred upon him by the British North America act, in the supervision of provincial legislation — has disallowed acts passed in the provinces, because they were at variance with rules hereinbefore recited, and which were established to define and regulate the powers assigned to the provincial legislatures by that statute, will appear on reference to the subjoined memorandum, for which I am indebted to Mr. Z. A. Lash, the deputy of the minister of justice of the dominion: —

The power of disallowance of provincial statutes is always exercised with caution. The dominion government has, since confederation, exercised this power in very few instances, compared to the large number of acts which, since confederation, have been passed by the several provincial legislatures.

The numbers of acts passed by the provinces, from confederation, in 1867, — or from the entry of particular provinces into the federal union, — to the year 1878, inclusive, are as follows: —

Ontario	1,000
Quebec	812
New Brunswick	1,005
Nova Scotia	1,081
Manitoba (from 1870)	304
British Columbia (from 1871)	209
Prince Edward Island (from 1873)	195
Total	4,606

And the total numbers disallowed, within the same period, are as follows: —

Ontario	3
Quebec	2
New Brunswick	none.
Nova Scotia	4
Manitoba	6
British Columbia	12
Prince Edward Island	none.
Total	27

This is a very small percentage, and shows how reluctantly the power is exercised. It by no means follows, however, that only twenty-seven acts have been thought objectionable by the dominion authorities during the past ten years. The practice has been, before taking the extreme course of disallowing an act, to call the attention of the provincial government to its objectionable features, and give them an opportunity of promoting its repeal or amendment. Occasionally, however, from the very nature of the act itself, or from the shortness of the time for disallowance, it has been thought necessary to disallow it, without waiting for its repeal. During the last ten years, many provincial acts have been objected to, and have accordingly, within the time for disallowance, either been wholly repealed or else amended so as to remove the objections.

If an act be, in its main features, clearly beyond the powers of the provincial legislature, it would seem to be the duty of the dominion authorities to disallow it; unless, within the limited time, it be repealed or so amended as to remove the objectionable features.

It is often very doubtful whether an act be within or beyond the competence of a provincial legislature; and very often acts which, in their main provisions, are clearly valid, contain some provision beyond the competence of the legislature. Moreover, in the character of the enactments which may be beyond the powers of the local body, there is often a vast difference. Though all such provisions are alike void, some of them may, without inconvenience, be passed by without interference by the dominion government; while, to take the same course as to others, might produce serious embarrassment and confusion. It is, therefore, in each particular case, a question to be decided, whether an act, though containing some void provisions, should be disallowed or left to its operation.[8]

In deciding as to the disallowance of an act, the government is not confined to considering its validity in a legal point of view. The power of disallowance is a general one; and, in arriving at a conclusion as to its exercise, the govern-

[8] See Report of the minister of justice (Mr. Blake), of Dec. 22, 1875, in Canada Sess. Papers, **1877**, no. 89, p. 450.

ment have undoubtedly the right to take into consideration other matters than those affecting merely the validity of the act. For instance, they may and should consider whether it affects imperial or dominion interests.

The same principles (among others) would apply in deciding as to giving or withholding assent to a reserved bill. The government have, on several occasions, dealt with provincial acts [as well as with bills which have been reserved for the consideration of the governor-general in council] upon those principles.[t]

Dominion government refuse to act unnecessarily.

In 1877, a peculiar case arose in reference to an act irregularly passed in the province of Quebec, which is deserving of special mention, as illustrating the control exercised by the dominion government in matters of provincial legislation.

A bill intituled "an act to provide for the formation of joint-stock companies for the maintenance of roads and the destruction of noxious weeds," was inadvertently assented to by the lieutenant-governor of the province of Quebec, upon a certificate that it had duly passed both houses of the legislature. It afterwards transpired that, although passed by the Legislative Council, it had only been read twice in the Assembly. Through the mistake of the clerk, it was certified as passed without amendment, returned to the Legislative Council, and assented to by the lieutenant-governor. On the discovery of this mistake, the governor-general was immediately appealed to by the provincial attorney-general, with a request that he would disallow the act. But the dominion minister of justice (Mr. Blake) declined to advise this course. He reported that, in his opinion, "the assent was void, and the

[t] For particular instances, see report of the minister of justice to council, on Oct. 16, 1876, on the Quebec Act, 39 Vict. (1875), "to compel assurers to take out a license." Canada Sess. Papers, **1877**, no. 89, p. 139. Also, the order in council withholding assent to a reserved act of British Columbia, of 1872. *Ibid.* p. 174. Also, the orders in council respecting four reserved acts from Manitoba in 1872, and one in 1876, which, though within the undoubted competency of the provincial legislature, were regarded by the dominion government as being premature and unnecessary. *Ibid.* pp. 179, 230. Also, the report to council on cap. 26 of the acts of Manitoba of 1875. *Ibid.* p. 307.

bill is not an act," and under these circumstances the power of disallowance could not properly be exercised. He pointed out that, according to precedent, an act might be passed in the ensuing session of the provincial legislature, to declare this act to be invalid; and that, meanwhile, it was in the power of the lieutenant-governor in council to refrain from putting it into operation. This report was communicated to the Quebec government, who, concurring in the opinion that the act, having been assented to in error, "was but blank paper," directed that it should not be printed amongst the statutes of the session.[u]

Control of legislation in territorial governments.

In respect to the north-west territories of the dominion of Canada, — which do not yet possess representative institutions and local self-government, but are presided over by a lieutenant-governor, assisted by an executive council, both appointed by commission under the great seal of Canada, — the dominion government exercises a more direct and less limited control. These territories were constituted by acts of the parliament of Canada passed in 1871 (c. 16), in 1875 (c. 49), in 1876 (c. 21), and in 1877 (c. 7). Under the authority of these statutes, all acts or ordinances passed by the lieutenant-governor and council of the territories, "come into force only after they have been approved by the governor-general in council, unless in case of urgency;" and all ordinances passed in the council may be disallowed by the governor-general in council, at any time within two years of their being passed.[v]

Thus, the act passed by the governor and council of the territories in 1873, to authorize the appointment of magistrates and coroners therein, was disallowed; although it was within the competency of the local government to enact it, because the governor-general in council considered "that until the settlement of the country shall have reached a more ad-

[u] Canada Sess. Papers, **1879**, no. 26. *Ibid.* no. 19. Papers in the case of Lieutenant-Governor Letellier, pp. 12, 20.

[v] Orders in Council, **1849–74**, pp. 463, 494.

vanced stage, it will be inexpedient to allow the act to go into operation."[w]

Judicial decisions on limits of legislation in Canada.

But the dominion government — either from motives of policy, or otherwise — may choose to abstain from the exercise of the powers vested in them by the British North America act to disallow objectionable measures passed by the provincial legislatures. And yet certain of these measures may, in fact, be *ultra vires*, and beyond the competency of provincial authority. In such a contingency, as we have already seen, it is the right and duty of any court of law, within the province, to entertain and decide upon the validity of the particular statute, or provision in a statute, which has been impeached.[x] The judgment of the court upon this question is, of course, open to appeal, and liable to be reviewed and annulled by a court of superior jurisdiction, whose decision likewise may be examined and adjudicated upon, either by the Supreme Court of the dominion, or by the judicial committee of the privy council in England.

By this process, a final and authoritative decision can be obtained, in respect to the legality of any provincial enactment, from the highest legal tribunal in the empire. And, if the decision should be adverse, the statute in question would become void and of none effect. This valuable safeguard against the wrongful exercise of the powers of provincial legislatures is always available, and recourse can be had to it by all parties who consider themselves aggrieved by any provincial statute, and who are of opinion that the same was invalid.

The following precedents will explain the circum-

[w] Canada Sess. Papers, **1877**, no. 89, p. 69. See further, in regard to laws and ordinances of the local government of the north-west territories, and the control of the dominion government over the same, *ibid.* **1876**, no. 70; *ibid.* **1878**, no. 45.

[x] See *ante*, p. 219.

stances under which provincial enactments have been reviewed by Canadian courts since confederation:—

Precedents of judicial decisions.

In November, 1870, the Circuit Court of Montreal decided that an act passed by the Quebec legislature, to extend the powers of a benefit society, called "The Union St. Jacques of Montreal," so as to save them from financial embarrassment, was unconstitutional and void; inasmuch as it trenched upon powers, in relation to bankruptcy and insolvency, exclusively reserved, by the British North America act, 1867, to the dominion parliament. This judgment was affirmed by the Court of Queen's Bench for the province of Quebec. But on July 8, 1874, the judicial committee of the privy council reversed this decision, and declared the act in question, as dealing with a matter of private and local concern, to be within the competence of the provincial legislature.[y]

In December, 1877, the Superior Court of Quebec decided that the provincial legislature had not power to declare the salaries of employés of the dominion government to be liable to seizure; and that so much of the fifth section of the provincial Act 38 Vict. c. 12, as required a return to be made in regard to public officers, was not applicable to an officer appointed by the dominion government, although he resided in the city of Montreal in the capacity of collector of inland revenue for the federal government.[z]

In March, 1878, the Ontario Court of Appeal, reversing a judgment of the Court of Queen's Bench, held that a provincial legislature is not competent, under the British North America act, 1867, to impose a tax upon the official income of an officer of the dominion government, or to confer power to this effect upon a municipality; and that a section of an Ontario statute, which authorized the levying of assessments on salaries of dominion officials, was *ultra vires*.[a]

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[y] Quebec Stat. 33 Vict. c. 58. Lower Canada Jurist, vol. xv. p. 212. P. C. Appeals, vol. vi. p. 31. Law Times Rep. N. S., vol. xxxi. p. 111. The same point was raised in Dow *v.* Black; wherein the judicial committee decided that a New Brunswick statute, declared by the provincial Supreme Court to be void, as being in excess of the powers vested in the provincial legislature by the imperial act, was within the competency of that legislature. (P. C. Appeals, vol. vi. p. 272.) See a decision upon insolvency legislation, Russell & Chesley, N. S. Sup. Ct. Rep. vol. i. p. 137.

[z] L. C. Jurist, vol. xxii. p. 268.

[a] Leprohon *v.* The City of Ottawa, 40 U. C. Rep. p. 486. 2 Ont. App. Rep. p. 522.

In July, 1878, the judicial committee of the privy council — affirming judgments of the Quebec Court of Queen's Bench, and Lower Canada Superior Court — decided that an act of the Quebec legislature imposing a tax upon policies of assurance, and on receipts and renewals thereof, was in excess of the powers of provincial legislatures under the imperial statute, it being virtually a stamp act, and not — as it purported to be — merely a license act. It did not impose a tax on taking out a license to follow the business of insurance, — which would have been within the competency of a provincial legislature, — but it imposed a tax on the taking out of a policy of assurance. A provincial legislature may impose "direct taxation within the province," for revenue purposes. But a stamp duty is "indirect taxation," which can only be levied by authority of the dominion parliament. The act was accordingly declared to be *ultra vires* and void.[b]

In September, 1878, the Supreme Court of British Columbia decided that an act passed by the provincial legislature, in the preceding session, requiring every Chinese person over twelve years old to take out, under heavy penalties, a license every three months, for which ten dollars shall be paid in advance, — in lieu of the customary taxation payable by the people for public purposes, — was *ultra vires* and unconstitutional; not only as being at variance with the treaty obligations between Great Britain and China, under which Chinese immigrants into any part of the queen's dominions should be free from exceptional burdens and disabilities; but primarily because, under the British North America act, it appertains to the dominion parliament, and not to the provincial legislatures to pass laws affecting trade and commerce, the right of aliens, and the obligation of treaties.[c]

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[b] Attorney-General for Quebec *v.* The Queen Insurance Company, Law Rep. 3 App. Cases, p. 1090. In Regina *v.* The Justices of the Peace of King's County, a section of a New Brunswick act was declared to be void, as being beyond the powers of the local legislature. 2 Pugsley Rep. p. 535. For similar cases, see Regina *v.* Chandler, 1 Hannay Rep. p. 548. *Ex parte* Marks, Unpubl. Rep. New Brunswick, Hil. T. **1872.** Regina *v.* Lawrence, 43 U. C. Q. B. 164.

[c] Judgment of Mr. Justice Gray, as to the validity of the Chinese tax bill. (Printed by order of government; see Brit. Columbia Sess. Papers, **1879.**) Brit. Col. Statutes **1878**, c. 35. Governor's speech on opening B. C. legislature, Jan. 29, 1879. See further on this subject, *ante*, p. 159.

By two judgments, delivered respectively in March and May, 1879, the Ontario Court of Appeals gave important decisions in the construction of sub-section two of the ninety-first clause of the British North America act, 1867, which assigns all matters affecting "the regulation of trade and commerce" to the parliament of the dominion, and of sub-section eleven of the ninety-second clause of the act, whereby "the incorporation of companies with provincial objects," is assigned exclusively to the legislatures of the provinces.

The judgments above mentioned concerned, firstly, the Citizens' Insurance Company, which had been incorporated by an act of the dominion parliament, passed in 1876; and, secondly, the Western Assurance Company, which was incorporated by the parliament of Canada before confederation, and their charter afterwards amended by the dominion parliament. Cases in relation to these companies had been adjudicated upon by the Court of Queen's Bench of Ontario, and were submitted afterwards to the consideration of the provincial court of appeals.

This court decided that, while "the regulation of trade and commerce" in Canada was within the exclusive jurisdiction of the dominion parliament, and while that parliament was competent to incorporate companies to transact insurance business throughout the dominion, with liberty to enter into such contracts as should come within the designated purposes of the company; yet that it had no power to confer privileges to be exercised within any of the provinces, except with their assent and recognition; and could not authorize a company created by dominion legislation to make contracts in particular provinces, except as the legislature of the province might ratify and approve. Any provincial legislature was competent, in its discretion, to exclude a dominion corporation from entering into contracts of insurance within the limits of the province; or might exact whatever security they should deem to be reasonable for the performance of its contracts.

For, within their respective limits, the court held that each legislature is supreme, and free from all control by the other.

And though, by a dominion statute, the general powers of a company previously incorporated are capable of being modified or enlarged, such company is not, thereby, removed from the scope of provincial legislation prescribing conditions in-

cidental to their contracting within the limits of the province.[d]

On May 31, 1879, Judge Johnson, sitting in the Superior Court, Montreal, decided that the power claimed by the city of Montreal to impose, by way of a penalty, ten per cent interest on overdue taxes, and which had been enforced under the authority of an act of the Quebec legislature, passed in 1878, was illegal; notwithstanding that such a power had been lawfully conferred by the provincial parliament of Canada, prior to confederation. Under the British North America act, legislation on the subject of interest is now exclusively assigned to the authority of the dominion parliament.[e]

In October, 1879, the Supreme Court of New Brunswick gave an opinion adverse to the constitutionality of the Canada temperance act of 1878; one of the judges (Palmer) dissenting. But upon this question so much diversity of opinion prevails, that it is evident it cannot be finally disposed of without a decision from the Supreme Court of the dominion, which is the appropriate tribunal for finally adjudicating upon the legality of legislation passed either by dominion or provincial authority.

Again, in 1879, it was decided, by the Supreme Court of New Brunswick, that a license granted by the minister of marine and fisheries of the dominion of Canada, — pursuant to the Canada statute (31 Vict. c. 60) for the regulation of the fisheries, — authorizing certain persons to fish in fresh-water rivers in New Brunswick, was illegal. The court were of opinion that, inasmuch as the several provincial legislatures, prior to confederation, whilst enacting necessary laws for the protection of fisheries, had always scrupulously abstained from any interference with the right of property of the riparian owners in the fish, it was therefore not competent for the dominion parliament, in legislating under the authority of the ninety-first section of the British North America act, in regard to "the sea-coast and inland fisheries" in the dominion, to assume a greater power than the legislatures of the different provinces had been accustomed to exercise. The

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[d] Up. Can. Q. B. Rep. vol. xliii. [e] The Montreal Legal News, p. 265. Ont. App. Rep. vol. iv. vol. ii. p. 186. pp. 96, 103, 281.

Canada act (31 Vict. c. 60) could not be construed to authorize the grant of leases in fresh-water rivers, where such rights did not already exist; and any lease granted by the dominion minister of marine and fisheries to fish in fresh-water rivers which are not the property of the dominion, or in which the soil is not in the dominion, is accordingly null and void. For the British North America act is distributive merely, in respect to powers of legislation exercisable by the dominion parliament and by the local legislatures respectively; and the dominion parliament may not intrench upon property and civil rights which are under the guardianship and subject to the power of the local legislatures, except to the extent that may be required to enable parliament "to work out the legislation upon the particular subjects specially delegated to it." [f]

Similar cases, wherein the validity of acts passed by provincial legislatures has been pronounced upon by Canadian courts of law, have already been reviewed in other parts of this volume, and need not, therefore, be specially cited in this section. It will be sufficient to refer to the case of the school acts passed by the New Brunswick legislature; [g] to the Ontario statute for the union of Presbyterian churches; [h] and to the Goodhue estate act, also passed by the legislature of Ontario. [i]

Establishment of dominion Supreme Court.

As an indispensable adjunct to the great imperial measure which joined the British provinces in North America in federal union, the dominion parliament was empowered by the one hundred and first section of the British North America act, to "provide for the constitution, maintenance, and organization of a general court of appeal for Canada." This intention of the Imperial Parliament was not carried out until 1875, when an act was passed for the establishment of a Supreme Court for the dominion, which should serve as a court of appeal from the provincial courts, and likewise possess original jurisdiction as an exchequer court

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[f] Steadman *v.* Robertson, 2 Pugsley and Burbidge, 580.

[g] See *ante*, p. 347.

[h] See *ante*, p. 356.

[i] See *ante*, p. 368.

in revenue causes, and other cases in which the Crown is interested. In 1876, further jurisdiction was conferred upon this court for the trial of suits against the Crown in Canada by petition of right.

By the Supreme Court act of 1875, the governor in council is empowered to refer any matters whatsoever to the court for hearing or consideration; and the judges are required to examine and report upon any private bill, or petition for the same, that may be referred to them by the Senate or House of Commons of the dominion. It is also provided that, when the legislature of any province in Canada shall have passed an act agreeing to the exercise by the Supreme Court of jurisdiction in controversies between the dominion and any such province, or between any two or more provinces; or, in suits wherein the question of the validity of a dominion or provincial statute is material to the decision thereof, then the Supreme Court shall exercise jurisdiction in regard to such matters. The legislature of Ontario, by an act passed in 1877 (40 Vict. c. 5), authorized and confirmed such references to the Supreme Court on behalf of the province of Ontario.

Importance of a dominion Supreme Court.

Herein consists the peculiar value and importance of a supreme court in a colony, or dominion, wherein a federal government has been established. Such a tribunal is available for the determination of all legal controversies between the supreme and the local authorities; and especially of questions resulting from the exercise of the legislative power, whether by the federal or provincial legislatures. It is the very crown and counterpoise of all authority entrusted to subordinate governments by imperial law, and it affords a constitutional method of ascertaining the proper bounds and limitations as well of provincial as of federal rights. It is the truest and most effectual safeguard of the people against the abuse of powers, either on the part of the

greater or lesser body upon which jurisdiction has been conferred. Independent of party conflicts, and superior to the corrupt influences by which all legislatures are liable to be assailed, a supreme court conveys an element of stability and of respect for the supremacy of law, not otherwise attainable in political institutions. It is likewise a guarantee for the impartial administration of justice, and for the maintenance of sound principles of government, without which popular institutions would easily degenerate into an instrument of oppression. Such advantages have already accompanied the establishment of a supreme court for the dominion of Canada. Although but five years have elapsed since the creation of this court, it has already determined several weighty and intricate questions of constitutional law, wherein a conflict of opinion and of powers had arisen between the local and the federal authorities. [1]

Its valuable decisions on constitutional questions.

For example, mention may here be made of two important decisions of the Supreme Court, — in addition to the cases cited in the note to the preceding paragraph, — one of which disposes of the question of the validity of a provincial enactment, and the other confirms a statute passed by the dominion parliament, which had occasioned much litigation, and had been adjudicated upon, in contrary ways, by several provincial courts.

On taxing powers of local legislatures.

In January, 1878, the dominion Supreme Court decided, on an appeal from a judgment of the Ontario Court of Queen's Bench, that the act of the Ontario legislature (37 Vict. c. 32), requiring brewers to take out a license for the sale of fermented or malt liquors by *wholesale*, was not within the competency of a provincial legislature; that the power to tax and regulate the trade of a brewer, being a matter of excise, and the raising of money by "taxation," as well as for the restraint and "regulation of trade and commerce," is comprised within the

[1] See especially the judgment on the question of queen's counsel, *ante*, p. 245; the judgment on the powers of local legislatures, *post*, p. 468; the judgment on clerical interference at elections, *ante*, p. 317, and the judgments noted in the text.

class of subjects reserved, by the ninety-first section of the British North America act, to the exclusive legislative authority of the dominion parliament; and that the license imposed by the said provincial statute was a restraint and regulation of trade, and not an exercise of municipal or police power. Under the ninety-second section of the imperial act, local legislatures are empowered to deal exclusively with such licenses only as are of a local or municipal description. The taxing power of a provincial legislature (as has been affirmed by the judicial committee of the privy council, in a case already referred to[k]), is confined to direct taxation, in order to raise a provincial revenue; and to the grant of licenses, to shops, saloons, taverns, auctioneers, and "other licences," for purely municipal and local objects, for the purpose likewise of raising a revenue for provincial, local, or municipal purposes.[l] Moreover, this taxing power of the local government must not be exercised so as to encroach upon, or to conflict with, the taxation in aid of dominion revenue, which is authorized to be exclusively imposed by the federal parliament.[m]

On dominion law for trying election petitions.

In January, 1879, the Superior Court of the province of Quebec decided, that the dominion controverted elections act of 1874, which imposed certain duties upon the judges of that court for the trial of election petitions against the return of members elected to serve in the dominion House of Commons, was within the competency of the dominion parliament, under the British North America act, 1867; notwithstanding that, by the ninety-second section of this act, "exclusive powers" are conferred upon the provincial legislatures to make laws respecting "the administration of justice" in the respective provinces, "including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction."

This court held that, while the dominion parliament could not alter the "constitution" of provincial courts, or enlarge their powers, even for the purpose of enabling them to try election petitions, as aforesaid, yet that these courts were already competent to undertake such duty, as they possessed

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[k] Attorney-General for Quebec *v.* The Queen Insurance Co., Law Rep. 3 App. Cas. 1090. See *ante*, p. 377.

[l] Canada Supreme Court Rep. vol. ii. pp. 70, 88, 97.

[m] *Ibid.* Judge Fournier, pp. 130-133. Judge Henry, pp. 136-140.

civil jurisdiction to try and determine "all civil matters" arising within the province. And inasmuch as the dominion parliament was undoubtedly competent, by the express authority of the imperial act, to create a new court for the trial of controverted elections (a privilege of which it had actually availed itself by an act passed in 1873, and since repealed) it was equally empowered, instead thereof, at its discretion, to assign to the judges of existing courts, judicial duties for the determination of such questions, the same not being inconsistent with their primary and ordinary functions, but rather being services which they were specially qualified to render on behalf of the dominion.[n]

This doctrine had previously been affirmed by the Ontario Court of Common Pleas, in December, 1878, the judges unanimously agreeing that the election trials act of 1874 was binding upon them.[o] It was also approved by the Court of Review at Montreal, in 1875, in two distinct cases.[p] An elaborate judgment to the same effect was rendered by the Quebec Provincial Court at St. Hyacinthe and Sorel. On a motion to appeal therefrom, made before the Court of Appeals at Montreal, as also upon other similar occasions, Chief-Justice Sir A. A. Dorion vindicated the right of the dominion parliament to impose the duty of trying federal election petitions upon Provincial Courts. He asserted that the dominion parliament, when legislating upon matters within its jurisdiction, could impose duties upon any subjects of the queen in the dominion, whether they were officials of provincial courts, other officials, or private citizens.[q]

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[n] Chief Justice Meredith, in Langlois *et al. v.* Valin. It should be stated, however, that in three other actions brought before the Superior Court, at Quebec, in January, 1879, wherein the same question was substantially raised, two decisions, adverse to the constitutionality of the dominion statute, were rendered, by different judges, and but one confirming the law, as explained by C. J. Meredith. Bélanger *et al. v.* Caron; Dubuc *et al. v.* Vallée; Guay *et al. v.* Blanchet, Quebec Law Reports, vol. v. nos. 1 and 2. In April, 1879, Judge McCord, in the Superior Court of Montmagny, likewise gave judgment against the dominion statute. *Ibid.* vol. v. p. 191.

[o] Ontario Common Pleas Rep. vol. xxix. p. 261.

[p] Lower Canada Jurist, vol. xx. pp. 77, 86.

[q] Bruneau *v.* Massue, L. C. Jurist, vol. xxiii. p. 60. The same point arose in other cases before the Court of Appeal, which were not reported; but the decisions uniformly sustained the judgment of the court, as rendered by Chief-Justice Dorion.

Validity of dominion election trials act.

The validity of the dominion election trials act of 1874 was thus confirmed by the weight of judicial authority. But inasmuch as decisions to the contrary effect had been given by several learned judges, the question was appropriately submitted to the consideration of the Supreme Court of the dominion, upon an appeal from the judgment of Chief-Justice Meredith in the case of Valin *v.* Langlois.

On Oct. 28, 1879, the Supreme Court, in judgments delivered by all the judges present, unanimously agreed to dismiss the appeal with costs, thereby confirming the constitutionality of the dominion statute, upon grounds equally applicable to all the provinces.

The court were of opinion that, under the British North America act, the exclusive legislative power of the provincial Assemblies was limited and confined to the subjects specifically assigned to them. But that all other powers of legislation for the welfare and good government of the dominion, including what is specially assigned to the dominion parliament, but not so as to restrict the generality of the supreme authority conferred upon the same by the imperial statute, were expressly and exclusively conferred upon the parliament of Canada. In fact, the authority of the federal power, over the matters left under its control, is exclusive, full, and absolute; whilst, as regards at least some of the matters left to the provincial legislatures, their authority cannot be construed as being similarly full and exclusive, when, by such construction, the federal power over matters specially left under its control would be lessened, restrained, or impaired.

That, in matters which concern the election of their members, the dominion House of Commons had undoubted and exclusive jurisdiction. It was therefore competent to parliament to transfer to the civil tribunals in the several provinces, having superior original jurisdiction, cognizance of all rights arising out of election petitions; and that in so doing there was no invasion or encroachment whatever upon the rights of local legislatures. And that, inasmuch as parliament may transfer such cognizance absolutely, it may do so qualifiedly or *sub modo*, by defining the mode in which the cognizance shall be exercised; which, by prescribing the mode of procedure, is what was actually done. Neither is such prescribing of the mode of procedure an encroachment upon the

rights of the local legislatures; for the fourteenth sub-section of the ninety-second clause of the British North America act must plainly be read as conferring upon the local legislatures the right to prescribe procedure only in such civil matters as were, by the preceding sub-section, placed under their exclusive control.

That the dominion parliament is at liberty either to create new courts, when public necessity may require it, for the better administration of the laws of Canada; or to assign to the jurisdiction of existing courts any further matters, appropriate to their sphere of duty. For, when legislating within its proper bounds, the dominion parliament is clearly competent to require existing courts, in the respective provinces, and the judges of the same, who are appointed by the dominion, paid by the dominion, and removable only by address from the dominion parliament, to enforce their legislation. Such an exercise of authority constitutes no invasion of the rights of the local legislatures.

That the exclusive power of the local legislatures to make laws in relation to "property and civil rights in the province" must necessarily be read in a restricted and limited sense; because many matters which directly involve property and civil rights are legitimately and without question affected, controlled, and guarded by dominion legislation. The competency of the local legislatures to make laws respecting civil rights is confined to those "civil rights" which are not affected by dominion powers of legislation, and do not come within the scope of the same. Moreover, it is expressly provided, in the ninety-first section of the British North America act, that any matter coming within any of the classes of subjects assigned to the exclusive authority of the dominion parliament shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the subjects assigned by this act to the exclusive legislative authority of the provinces.[r]

The foregoing decisions, and especially those of the Supreme Court of the dominion, are of inestimable value

[r] Canada Supreme Court Rep.: judgments delivered on Oct. 28, 1879, by Chief-Justice Ritchie, and by Judges Fournier, Henry, Taschereau, and Gwynne.

in the construction of the written constitution conferred upon Canada by the British North America act. They lift out of the narrow groove of a mere technical interpretation principles of legislation concerning which Canadian statesmen, whether federal or provincial, need to be accurately informed, and should be agreed. They secure to the dominion parliament the exclusive control and determination of all questions of national import and significance; while they uphold the provincial governments in their statutory right to frame whatsoever laws may be necessary to develop their internal resources, and to strengthen and improve their local and municipal institutions. For vigilance, and the exercise of judicial impartiality, by legal tribunals, is equally indispensable to prevent encroachment by the dominion parliament upon local rights, — which have been assigned by imperial authority to the guardianship and control of the provincial legislatures, — and to prevent invasion by local legislatures of the powers which appertain to the supreme jurisdiction of the dominion parliament.

Judicial interpretation of confederation statute

The appropriate limits of dominion and of provincial jurisdiction, thus ascertained and confirmed by judicial authority, coincide with the opinions expressed by leading statesmen in the Imperial Parliament as to the powers intended to be granted to the federal and local governments established in Canada by the British North America act,[s] — powers that were broadly defined and apportioned in that statute, but not so explicitly as to dispense with the need for judicial interpretation, which is the surest and safest method of deciding all constitutional controversies.

[s] See Hans. Deb. vol. clxxxv. pp. 566, 1178.

2. *Dominion control over the Canadian provinces in matters of administration.*

Provinces in the dominion of Canada.

The local governments which form part of the dominion of Canada, under the authority of the British North America act of 1867, are as follows: The provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, which were included in the original act of confederation, in 1867; the province of Manitoba, which entered the union in 1870; the province of British Columbia, which entered in 1871; the province of Prince Edward Island, which entered in 1873; and the north-west territories, which are separately governed by a governor and council.

By the one hundred and forty-sixth section of the act of 1867, authority was given to the queen in council to admit into the union any of the provinces or territories in British North America (including Newfoundland) which were not originally comprised therein, on addresses from the houses of parliament of Canada, embodying the terms and conditions of union agreed upon with the local authorities concerned. The island of Newfoundland still remains outside of the union, and is the only colonial government in North America that has not expressed a desire to participate in the benefits of the same.

Inasmuch as the several local governments now, or hereafter to be included in the dominion of Canada, are, by the provisions of the British North America act of 1867, subordinated to the authority of the queen, as exercised by the governor-general of Canada, and are thereby exempted from the direct control and oversight of the imperial government, it is necessary to inquire what provision has been made for the exercise of executive authority in these provinces.

Control of the governor-general

By the fifty-eighth and sixty-seventh sections of the imperial act aforesaid, the governor-general is empowered — by and with the advice of the dominion privy council, and under the great seal of Canada — to appoint a lieutenant-governor in and over each of the provinces; and also an administrator, who shall execute the office and functions of the lieutenant-governor during the absence, illness, or other inability of that personage.

over lieutenant-governors of the provinces.

The commissions under which the lieutenant-governors of provinces in Canada exercise the functions of their office "authorize and empower and require and command" them "to do and execute all things that shall belong" to the command and trust confided to them, by virtue of their commission and of the provisions of the British North America act, 1867, in accordance with which they have been appointed. And likewise "according to such instructions as are herewith given to you, or which may from time to time be given to you," "under the sign-manual of our governor-general," "or by order of our privy council of Canada."[t]

But, in point of fact, it would seem that though the commission of a lieutenant-governor expressly refers to instructions accompanying it, yet no instructions of either an affirmative or a negative kind have been sent with the commissions, or afterwards, at least as regards the older provinces of the dominion.[u]

On the appointment, however, of the Hon. A. G. Archibald, in July, 1870, as lieutenant-governor of the province of Manitoba, under the provisions of a dominion act for the establishment of a government therein, preliminary instructions for his guidance in office were approved by the governor-general in council on Aug. 2 following, and directed to be forwarded to Mr.

[t] See a form of the commission in Canada Senate Journals, **1878**, p. 175.

[u] Attorney-General Mowat's memorandum of Dec. 16, 1873, in Ontario Sess. Papers, **1874**, no. 19. And see *ante*, p. 362.

Archibald by the under-secretary of state for the provinces.

Office of lieutenant-governor.

These instructions direct that the lieutenant-governor shall "be guided by the constitutional principles and precedents which obtain in the older provinces." They enjoin upon him the duty of forming a responsible executive council, in reference to which he is commanded to give his advisers "the full exercise of the powers which in the older provinces have been wisely claimed and freely exercised;" "but," it is added, "you will be expected to maintain a position of dignified impartiality, and to guard with independence the general interests of the dominion, and the just authority of the Crown."[v]

At the same time, the lieutenant-governor of Manitoba was appointed by another commission lieutenant-governor of the north-west territories, and he received from the department of the dominion secretary of state special instructions for his guidance in the government of those territories. These instructions principally relate to dealings with the Indian tribes, and to opening up the country for settlement.[w]

The lieutenant-governor of every province in the dominion holds office "during the pleasure of the governor-general." The office is usually held for a period of five years only, although the incumbent thereof may be reappointed for one or more additional terms. But it is expressly provided by the British North America act that no lieutenant-governor of a Canadian province "shall be removable within five years from his appointment except for cause assigned, which shall be communicated to him in writing, within one month after the order for his removal is made;

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[v] Canada Sess. Papers, **1871**, no. 20.

[w] *Ibid.* In 1876, a separate lieutenant-governor was appointed for these territories.

which cause shall also be communicated by message, within a week thereafter, to both houses of the dominion parliament." [x]

Limited powers of lieutenant-governors.

It has been authoritatively stated of these officers that, "however important locally their functions may be, [they] are a part of the colonial administrative staff, and are more immediately responsible to the governor-general in council. They do not hold commissions from the Crown, and neither in power or privilege resemble those governors, or even lieutenant-governors, of colonies, to whom, after special consideration of their personal fitness, the queen, under the Great Seal and her own hand and signet, delegates portions of her prerogatives, and issues her own instructions." [y]

Not being directly nominated or appointed by the sovereign, the lieutenant-governors of the provinces in Canada are not entrusted with the administration of the more eminent and personal prerogatives of mercy or of honour. Previous to confederation, the power of exercising the royal prerogative of pardon was con-

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[x] British North America Act, **1867**, secs. 58–67. The provision in the fifty-ninth clause was introduced "to prevent the possibility of its being supposed that lieutenant-governors, under the new *régime*, were of necessity to be in sympathy with the dominion ministry of the day, and to be removable with every change of party." And also "to operate as a check upon the capricious and arbitrary exercise of the power of dismissal, by compelling the ministry to submit the reasons for the exercise of the royal pleasure to parliament." Sir J. A. Macdonald's memorandum in Commons Papers, **1878–79**, C. no. 2445, p. 108.

[y] Despatch of the colonial secretary (Earl Carnarvon) to governor-general of Canada (Earl Dufferin), of Jan. 7, 1875; Canada Sess. Papers, **1875**, no. 11, p. 38. "Under the circumstances of the case, the lieutenant-governors of the provinces, holding their commissions from the governor-general," are not entitled to salutes from her Majesty's ships and fortifications within their respective provinces. Despatch of the colonial secretary (Duke of Buckingham) to Governor-General Monck, dated Oct. 19, 1868. According to the official Table of Precedence in Canada, lieutenant-governors rank next after the general commanding her Majesty's troops within the dominion, and the admiral commanding her Majesty's naval forces on the British North American station. During their term of office they are styled "his Honour." *Ibid.* July 23 and 24, 1868. See *ante*, pp. 228–232.

ferred upon the lieutenant-governors of the several provinces in British North America. But that power was withdrawn in 1867, not only by the revocation of the letters-patent under which it was exercised, but also by the act of the queen in assenting to the British North America act, which changed the status of lieutenant-governors in Canada, and annulled the powers formerly conferred upon them, except in so far as they were specially retained by that statute.[z] Since confederation, neither the prerogatives of mercy or of honour can be administered by the lieutenant-governors: they can only be exercised in Canada by the sovereign directly, or through her representative, the governor-general, by virtue of an express authority given to him in his commission or by instructions from the Crown.[a]

How far they represent the Crown.

It is, nevertheless, a mistake to infer, from the limited jurisdiction and functions assigned to the lieutenant-governors of the Canadian provinces under the British North America act, that they are not to be accounted as being in any degree representatives of the Crown. Though appointed to office by the governor-general in council under the great seal of Canada, their commissions run in the name of the sovereign.[b] The form of government which, by their oath of office, they are enjoined to administer, is monarchical; and their powers as lieutenant-governors proceed directly, as well as indirectly, from the Crown of Great Britain. In the several royal commissions appointing the governor-general of the dominion, from the period of confederation until October, 1878, the lieutenant-governors of

[z] See Upper Canada Assem. Journals, **1839**, appx. vol. ii. pt. ii. p. 625: Canada Sess. Papers, **1869**, no. 16. British North America Act, 1867, secs. 12, 14, 65.

[a] See Canada Sess. Papers, **1877**, no. 89, pp. 332–335. British Columbia Sess. Papers, **1878**, p. 709.

[b] See the commission of the lieutenant-governor of Quebec; in Canada Senate Journals, April 8, 1878.

the provinces are expressly referred to, and they were directly authorized by those instruments "to exercise from time to time, as they may judge necessary, all powers lawfully belonging" to the sovereign "in respect of assembling or proroguing, and of dissolving the legislative councils or the legislative or general assemblies of those provinces respectively." [e]

Powers under royal commission and confederation act.

In the revised commission issued, in October, 1878, to the Marquis of Lorne, upon his appointment as governor-general of Canada, this clause, in reference to the powers and duties of the lieutenant-governors, was omitted. But this omission is not attributable to any intention on the part of the imperial government to diminish the rightful authority of these officers, or to disconnect the particular functions of state in question from a direct relation to the Crown. The words were left out from the governor-general's commission at the suggestion of Mr. Blake, then minister of justice for Canada, and in consequence of representations addressed by him, as we have already seen, in June, 1876, with a view to a general revision of the commission and instructions issued to the governor-general of Canada, so as to exclude from these instruments all superfluous and extraneous recitals, and to make them accord with existing constitutional usage. In his comments upon this clause in former commissions, since confederation, Mr. Blake remarks as follows: "The provision giving these powers to the lieutenant-governors by the governor-general's commission appears somewhat objectionable, and it might perhaps be advisable to leave these matters to be dealt with by those officers under the British North America act, the eighty-second section of which in terms confers on the lieutenant-governors of the new provinces of Ontario and Quebec the power, in

[e] Earl of Dufferin's commission in Canada Commons Journals, March 28, 1873. See also the British North America Act, 1867, secs. 61, 82.

the queen's name, to summon the local bodies, a power which no doubt was assumed to be continued to the governors of the other provinces."[d] Elsewhere, Mr. Blake suggests that, if needful, a separate commission could be issued by the sovereign to the lieutenant-governors for this purpose; but he was clearly of opinion that that was unnecessary, because, in his judgment, full powers for the performance, on behalf of the Crown, of these acts of executive authority must be taken to have been conferred, either expressly or impliedly, by the British North America act.[e]

They represent the Crown in the local legislatures.

Inasmuch, then, as the Crown, with the sanction and by the express authority of the Imperial Parliament, has authorized the lieutenant-governors of the provinces, "from time to time," "by instrument under the great seal of the province," to "summon and call together" the several provincial legislatures, it equally devolves upon these high officers of state, "in the queen's name," to open and to close these assemblies; and, in conformity with their instructions, and pursuant to their constitutional discretion, to give or to withhold the assent of the Crown to the bills enacted therein, or to reserve the same for the consideration of their superior officer, his Excellency the governor-general.

May withhold the royal assent from bills.

It is worthy of notice that, since confederation, the lieutenant-governors in the provinces of Quebec and Ontario, while they have occasionally reserved bills for the consideration of the governor-general, have never "withheld" the assent of the Crown from any bill passed by the provincial legislature.

In Nova Scotia and in New Brunswick, it has been otherwise. In Nova Scotia, Lieutenant-Governor Archibald has, on five several occasions, in the years 1874 to

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[d] Canada Sess. Papers, **1877**, no. 13, p. 7. And see *ante*, p. 84.

[e] Correspondence in Canada Sess. Papers, **1877**, no. 13; **1879**, no. 181. And see further on this point, *ante*, p. 329.

1879, refused to assent to bills. And in New Brunswick the same course was taken by Lieutenant-Governor Wilmot, in 1870, 1871, and 1872, and by Lieutenant-Governor Tilley in 1875 and 1877.

So far, at least, as Nova Scotia is concerned (and I have no reason to doubt that the action of the lieutenant-governor in New Brunswick could be similarly accounted for), this unusual proceeding, on the part of the lieutenant-governor, was not attributable, in any instance, to a disagreement between himself and his constitutional advisers.

The British North America act, 1867, section fifty-five, — as applied to the provincial constitutions by section ninety, — expressly empowers a lieutenant-governor, in "his discretion," to "withhold" the royal assent from any bill presented to him.

But the act of a lieutenant-governor, in withholding the assent of the Crown to a bill which has been passed by the legislative chambers, — wherein a responsible minister should be able to exercise a constitutional influence in the control of legislation,[f] — is obviously a difficult and delicate proceeding. It is one that must, at the outset, be advised by a minister, who is willing to become responsible for the same to the legislature. If a lieutenant-governor should, for any reason, deem it imperative upon him to take such a course, and his ministers should not agree therein, he must be prepared to accept their resignation, and be able to form a new ministry, by whom the act proposed could be constitutionally advised and justified to both houses.

In regard to the action of Lieutenant-Governor Archibald, in Nova Scotia, I have been favoured with information which enables me to explain the circumstances under which he exercised the royal prerogative in with-

[f] See Todd, Parl. Govt. vol. ii. pp. 305, 318.

Exercise of this prerogative in Nova Scotia.

holding his assent to bills in the cases above mentioned.

In every one of the instances wherein he interposed the veto of the Crown upon provincial legislation, he acted under the advice of his ministers, who agreed with him in an anxious desire to keep within the bounds assigned to the provincial legislature by the British North America act, and to refrain from enacting any measure to which exception could be justly taken, on the ground of its being in excess of the powers conferred upon the local legislatures by the imperial statute.

The bills in question, from which Lieutenant-Governor Archibald withheld the sanction of the Crown, were bills which, after they had passed both houses, appeared upon careful examination, and on being subjected to the scrutiny of the lieutenant-governor as a responsible officer of the dominion, to be *ultra vires*, or to be otherwise objectionable for reasons that had escaped notice during their progress through the legislative chambers.

Whereupon, it was agreed by the local administration, as the least objectionable method of obviating the difficulty, to advise the lieutenant-governor to reject these bills. Otherwise, they would certainly have been disallowed by the dominion government, after having been in force up to the time of their disallowance.

Had the lieutenant-governor been advised, instead, to reserve these bills for the consideration of the governor-general in council, the dominion government might have complained that they had been required to decide in a case which was within the competency and jurisdiction of the lieutenant-governor by the tenor of his commission to determine.

Ontario precedents.

Thus, in 1873, the dominion government took exception to two local bills to incorporate certain Orange Societies, which the lieutenant-governor of Ontario had reserved for the consideration of the governor-general.

The dominion minister of justice reported that these bills were clearly within the competence of the local legislature, and that the local government ought to have assumed the responsibility of disposing of them. Accordingly, no action was taken upon these bills, by the governor-general in council.[g]

Quebec precedent.

In 1878, the lieutenant-governor of Quebec reserved a bill, passed by the legislative chambers, to give certain powers to "the Quebec, Montreal, Ottawa, and Occidental Railway." Ministers had promoted this bill, but the lieutenant-governor was decidedly opposed to it on broad grounds of principle, and he deliberately refused to assent to it. For this, and other reasons, the lieutenant-governor dismissed the ministry, and appointed a new administration who agreed with the governor in disapproving of this railway bill. The incoming premier, "being in doubt as to the lieutenant-governor having the right of his own accord, *ex proprio motu*, to exercise the prerogative of veto, and thus to decide finally on the fate of a measure passed by both houses, when the British North America act of 1867 seems to leave such power to the governor-general," concurred with his predecessor, and advised that the bill should be reserved.[h] The dominion government, however, took no action upon it. In the next session of the Quebec legislature, another bill of an unexceptionable character, was proposed by the new ministers and became law.[i]

Where this prerogative should have been used.

It would have been more in accordance with constitutional doctrine, and in agreement with precedents previously established in other provinces of the dominion, if M. Joly, whose ministry replaced the administration dismissed from office by the lieutenant-governor

[g] Ontario Sess. Papers, First Sess. **1874**. no. 19.
[h] Quebec Leg. Assem. Journals, **1877-78**, pp. 230, 272.
[i] Quebec Stats. 41 and 42 Vict. c. 3.

of Quebec, had advised that the assent of the Crown should have been withheld from this obnoxious railway bill, instead of reserving it for the consideration of the governor-general.[j]

In the distribution of powers, — whether appertaining to the federal or the provincial constitutions, — under the British North America act, "the Crown of the United Kingdom of Great Britain and Ireland" is recognized as the source of all executive authority throughout the dominion.

The Crown the source of all executive authority in Canada.

And the lieutenant-governors — who are sworn to fulfil the duties of their station by oaths "similar to those taken by the governor-general" — are, within the limits of their respective governments, and subject to the supreme authority of the governor-general, expressly authorized by the imperial statute to exercise "all powers, authorities, and functions" previously "vested in or exercisable by the respective governors or lieutenant-governors of those provinces" prior to confederation, "so far as the same are capable of being exercised, after the union, in relation to" the particular provinces. This constitutes and empowers the lieutenant-governors to be the appropriate channels to represent and administer the authority of the Crown in their several provinces; and to convey, through subordinate functionaries, that authority in all matters wherein it is necessary for the Crown to act through the provincial executive.[k] Thus, through "the discipline and subordination which should connect together in one unbroken chain the Crown and its representative in the province, down to the lowest functionary to whom any portion of the powers of the state may be confided," the "royal authority," assigned to and re-

[j] See Todd, Parl. Govt. vol. ii. p. 319.

[k] British North America Act, **1867**: preamble and secs. 58-62, and 65. And see the Ontario Rev. Stats. c. 15.

presented by a duly accredited officer, is "most distinctly admitted as one of the component and inseparable principles of the social system" in British North America; and every British subject throughout the dominion shares equally with his brethren in the mother-land in the protection and blessings of monarchial rule.[l]

Responsible government in the provinces.

But the authority of the Crown, in the provinces as well as in the dominion, is exercised and administered in conformity with the obligations of "responsible government." That system, as we have already seen, was introduced into all the British North American provinces prior to confederation. Accordingly, in the sections of the British North America act which treat of the executive power in the provincial constitutions, it is declared that the executive council of each province "shall be composed of such persons as the lieutenant-governor, from time to time, thinks fit; and that the powers, authorities, and functions heretofore vested in or exercisable by the several governors or lieutenant-governors of these provinces, with the advice or with the advice and consent of or in conjunction with the respective executive councils, or any members thereof," — words identical with those used in a preceding clause to define the constitutional relations between the governor-general and "the queen's privy council for Canada," — shall continue to be discharged in like manner, after confederation, by the lieutenant-governors, "as far as the same are capable of being exercised, after the union, in relation" to the provincial governments.[m] These words unmistakably show

[l] See Lord Glenelg's despatch to the Earl of Gosford, in Commons Papers, **1836**, vol. xxxix. p. 7. And his despatch to Lieutenant-Governor Head. *Ibid.* **1839**, vol. xxxiii. p. 5.

[m] British North America Act, **1867**, secs. 63, 64. Compare secs. 12 and 65 of the act. And see Sir John A. Macdonald's remarks on this point, in Commons Papers, **1878-79**, C. 2445, p. 108.

that the Imperial Parliament has ratified and enjoined a continuance of the exercise of executive power in the various provinces of the dominion, in accordance with the usages of responsible government; and that it contemplates that the lieutenant-governors therein should occupy, towards their executive council and towards the local legislature, the identical relation occupied by the governor-general in Canada and by the queen in the United Kingdom towards their several privy councils and parliaments.

Judicial decisions as to powers of a lieutenant-governor.

The position herein claimed for the lieutenant-governors of the provinces in Canada — that, as being the chief executive officers in the local governments, they do represent the Crown in divers weighty and important public functions, both legislative and administrative — has been repeatedly acknowledged and sustained by decisions of the courts, and by legislative enactments, wherein the right and duty of a lieutenant-governor to administer such portions of the royal prerogative as are essential to the conduct of a government founded upon a monarchial basis have been unequivocally asserted.

Thus, in 1874, a controversy arose between the dominion government and the provincial authorities, in Ontario and in Quebec, in respect to escheats. By a decision of the Court of Queen's Bench, of the province of Quebec, in 1876, upon an appeal from an inferior court, the right of the province to the control of escheats and forfeitures, within the province, was affirmed. Whereupon it was agreed, between the dominion and provincial governments, that — until or unless there should be a judicial decision establishing a contrary principle — "lands and personal property in any province, escheated or forfeited by reason of intestacy, without lawful heirs or next of kin, or other parties entitled to succeed, are subjects appertaining to the province, and within its legislative competency;" while, on the other hand, "lands and personal property forfeited to the Crown for treason, felony, or the like, are subjects appertaining to the dominion, and within

its legislative competence."[n] This case involved the question of the status of a lieutenant-governor in a province of Canada, and the extent to which such an officer was competent to act on behalf of the Crown, and to administer a prerogative inherent in the Crown. It affirms the principle — in opposition to the contention of the dominion government, in the first instance — that while certain prerogatives, exercisable at the discretion of the sovereign, though not without the advice of responsible ministers (such as the prerogatives of mercy and of honour), ought not to be administered by a lieutenant-governor, yet that ordinary prerogative rights may suitably be exercised, on behalf of the Crown, by the chief executive officer in the province, holding a limited commission, which runs in the name of the sovereign.

Legislation on this question.

It has also been determined, in conformity with the opinion of the law officers of the Crown in England, — and in opposition to the opinion expressed by the dominion minister of justice, — that lieutenant-governors of the provinces are competent to exercise the prerogative right of marriage licenses, and the provincial legislatures to pass laws regulating the same.[o] This has since been ratified by the Revised Statutes of Ontario, c. 124, sec. 5.

The Ontario Revised Statutes, c. 15, sec. 15, empower the lieutenant-governor of the province to remit the forfeiture or penalty, in certain civil cases, which would otherwise accrue to the Crown.

Pursuant to the British North America Act, sec. 136, and under the authority of the dominion Statute, 1877, c. 24, which was passed to remove doubts on the subject, so far as the dominion parliament was competent to determine the same, the lieutenant-governor in council, in each province of Canada, is de-

[n] Canada Sess. Papers, **1877**, no. 89, pp. 88–105. And see *ibid.* p. 232. A law to the same effect was passed by the legislature of the province of New Brunswick, in 1877, c. 9.

[o] Canada Sess. Papers, **1877**, no. 89, p. 339.

clared to have the power of appointing, and of altering from time to time, the great seal of the province.[p]

And in the case of Regina *v.* Amer *et al.*, it was held by Mr. Justice Wilson that, since confederation, the lieutenant-governor of Ontario (equally with the governor-general of the dominion) is capable of exercising the prerogative right of issuing special commissions to hold courts of assize, for the trial of criminal offences.[q]

It is evident, therefore, that, in a modified but most real sense, the lieutenant-governors of the Canadian provinces are representatives of the Crown.

Control over lieutenant-governors by central government.

Let us now inquire into the extent to which these lieutenant-governors "are more immediately responsible to the governor-general in council:" and into the duty which properly devolves upon the central government in any group of confederated colonies to exercise towards the subordinate provinces the degree of constitutional oversight and control which the imperial executive maintains over the whole empire.

Such supervision in Canada would, as we have seen, sometimes necessitate a direct interference with the proceedings of the provincial authorities, and the disallowing of acts wherein they had transgressed the assigned limits of their powers, or had sought to give effect to principles which were inimical to the interests of sister provinces or of the confederation generally.

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[p] Canada Sess. Papers, **1877**, no. 86. Nova Scotia Assem. Journals, **1878**, appx. no. 16. The judges of the Supreme Court in Nova Scotia pointed out in "The Great Seal" case, in 1877, that her Majesty, in assenting (through the governor-general) to certain provincial acts, authorizing "her lieutenant-governor" to exercise her prerogative right, in the use of the great seal in and for the province, — "to the extent in which it is necessarily conferred on that high officer by the statute," — did expressly delegate to and empower lieutenant-governors to exercise certain prerogative rights appropriate to the office of the representative of the sovereign in the particular province. (See Canada Sess. Papers, **1877**, no. 86, p. 36.) The dominion Supreme Court, in reviewing the decision in the "Great Seal" case, in 1879, did not contravene this position. See *ante*, p. 247.

[q] Ontario Q. B. Rep. vol. xlii. p. 391.

Supervision by central government in provincial matters.

But in addition to the control which, under these circumstances, would be appropriately fulfilled by the central government, there is a further duty which the existing relation between a central and a subordinate government obviously entails upon the former. Having been constitutionally empowered to represent towards subordinate provinces, associated together in confederation, the supreme authority of the Crown, and to act towards them in that behalf, the central government should be prepared to afford to the several subordinate governments the benefit of its interposition and advice upon all matters, whether of administration or of legislation, wherein the same could be advantageously rendered.

The extent to which such interference would be justifiable must, however, altogether depend upon the degree of self-government accorded by the sovereign power to the particular provinces. There could be no interference beyond these limits without an undue encroachment upon the confederation compact. But, even where direct and authoritative interposition would be objectionable or undesirable, the paternal position occupied by the central executive towards the provincial governments would naturally suggest the propriety of intervening by advice or remonstrance, whenever it might appear that the mature, experienced, and impartial counsels of the supreme government would be helpful.

In like manner, the local ministries and parliaments in the self-governing colonies of Great Britain — even where representative institutions of the most liberal type exist — not infrequently have sought the advice of the imperial government to help them in the solution of difficult constitutional questions; and this advice is rarely refused, even when the question is one that must be locally decided.[r]

[r] See *ante*, pp. 126, 161.

It would be of immense advantage to all subordinate provinces under a federal government, now or hereafter to be established in any part of the empire, if the local authorities could appeal, with similar confidence and assurance of receiving wise counsel and true guidance, to the central government, whenever a necessity for the same might arise. It should, therefore, be the aim and obligation of every supreme federal government to supply to its subordinate provinces an equal measure of intelligent and impartial aid, in the endeavour to solve the problems which are continually arising in the working of free institutions, to that which the imperial government paternally accords to all the colonies and dependencies of the Crown.

Through the federal secretary of state.

Such a function, whether it be discharged for the purposes of advice, admonition, or restraint, would, by constitutional analogy, be fittingly entrusted to the secretary of state of the federal government, who is the proper channel and representative to the subordinate provinces of the central and supreme authority.

In conformity with the constitutional maxim that "advice and responsibility must go hand in hand,"[8] it is evident that, whenever a central government undertakes to advise or to control a provincial government, the central executive must be accountable for the same to the central parliament. The action which it may be expedient for a central parliament to take under such circumstances, can only be determined by a consideration of the respective limits assigned by imperial authority to provincial and federal jurisdiction.

The federal system was unknown in Great Britain or her colonies, until it was introduced and applied to the colonies in British North America by the imperial act of 1867. Since then an attempt has been made to

[8] Todd, Parl. Govt. vol. i. p. 53.

establish a similar system in South Africa; but this project is, for the present, in abeyance. It is not unlikely that ere long the several Australian colonies will be united together under a form of government resembling that which has been successfully applied to the older colonies upon the American continent. Meanwhile, a study of the cases that have arisen under the Canadian constitution cannot but be serviceable to all who are interested in complex questions of colonial government.

Value of Canadian precedents to other federal governments.

In 1878, a much controverted case arose in Canada, under the British North America act of 1867, affecting the relations between the dominion and provincial governments, so far as the office of lieutenant-governor is concerned. Before it was finally disposed of, the counsel of the imperial government was requested, in view of the importance of the decision as a precedent for future guidance. It will therefore be profitable to call attention to the facts of this case, and to point out their bearing upon the general questions now under consideration.

Office of lieutenant-governor in relation to dominion executive.

In March, 1878, his Honour Luc Letellier, the lieutenant-governor of the province of Quebec, in the exercise of his constitutional discretion, dismissed his ministers, and summoned other advisers to his counsels. The circumstances under which M. Letellier exercised this prerogative of the Crown were afterwards reported by himself to the governor-general.

Case of Lieutenant-governor Letellier

The lieutenant-governor alleged that, in general, the recommendations which from time to time he addressed to his ministers upon public affairs had not received from them the consideration which was due to suggestions emanating from the representative of the Crown.

That his ministers had taken steps in regard both to administrative and legislative measures, not only contrary to his representations, but even without previously advising him of what they proposed to do. This was notably exhibited in the case of a bill which contained provisions whereby her Majesty's subjects would have been deprived of their un-

Letellier case.

doubted right to the protection of the courts of law, in matters of dispute with the provincial government.

That the bill in question, which was intended to substitute the power of the executive for that of the judiciary, in determining certain claims under a railway act, had been introduced by ministers into the Legislative Assembly, and passed through both houses, without the previous consent of the lieutenant-governor, and notwithstanding his strenuous opposition to the measure, which he deemed to be an arbitrary and illegal infringement of vested rights.

That ministers had, he believed, yielded to a corrupt pressure, brought to bear on them by irregular combinations of members, for political considerations, to promote a lavish expenditure of public money in subsidizing railways, contrary to the advice of the lieutenant-governor, who warned them of the detrimental result to the province of such objectionable influences.

The lieutenant-governor further alleged that he had repeatedly remonstrated with his ministers before proceeding to extremity with them, but without avail. At length he was compelled to declare that he could no longer repose confidence in them, and must place the administration of the government in other hands.

After the dismissal of the De Boucherville ministry, the leader of the opposition in the Assembly, M. H. G. Joly, was called upon to form a new administration. He succeeded in the attempt, but being unable to carry on the government with a powerful majority against him in the Assembly (his supply bill having been rejected by a vote of thirty-two to thirteen), he applied for a dissolution of the legislature, which was granted by the lieutenant-governor.

The new Assembly afforded M. Joly much additional support; sufficient, at least, to enable him to continue in office, and to proceed with the business of legislation.

The act of the lieutenant-governor, in dismissing the De Boucherville administration, gave great umbrage to the political party then in the ascendant in Lower Canada. The ex-ministers assigned reasons to the legislature for their removal from office, which reflected injuriously upon the motives and conduct of the lieutenant-governor. M. Letellier regarded these explanations as being partial and erroneous.

He therefore forwarded to the Earl of Dufferin, the governor-general, a memorandum, containing explanations in justification of his proceedings, wherein he showed that the action of his late advisers had endangered the prerogatives of the Crown, and jeopardized the welfare of the province. Letellier case.

A counter-statement, in rebuttal and refutation of certain alleged inaccuracies in M. Letellier's memorandum, was afterwards forwarded to the governor-general by the ex-premier, M. De Boucherville. And, at a subsequent period, a petition was addressed to the governor-general in council, by certain members of the ex-ministry, praying for the dismissal of his Honour the lieutenant-governor of the province of Quebec. This petition, with an answer made to the statements therein by M. Letellier and a rejoinder by the petitioners, were transmitted, at different periods, by the governor-general, without comment, to the Senate and House of Commons of Canada then in session.[t]

The dominion government having refrained from taking any action upon these petitions of complaint against the lieutenant-governor, the political friends of the ex-ministers determined to bring the matter into discussion in both houses of the Canadian parliament. And here it should be stated that the conservative party, which had espoused the cause of M. De Boucherville, was in a majority in the Senate, but in a minority in the House of Commons.

On April 11, 1878, as an amendment to the question for going into committee of supply, it was moved by Sir John Macdonald (then leader of the opposition), seconded by Mr. Brooks, to resolve, that the recent dismissal by the lieutenant-governor of the province of Quebec of his ministry was, under the circumstances, unwise, and subversive of the position accorded to the advisers of the Crown since the concession of the principle of responsible government to the British North American colonies. This motion led to a protracted debate; but, on April 15, it was negatived by a large majority.

On the same day, the leader of the opposition in the Senate (Mr., now Sir Alexander Campbell), seconded by Senator

[t] See Senate and Commons Journals, March 26 and April 8, **1878**; Canada Sess. Papers, **1879**, no. 19; Correspondence laid before the Imperial Parliament respecting the case of M. Letellier. Commons Papers, **1878–79**, C. 2445.

Letellier case.

Bellerose, moved to resolve, that the course adopted by the lieutenant-governor of the province of Quebec towards his late ministry was at variance with the constitutional principles upon which responsible government should be conducted. This was met by an amendment, proposed by supporters of the Mackenzie administration, to substitute a resolution to declare that, under the rule of our constitution, the federal and the provincial governments, each in their own sphere, enjoy responsible government equally, separately, and independently, therefore, under existing circumstances, this house deems it inexpedient to offer any opinion on the recent action of the lieutenant-governor of the province of Quebec, or of his late ministers. This amendment was negatived by a strict party vote, and the original motion agreed to.[u]

The two houses were thus divided upon the merits of the case; and no further proceedings were taken upon it, during that session of the dominion parliament.

Shortly afterwards, a dissolution of the dominion parliament occurred, the existing parliament being about to expire by efflux of time. The general elections went against the party in power; and the conservative party, headed by Sir John A. Macdonald, were triumphant. The Mackenzie administration accordingly resigned office, and Sir John A. Macdonald was appointed premier of the incoming ministry.

The new parliament met on Feb. 13, 1879. Ministers took no steps in furtherance of the policy they had advocated when in opposition for the removal of Governor Letellier. But the question was mooted by one of their supporters, who submitted to the House of Commons a motion, identical in terms with that proposed in the previous session by Sir J. A. Macdonald, and then defeated by a majority of thirty-two. On March 14, 1879, this motion was agreed to, by a majority of eighty-five.

Whereupon, Sir John A. Macdonald informed the governor-general (the Marquis of Lorne), that in the opinion of ministers, after the resolution of the senate last session, and that of the House of Commons in the present session, "the usefulness of M. Letellier, as lieutenant-governor of Quebec, was gone," and they advised his removal from office. "After

[u] Senate Journals, April 15 and 16, 1878.

such a vote," they urged, "it must be obvious that he cannot either with profit or advantage be maintained in his position." "Even if their opinion had been adverse to that arrived at by Parliament," the ministry considered that they were "bound to respect that decision, and to act upon it as they have done by advising the removal." [v] Letellier case.

The governor-general demurred to this proposition. He objected to the policy which dictated the advice, and believed that "the dismissal of the lieutenant-governor would set a dangerous precedent." In this dilemma, at the suggestion of the premier it was agreed to refer the matter to her Majesty's government for their consideration and instructions; inasmuch as the question was new, and the decision thereon would settle for the future the relations between the dominion and provincial governments, so far as concerns the office of lieutenant-governor.

In the words of the governor-general, which were assented to by Sir J. A. Macdonald, "to dismiss the lieutenant-governor for acts for which M. Joly has declared himself to be responsible to the provincial legislature, is a new exercise of the federal power, and as it affects the interpretation of an imperial act, which carefully guards provincial interests," it was expedient that an authoritative expression of the views of her Majesty's government should be obtained, with reference to the powers given by the British North America act of 1867, to the governor-general, for the dismissal of a lieutenant-governor.

In support of the advice tendered by ministers for the removal of M. Letellier, the premier forwarded a memorandum on the subject to the governor-general, to be communicated to the secretary of state for the colonies.

When M. Letellier learnt that the question had been referred to the consideration of the imperial government, he addressed a letter, dated April 18, 1879, to the dominion secretary of state, containing further explanations in regard to his conduct, in the matter of complaint, for the information of the governor-general. Herein, after rehearsing the facts of the case, he submitted an order in council, passed by the Quebec government, which asserted "that the action of the

[v] Commons Papers, **1878–79**, C. 2445, pp. 104–108.

Letellier case.

lieutenant-governor of the province of Quebec, in dismissing his ministers and calling others in their stead, is a purely provincial matter, affecting in no way federal interests, and is not one of the causes contemplated in the fifty-ninth section of the British North America act, as justifying the removal of [a] lieutenant-governor." [w]

It was further insisted upon, by the Quebec government, that "the maintenance of local and provincial autonomy and independence imperiously demands that questions of purely local and provincial interest should not be subjected to the control and influence of the federal legislature and the federal government." [x]

In order to watch the proceedings that might be taken by the imperial authorities upon this case, M. Joly, the Quebec prime minister, proceeded to England to represent the lieutenant-governor personally, and the executive government of the province generally, in their efforts to protect the autonomy of Quebec. The dominion ministry, meanwhile, had despatched one of their number to London, to represent the case on their own behalf.

Upon his arrival in London, the Quebec premier suggested that a reference of the question to the judicial committee of the privy council would be generally acceptable in Canada, on account of the profound respect and confidence entertained in Canada, as elsewhere, for the decisions of that tribunal. The secretary of state for the colonies, however, was not of opinion that this course was advisable. He considered the present case closely analogous to that of the New Brunswick school act; upon which, in 1872, the Canadian House of Commons sought to obtain the opinion of the judicial committee. "It was then decided that, there being nothing in the case which gave the queen in council any jurisdiction over the question, her Majesty could not with propriety be advised to refer to a committee of the privy council a question which the queen in council had no authority to determine, and on which the opinion of the privy council would not be binding on the parties in the dominion of Canada." [y]

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[w] Commons Papers, **1878–79**, C. 2445, pp. 111–114.
[x] *Ibid.* p. 124.
[y] *Ibid.* p. 121. And see *ante*, p. 347.

Sir M. Hicks-Beach, her Majesty's secretary of state for the colonies, in a despatch dated July 3, 1879, conveyed to the Marquis of Lorne the conclusions of her Majesty's government, upon his request for instructions in regard to the Letellier question. Letellier case.

The application for instructions, in this very exceptional case, was approved; although, as a rule, whatever affects the internal affairs of the dominion should be dealt with by the government and parliament of Canada. Bearing in mind this rule, the imperial government refrained from expressing any opinion upon the merits of this case, and declined to interfere with the exercise of the powers conferred upon the governor-general, by the British North America act, for determining the same.

But, in view of the importance of the precedent which may be established by the decision thereon, her Majesty's government would not withhold their opinion on the abstract question of the function and responsibilities of the governor-general, in relation to the lieutenant-governor of a province under the imperial statute.

Accordingly, the despatch proceeds to state that "there can be no doubt that the lieutenant-governor of a province has an unquestionable constitutional right to dismiss his ministers, if, from any cause, he feels it incumbent upon him to do so. In the exercise of this right, as of any other of his functions, he should of course maintain the impartiality towards rival political parties which is essential to the proper performance of the duties of his office; and, for any action he may take, he is (under the fifty-ninth section of the British North America act) directly responsible to the governor-general."

In deciding whether the conduct of a lieutenant-governor merits removal from office, the governor-general — as in the exercise of other powers vested in him by the imperial statute — must act "by and with the advice of his ministers."

Though the position of a governor-general would entitle his opinion on the subject "to peculiar weight, yet her Majesty's government do not find any thing in the circumstances which would justify him in departing in this instance from the general rule, and declining to follow the decided and sustained opinion of his ministers, who are responsible for the peace and good government of the dominion to the parliament, to

Letellier case.

which (according to the fifty-ninth section of the statute) the cause assigned for the removal of a lieutenant-governor must be communicated."

On the other hand, the secretary of state advises the governor-general to request his ministers to review their action in this case; and to satisfy themselves whether, after all that has passed, it is "necessary for the advantage, good government, or contentment of the province, that so serious a step should be taken as the removal of a lieutenant-governor from office." "The spirit and intention" of the imperial statute clearly require that the tenure of this high office "should, as a rule, endure for the term of years specifically mentioned; and that, not only should the power of removal never be exercised except for grave cause, but that the fact that the political opinions of a lieutenant-governor had not been, during his former career, in accordance with those held by any dominion ministry who might happen to succeed to power during his term of office, would afford no reason for its exercise."

The long interval which had unavoidably elapsed between the mooting of this complicated question and its final settlement, might, it was suggested, be useful, not only in affording time for its thorough comprehension, but also in permitting "the strong feelings, on both sides, which have been often too bitterly expressed, to subside."[z]

After the receipt of this despatch, the governor-general, on July 14, 1879, requested his ministers to reconsider their advice, in view of the remarks contained therein, and likewise of "the support afforded in the province of Quebec to M. Joly, the minister who is by constitutional practice responsible for the action of the lieutenant-governor."

On July 21, Sir J. A. Macdonald reported to the governor-general that the cabinet, "having fully considered the despatch and his Excellency's minute, desire to state that, after anxious consideration, they adhere to the advice previously tendered to him for the removal of Lieutenant-Governor Letellier."

Upon which, by order in council, approved by the governor-general on July 25, it was resolved, "that it is expedient and necessary that Mr. Letellier should be removed from his office

[z] Commons Papers, **1878–79**, C. 2445, pp. 127, 128.

of lieutenant-governor of Quebec;" and that "the cause to be assigned for such removal, according to the provisions of the fifty-ninth section of the British North America act, 1867, is, that after the vote of the House of Commons during last session, and that of the Senate during the present session, Mr. Letellier's usefulness as a lieutenant-governor was gone." Letellier case.

On the following day, on the recommendation of the prime minister, an order in council was passed, and approved by his Excellency the governor-general, appointing the Hon. Theodore Robitaille, lieutenant-governor of the province of Quebec in the room and stead of the Hon. Luc Letellier de St. Just, removed.[a]

The foregoing case is undoubtedly one of considerable importance, as a precedent. It furnishes the first example of the interposition of dominion authority for the removal of a provincial lieutenant-governor from office before the expiration of his ordinary term of service. It requires, therefore, to be carefully and dispassionately examined, lest erroneous conclusions should be hereafter drawn, from the action taken upon this case by either party; and lest it should seem to justify dominion interference in provincial affairs under unwarrantable circumstances. Its importance as a precedent.

In the first place, it is indisputable that the lieutenant-governor of Quebec was in error when he claimed that, as the representative of the sovereign, he was "irresponsible for acts performed within the legitimate sphere of the duties prescribed to him by the British North America act."[b] If this were so, as Sir John A. Macdonald justly remarks, "a provincial lieutenant-governor would be the only practically irresponsible official in Canada."[c] A lieutenant-governor is clearly responsible to the authority that has appointed him, and by which he is removable, although he is not responsible to any other tribunal for his conduct in office. M. Letellier's erroneous position.

[a] Commons Papers, **1878-79**, C. 2445, pp. 129–131.
[b] *Ibid.* p. 114.
[c] *Ibid.* p. 109.

M. Joly's error.

Again, we cannot approve of M. Joly's assumption that the framers of the British North America act drew an intentional distinction between the authority that appoints lieutenant-governors, and the authority that is competent to dismiss them, — making the appointment to proceed from the governor-general in council, and the dismissal to be the act of the governor personally. The advocates of this theory contend that the distinction was advisedly made, for the purpose of securing to lieutenant-governors a position of permanence, during their five years' lease of office, irrespective of the changes of party government at Ottawa within that period.[d] But Sir John A. Macdonald easily refutes this argument, as well on practical grounds as upon constitutional principle. He points to the undeniable fact that all acts of government must equally be performed under the advice of responsible ministers wherever the British Constitution prevails, whether the chief executive officer is individually charged with the same, or whether his council are formally associated with him in the transaction.[e]

Refuted by Sir J. A. Macdonald.

It is evident that the tenure of office of a lieutenant-governor is "during the pleasure of the governor-general,"[f] a phrase which is descriptive of a tenure different in kind from that of one who holds office "during good behaviour." It confers no vested right upon a lieutenant-governor to retain his office for any number of years, and it gives a wide scope for the exercise of discretion on the part of the removing power.

We may, therefore, pass by, as unworthy of notice, the contention that the governor-general personally has alone the power of dismissing a lieutenant-governor; and that he is at liberty, in the exercise of this prerogative, to act independently of his constitutional advisers.

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[d] Commons Papers, **1878–79**, C. 2445, p. 118.
[e] *Ibid.* p. 109. And see *ante*, p. 341.
[f] B. N. A. Act, **1867**, sec. 59.

Not only has the Canadian premier exposed the fallacy of this argument, but her Majesty's secretary of state for the colonies has ratified Sir John A. Macdonald's interpretation of the imperial statute in this particular. And by the colonial secretary.

There can, then, be no doubt that a lieutenant-governor is directly responsible to the authority by which he has been appointed, namely, the governor-general in council, and that he is removable "at pleasure" by that body.

On the other hand, the position of a lieutenant-governor, under the British North America act, is one which renders great caution and forbearance necessary in the exercise of this authority.

The union of the provinces effected by that statute was a federal union. And it was so framed as to preserve intact and inviolate the local rights and privileges previously assured to the several provinces, so far as is compatible with their confederation. Provincial rights of self-government.

One especial privilege conceded to the colonies in North America when "responsible government" was established therein was that of self-government in local affairs. This privilege was obtained after a protracted political struggle, and was highly prized.

By the British North America act of 1867, the Crown transferred to the central dominion government and parliament the measure of control previously exercised by the mother country over the respective provinces; and since their confederation the imperial government has declined to interfere directly in questions of local concern in the provinces.[g] But this concession to the federal government of imperial rights over the provinces simply places that government in the position towards the provincial governments heretofore occupied by the Crown. It does not increase or diminish the

[g] See *ante*, pp. 319, 342, 345.

relative powers of either in respect to local affairs. This principle has been unreservedly established as regards provincial legislation. It is well understood that each province retains "exclusive" rights of legislation within its assigned jurisdiction, that may not be interfered with by the dominion government, save only when dominion interests or the public welfare in general might be injuriously affected by such legislation.

The same principle applies with equal force to acts of administration. The spirit and intent of the British North America act equally forbids unnecessary interference by the dominion executive with provincial rights in all matters of local self-government.

Constitutional restraints on dismissal of a lieutenant-governor.

This explains why a restraint is imposed by that statute upon the prerogative right of dismissing a lieutenant-governor.

Such functionaries cannot be removed "at pleasure," as freely as the sovereign is at liberty to remove a colonial governor. The act secures them against any such arbitrary exercise of the prerogative. They are only removable within five years of their appointment "for cause assigned, which shall be communicated by message to the Senate and House of Commons" at the earliest possible period.

The object of this proviso is manifestly to guard against a removal for insufficient cause, and to afford a guarantee to the provinces that their chief executive officers shall not be removed for any reason that would impair or infringe upon the cherished right of local self-government.

But what, it may be asked, would be a sufficient cause for such a proceeding?

Undoubtedly, if a lieutenant-governor overstepped his lawful powers he would be properly subject to dismissal.

Or if he exercised his lawful powers in an improper and partial manner.

But, let the sufficient cause be what it may, it is clear that the responsibility for the act of removal devolves upon the governor-general in council; and that the initiatory step to that end should proceed from thence.

Dominion executive should initiate such dismissal.

To permit the initiative in such a momentous proceeding to be undertaken by either house of parliament would be an undue interference with executive responsibility. It would weaken the just authority of the Crown, and produce a result for which no one could be held actually responsible.

Herein, it is obvious that the dominion government was at fault in the procedure against Governor Letellier.

They had abstained, as a government, from calling M. Letellier to account. And when the two houses of parliament had passed resolutions calling for his removal, the premier informed the governor-general that, in the opinion of ministers, "it was not at all necessary, in order to justify their advice, to go behind the vote of parliament: . . . even if their opinion had been adverse to that arrived at by parliament, it seems clear that they are bound to respect that decision, and to act upon it, as they have done, by advising the removal." [h]

This statement involves a complete abnegation of ministerial responsibility, and a surrender of the safeguards over individual rights which ministerial responsibility is intended to afford.

We have elsewhere shown that "any direct interference by resolution of parliament in the details of government is inconsistent with and subversive of the kingly authority, and is a departure from the fundamental principle of the British Constitution which vests all executive authority in the sovereign, while

[h] Commons Papers, 1878-79, C. 2445, p. 108.

it ensures complete responsibility for the exercise of every act of sovereignty." And that "no resolution of either house of parliament which attempts to adjudicate in any case that is within the province of the government to determine has of itself any force or effect." [i]

Even where parliament has been invested by statute with the direct right of initiating a criminatory proceeding for the removal of a high public functionary, as where a judge is declared to be removable upon an address from the two houses of the Imperial Parliament, constitutional practice requires that, in any such address, "the acts of misconduct which have occasioned the adoption thereof ought to be recapitulated, in order to enable the sovereign to exercise a constitutional discretion in acting upon the advice of parliament." [j]

This wholesome rule is imperatively insisted upon by the Crown in all addresses from colonial legislatures for the removal of judges appointed under a similar parliamentary tenure. In cases where it has been disregarded, the Crown has refused to give effect to the address, though passed by a colony enjoying "responsible government." And this because "in dismissing a judge, in compliance with addresses from a local legislature and in conformity with law, the queen is not performing a mere ministerial act, but adopting a grave responsibility, which her Majesty cannot be advised to incur without satisfactory evidence that the dismissal is proper." [k]

The resolutions passed by the Senate and House of Commons of Canada, in 1878 and 1879, substantially agree in declaring that the dismissal by the lieutenant-

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[i] Todd, Parl. Govt. vol. i. p. 257.

[j] *Ibid.* vol. ii. p. 744.

[k] *Ibid.* vol. ii. p. 763. And see Sir F. Rogers' memorandum, in Commons Papers, 1870, vol. xlix. p. 440.

Action of dominion government in Letellier case considered.

governor of Quebec of his ministers, on March 2, 1878, was under the circumstances unwise, and subversive of the constitutional principles upon which responsible government should be conducted.

This assertion is, in itself, extremely vague and ambiguous. It does not explain why the dismissal was "unwise," or in what respect it was "subversive of the position of ministers under responsible government."

We are, therefore, compelled to conclude that the action taken for the removal of Lieutenant-Governor Letellier was at variance with constitutional law and precedent, as well as contrary to the spirit and intent of the British North America act; inasmuch as it was initiated by parliament and not by the executive government, and did not set forth the particular acts of misconduct for which his removal was deemed to be necessary.

If we go behind the formal resolutions of parliament, and inquire into the reasons urged by the advocates of these resolutions for their adoption, we find it alleged, as a primary motive to justify the dismissal of the lieutenant-governor, that, by his dismissal of his ministers at a time when they were able to command a majority in parliament, he had exercised an arbitrary and obsolete power, which was incompatible with the recognition of responsible government. The leader of the opposition in the Commons, in advocating the adoption of the resolution against Governor Letellier, said that, "in England, the power of dismissal of a government having the confidence of parliament is gone for ever, and that, if it is gone there, it ought never to have been attempted to be introduced in a colony under the British Crown."[1]

It is scarcely necessary to point out, to any attentive reader of this treatise, that this rash and ill-considered

[1] Canadian Hansard, April 11, 1878, p. 1894.

declaration has no warrant, either in theory or practice. In our preliminary chapter, we have described the precise powers of the sovereign in relation to her ministers and parliament, as the same have been defined by eminent British statesmen of our own day. The reserved powers of the Crown, which like all prerogatives are held in trust for the benefit of the people, are therein clearly shown to include the right of appealing, at all times, from a ministry, strong (it may be) in the possession of the confidence of the existing parliament, to the electorate, whose decision must ultimately prevail. Meanwhile, the Crown is constitutionally competent to dismiss any ministry in whom the sovereign is no longer able to confide, and invite the assistance of other ministers who are willing to be responsible for this act of the Crown.[m] To deny to the sovereign the possession of these reserved powers — however seldom it may be needful to exercise them — would be, in effect, to destroy the strength and vitality of the monarchy.

Constitutional powers of a governor.

And this is equally true of the powers of a governor in the colonies of Great Britain.

The right of a governor, or lieutenant-governor, to dismiss his ministers, when he has ceased to have confidence in them, is undeniable; and that right is not impaired by the fact of their being able to command a majority in the representative chamber. This principle has been repeatedly affirmed in colonies under responsible government,[n] and it is now placed beyond the reach of cavil by the corroborative testimony of her Majesty's secretary of state for the colonies in the Letellier case, that "there can be no doubt that [the lieutenant-governor of a province] has an unquestionable constitutional right to dismiss his ministers, if, from any cause, he feels it incumbent upon him to do so."[o]

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[m] See *ante*, pp. 13, 20.

[n] See *post*, p. 432, *et seq.*

[o] See *ante*, p. 411.

This abstract right being admitted, we may go further and declare that it is the bounden duty of a governor to dismiss his ministers, if he believes their policy to be injurious to the public interests, or their conduct to be such, in their official capacity, that he can no longer act with them harmoniously for the public good. But before a governor proceeds to this extremity, at least towards a ministry having the confidence of the Assembly, he should be assured that he can replace them by others, who will be acceptable to the country and to the Assembly, as well as to himself, and who will be prepared to assume full responsibility for his act in effecting the change of government.

By a dissolution of the Assembly, consequent upon a change of ministry, this question is brought directly under the review of the constituencies.

In the Letellier case, the province of Quebec — which was the only part of the dominion directly interested in the wisdom of the lieutenant-governor's act in the dismissal of his ministers — ratified the same by the support which they afforded to M. Joly, the minister who became constitutionally responsible for the action of the lieutenant-governor.

Conduct of a lieutenant-governor not a party question.

To revert for a moment to the votes of censure against Governor Letellier, which we have characterized as "vague and ambiguous." It is noticeable that these votes, whenever they were proposed, and whether they were negatived or affirmed, were invariably decided as strict party questions. This fact leads us to object, still further, to the proceedings in this case, and to deprecate any reliance upon it, as a precedent for further guidance.

Such questions should always be determined upon broad grounds of justice and of public policy, wholly irrespective of party proclivities. While it may be unnecessary that a governor should be pointedly charged with gross moral or political misdeeds, and while the

removal of a governor may undoubtedly be advisable on less personal considerations, yet there should be at least the security against political oppression which is afforded by insisting that a vote in condemnation ought not to be affirmed or rejected upon strict party lines.

It may be said, however, that the unanimous defence of M. Letellier by his own political friends was in itself a presumption that he had been unduly influenced by party bias in his official conduct, instead of uniformly exhibiting the neutrality which is essential to the position of a constitutional governor. And Sir John A. Macdonald in his memorandum on the case, presented to the governor-general after the last adverse vote in the House of Commons against Governor Letellier, says that his removal would be "a warning to all future lieutenant-governors to exercise their powers as such with the strictest impartiality. As M. Letellier has been the first, in the case of his removal, he will probably be the last partisan lieutenant-governor, and all future trouble from that source may be considered as at an end." [p]

Alleged misconduct should be stated and proved.

If this had been M. Letellier's offence, why was not the charge of partiality and political preferences distinctly formulated against him, and his sentence of dismissal based upon proof of the same? Such proof, if it existed, could not have been difficult to procure, and for the credit of the country, as well as in view of the importance of establishing a great constitutional precedent upon an adequate and unimpeachable foundation, it should have been adduced on this occasion, and the order in council for M. Letellier's removal predicated upon it.

Instead of this, the order in council, equally with the resolutions upon which it was professedly founded, was

[p] Commons Papers, **1878–79**, C. 2445, p. 110.

vague and indeterminate. In effect it was a mere assertion that, in the opinion of the political allies of the dismissed ministers and of the political opponents of those who had been placed in power by the act of the lieutenant-governor, "his usefulness was gone!"

It is true that a vote of want of confidence in an existing administration may properly be passed in either house of parliament, without it being necessary to assign any reasons for the same.[q] But votes of this description are essentially political, and are always carried by party majorities. They express the general feelings of those who support them, whilst the particular reasons which influence the majority of members may materially differ.

But it is contrary to the first principles of justice, and in opposition to the established usage of parliament, to entertain criminative complaints against individuals except for cause assigned, which cause should be the assured warrant of its own sufficiency, upon proof of the complaint being substantiated.[r]

Apart from all personal considerations, and aside from the question whether M. Letellier's conduct was uniformly discreet and unobjectionable, there is another aspect in which this case must be examined.

Dominion action in Letellier case an interference with local rights.

Bearing in mind the importance in our confederate system of preserving intact provincial rights, and the obvious peril of any undue or arbitrary interference therewith by the federal government, we must inquire whether the action of the lieutenant-governor in dismissing his ministers was so manifestly unwise and unnecessary as to justify the interposition of dominion authority for its condemnation.

It is notorious that, if the forms of the house had permitted, the majority of the House of Commons who

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[q] See Todd, Parl. Govt. vol. ii. p. 396.

[r] *Ibid.* vol. i. p. 354.

negatived the motion of censure against Governor Letellier on April 11, 1878, would have directly asserted, in bar of this proposition, the undeniable principle of non-intervention by the federal government in a matter of provincial concern.[s] But the motion was offered as an amendment upon going into committee of supply, when by parliamentary usage no further amendment is allowable; otherwise, had it been possible to raise a distinct issue upon this principle, it would have been difficult and injudicious for any Canadian statesman to have committed himself to an open repudiation of it.

In the Senate, however, no such hindrance existed. The minority in that chamber were of the party of the majority in the Commons. They, therefore, failed to prevent the passing of the resolution censuring the lieutenant-governor. But they placed on record their reasons for objecting to the vote by an amendment which declared that, under the rule of our constitution, the federal and the provincial governments, each in their own sphere, enjoy responsible government equally, separately, and independently; therefore, under existing circumstances, this house deems it inexpedient to offer any opinion on the recent action of the lieutenant-governor of the province of Quebec or of his late ministers.[t]

This view of the case was consistent and statesmanlike. It did not ignore the propriety of a dominion secretary of state addressing words of caution and advice to a lieutenant-governor, whenever it might appear suitable and expedient. But it deprecated coercive interference, in any matter plainly and exclusively within the domain of provincial rights.

If any just cause of offence or complaint had arisen

[s] M. Joly's letter to the colonial secretary of May 22, 1879, Commons Papers, **1878-79**, C. 2445, p. 122.

[t] See *ante*, p. 408.

out of the conduct of Lieutenant-Governor Letellier towards his late ministers, the Legislative Assembly of the province were competent to afford redress. The Joly administration, which succeeded to office, thereby assumed entire responsibility for the act of the lieutenant-governor, in dismissing their predecessors. If only that ministry had been compelled to resign, — either by the vote of the Assembly or as the result of an appeal to the people, — the governor must have recalled his late advisers. But, by the dissolution of the legislature which ensued, the electoral body of the province ratified the action of M. Letellier, and upheld him in the exercise of his lawful prerogative.

Lieutenant-governors accountable to dominion government.

We are free to admit that the responsibility which, under the British North America act, a lieutenant-governor incurs to the governor-general in council renders him amenable to the dominion government for his conduct in office; and that, upon all needful occasions, that government may interpose, either to correct irregularities, to counsel in emergencies, or, if necessary, to remove an incompetent or untrustworthy governor, before the expiration of his ordinary term of service.

But, in the discharge of this duty, in a system so complex and delicate as that of the Canadian confederation, great caution and forbearance must be observed, so as to avoid the suspicion of party influences, or of a disposition to encroach upon provincial rights of self-government.

An officer of the eminent position and responsibility of a lieutenant-governor should be placed beyond the reach of party strife. His own reputation as a public man will always depend upon his unswerving impartiality and entire freedom from party bias. But he ought not to be exposed to political assaults for his official conduct. And it should not be in the power of a defeated minority in his own province to assail

a lieutenant-governor or his responsible advisers by appealing against them, on party grounds, to a sympathizing majority in the dominion parliament.

But not to be removed on party grounds.

Every individual in the community is interested in sustaining the office of lieutenant-governor, and in securing for its occupant an independent and non-political tenure. It is, therefore, clear that the "cause assigned" for the removal of a lieutenant-governor should be wholly irrespective of party considerations or of political predilections, and should be sufficiently weighty and unequivocal to command the suffrages of all parties, in the event of an expression of the opinion of the dominion parliament being invited upon such an act.

The law which prescribes that notification of the order in council for the removal from office of a lieutenant-governor, and of the cause thereof, shall be communicated, with as little delay as possible, to the Senate and House of Commons of the dominion undoubtedly empowers either house to express its opinion or to tender advice to the governor-general, not merely in reference to such removal, but also upon any question that may appropriately arise out of the appointment of a lieutenant-governor, or in regard to his execution of his trust.

But, when we note the jealous care which is apparent throughout the British North America act to define and regulate the exercise of the "exclusive powers" assigned by that statute to the provincial governments, — whether those powers appertain to the executive or to the legislature, — it is manifest that it was the intention of the Imperial Parliament to guard from invasion all rights and powers exclusively conferred upon the provincial authorities, and to provide that the reserved right of interference therewith by the dominion executive or parliament should not be exer-

cised in the interests of any political party, or so as to impair the principle of local self-government. Prior to confederation, this principle was earnestly and successfully contended for, as a restraint upon undue interference by the imperial authorities in matters of local concern. It is no less essential now, when the diverse interests of separate provinces, heretofore independent of each other, require to be harmoniously combined, — without infringing upon the freedom of any government within the sphere of its constitutional powers, — so as to ensure unity and co-operation for the common good.

Hence, we conclude that the reserved right of the dominion government to remove a provincial lieutenant-governor from office should only be used upon grave emergencies, — so obviously irrespective of party considerations as to secure the consent of all impartial statesmen, — and moreover when it is clear that the removal can be effected without detriment to the principle of local self-government.

Action by dominion parliament on provincial questions.

The abstract right of deliberation, and of consequent action thereupon, which is undeniably possessed by the two houses of the dominion parliament, upon all matters which affect or concern the welfare of the Canadian people, is likewise subject to limitation and restraint, by the constitutional law of the confederation. And it is equally incumbent upon the dominion parliament, as it is upon the governor-general in council and upon the governor-general in his capacity of an imperial officer, representing in Canada the authority of the Crown, to respect and uphold the federal rights, secured to the several provinces by the British North America act; and to abstain from encroaching upon the same, and from any undue interference therewith.[u]

[u] See Earl of Dufferin's despatch to the colonial secretary, of Aug. 15, 1873, p. 16. (Canada Commons Journal, vol. vii. p. 27.) Earl of

Free discussion in the parliament of the dominion, upon all Canadian questions, is a constitutional and indisputable privilege, the exercise of which may be oftentimes productive of a good understanding between conflicting parties, even in regard to questions which are undeniably of provincial concern. But the houses of parliament ought to refrain from any overt acts, and even from the formal enunciation of any opinion, in respect to matters which do not come within the sphere of their jurisdiction, as a federal legislature. It is to their cautious and timely forbearance, in deliberation and action, that the Imperial Houses of Lords and Commons are mainly indebted for the weight and influence which are justly attributed to their debates, upon questions which do not immediately affect British interests, and where their principal aim is to guide and enlighten public opinion in other countries, without assuming a right to dictate, or to interfere with the absolute freedom of independent powers.[v]

Carnarvon, Hans. Deb. vol. clxxxv. p. 563. New Brunswick School case, *ante*, p. 346.

[v] See Todd, Parl. Govt. vol. i. p. 619, vol. ii. p. 730.

CHAPTER IV.

PART III.

LOCAL SELF-GOVERNMENT IN THE COLONIES.

a. *Colonial rights of self-government in local affairs, and the position of a governor in relation thereto.*

Introduction of responsible government.

"RESPONSIBLE government" was avowedly introduced into the colonies of Great Britain for the purpose of reproducing in them a system of local self-government, akin to that which prevails in the mother country, and to relieve the colonies from imperial interference in their domestic or internal concerns.

To effect this desirable result, no material alteration was necessary in the structure of colonial institutions. The needful change was accomplished, as we have seen, by instructions from the Crown to the several colonial governments, directing that, for the future, public affairs in the colony should be administered in conformity with the principles of ministerial responsibility which, since the Revolution of 1688, have been engrafted upon the British Constitution.[a]

The advocates of colonial reform had long striven to obtain such a modification in the methods of colonial administration as would confer upon British subjects in the colonies similar rights of self-government to those enjoyed by their fellow-citizens at home. This boon it was the expressed desire of the imperial government to bestow, so far, at least, as was compatible with the allegiance due to the Crown.

[a] See *ante*, p. 26 ; and Merivale on the Colonies, ed. 1861, p. 636.

The new polity granted to the colonies was not intended, however, to effect a fundamental change in the principles of government, by substituting democratic for monarchical rule. It was designed to extend to distant parts of the empire the practical benefits of a parliamentary system similar to that which exists in the parent state, and thus to render political institutions in the colonies, as far as possible, "the very image and transcript" of those of Great Britain.

The British government is a limited monarchy, wherein the sovereign has certain constitutional rights and a defined position.

Position of governor under responsible government.

In the substantial reproduction in a British colony of the imperial polity, the governor must be regarded not merely as the representative of the Crown in matters of imperial obligation, but as the embodiment of the monarchical element in the colonial system, and the source of all executive authority therein.[b]

Our colonial institutions, derived from and identical in principle with those of the mother country, are essentially monarchical, and whatsoever duties or rights appertain to the Crown in the one are equally appropriate and obligatory in the other. In the constitutional monarchy of Great Britain, there is no opportunity or justification for the exercise of personal government by prerogative. The Crown must always act through advisers, approved of parliament, and their policy must always be in harmony with the sentiments of the majority in the popular chamber. With this important limitation, however, the British monarch occupies a position of authority and influence, and is a weighty factor in the direction of public affairs; exercising his high trust for the welfare of the people, and as the guardian of their political liberties.

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[b] See *ante*, p. 28.

These elementary maxims of the British Constitution have been fully set forth in the earlier pages of this treatise, and the precise relation of the sovereign, in the mother country, to her ministers and to parliament, have been therein carefully explained.

Non-interference of governor in local affairs.

In applying these general principles of imperial administration to our colonial system, a constitutional governor should (as expressed by Earl Grey) make "a judicious use of the influence rather than of the authority of his office." [c] Moreover, it is undoubtedly true that a governor, in colonies possessing parliamentary institutions, following the example of the sovereign, whose representative and minister he is, in his prescribed sphere and jurisdiction, should, as a general rule, refrain from personal interference with his ministers in their direction of local affairs. This is in accordance with the well-known axiom of colonial responsible government, first enunciated by Lord John Russell when secretary of state for the colonies, that "in all matters of domestic policy, the colony should be governed according to the well-understood views and wishes of its inhabitants, as expressed through their representatives in the legislature;" and it is in conformity with the royal instructions for the guidance of governors in colonies under responsible government, which state that, under such circumstances, "the control of all public departments is practically placed in the hands of persons commanding the confidence of a representative legislature." [d]

This rule of non-interference, on the part of a constitutional governor, in matters of local concern, is subject, however, to certain limitations, which are identical

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[c] See Governor Bowen's despatch to the Earl of Carnarvon, of Sept. 19, 1877: Commons Papers, **1878**, C. 1982.

[d] See Commons Papers, **1866**, vol. 1. p. 740; and the Colonial Regulations, **1879**, sec. 4.

in principle with the usages which define and regulate the duties of the sovereign at home.

Except to uphold the law, or protect the people.

Firstly, the governor is the especial guardian of the law, and must never sanction any ministerial act or proposal which infringes upon an existing law.

Secondly, the governor, like the queen herself, is bound to be satisfied as to the wisdom and political expediency of every act or proceeding advised by his ministers, before he ratifies and sanctions the same with the authority which appertains to his office.

Must consent to all acts of government.

To enable the governor to form sound and intelligent conclusions in regard to every question of state policy, or act of administration submitted to him for his approval, it is essential that the fullest information should be communicated to him in relation to the same; that he should be free to criticise, discuss, and suggest alterations thereupon; and likewise that he should himself be at liberty to propose, for the consideration and concurrence of his ministers, any matter or thing which he might deem to be proper for governmental action.

While it should be the continual aim of a constitutional governor to co-operate cordially with his ministers for the time being, irrespective of personal inclinations or of party preferences, should he be unable to agree with them upon any matter affecting the public interests which he may consider to be of sufficiently vital consequence to justify such an extreme measure, he is always entitled, as a last resort, to dismiss them from his counsels, and to have recourse to other advisers. By the exercise of this reserved power, upon suitable occasions, the full benefits of monarchical government are guaranteed to the people. And the necessity imposed upon the governor under such circumstances that he should be able to secure the assistance of other ministers, who are willing to become responsible for his acts in the dismissal of their predecessors; together with

His reserved powers.

the obligation imposed upon the new administration of obtaining a ratification of their conduct and policy by the local parliament, either with or without a direct appeal to the constituencies by a dissolution of the same, — affords an ample warrant that these constitutional powers will be wisely used, and solely for the public good.[e]

This doctrine may be illustrated by reference to the following extracts from despatches from her Majesty's secretary of state for the colonies to colonial governors:

Thus, on March 26, 1862, the colonial secretary (the Duke of Newcastle) wrote as follows to the governor of Queensland (Sir G. F. Bowen): —

Limits of governor's interference in local concerns.

"The general principle by which the governor of a colony possessing responsible government is to be guided is this: that, when imperial interests are concerned, he is to consider himself the guardian of those interests; but, in matters of purely local politics, he is bound, except in extreme cases, to follow the advice of a ministry which appears to possess the confidence of the legislature. But extreme cases are those which cannot be reduced to any recognized principle, arising in circumstances which it is impossible or unwise to anticipate, and of which the full force can, in general, be estimated only by persons in immediate contact with them."

The Duke of Newcastle, however, defined the "extreme cases" referred to by him as "such extreme and exceptional circumstances as would warrant a military or naval officer in taking some critical step against or beyond his orders. Like such an officer, the governor, who took so unusual a course in the absence of instructions from home, would not be necessarily wrong, but he would necessarily act at his own peril. If the question were one in which imperial interests were concerned, it would be for the home government to consider whether his exceptional measure had been right and prudent. If the question were one in which colonial interests were alone or principally concerned, he would also make himself,

[e] See *ante*, pp. 40, 336, 420, and *post*, pp. 446, 448, 453. And see the Nineteenth Century, for December, 1878, p. 1063.

in a certain sense, responsible to the colonists, who might justify the course he had taken, and even prove their gratitude to him for taking it by supporting him against the ministers whose advice he had rejected; but who, on the other hand, if they perseveringly supported those ministers, might ultimately succeed in making it impossible for him to carry on the government, and thus, perhaps, necessitate his recall."

The Duke of Newcastle added these significant remarks: — "In granting responsible government to the larger colonies of Great Britain, the imperial government were fully aware that the power they granted must occasionally be used amiss. But they have always trusted that the errors of a free government would cure themselves; and that the colonists would be led to exert greater energy and circumspection in legislation and government when they were made to feel that they would not be rescued from the consequences of any imprudence merely affecting themselves by authoritative intervention of the Crown or of the governor." [f]

On Nov. 20, 1866, Lord Carnarvon, the then colonial secretary, addressed a despatch to Sir G. F. Bowen (governor of Queensland), which not merely endorses the general principle embodied in the preceding extract, but also refers to an important point of constitutional practice, arising out of the relations of a governor to his responsible ministers: —

His previous consent to proposed legislation.

I have given my best consideration to the question which you have asked, "whether it is requisite or desirable, in colonies possessing parliamentary government, that the consent of the governor (as of the sovereign in England) should be *previously* obtained by his ministers to their most important measures, especially to the introduction by them of any bills of an extraordinary nature, whereby the prerogative of the Crown, or the rights and property of British subjects resident elsewhere, or the trade of the United Kingdom, or other imperial interests, may be prejudiced.

[f] Quoted in Sir G. F. Bowen's despatch to the secretary of state, of May 8, 1878; Commons Papers, August, 1878, C. 2173, p. 70. And see Victoria Parl. Papers, 1878, no. 27, p. 7.

There can be no doubt that it is most desirable that the ministers should obtain the governor's previous concurrence in their most important measures, especially when they are of the character indicated in your present despatch.

It is obvious that without a full knowledge on the part of the governor of the measures which his responsible ministers intend to propose to the representative Assembly of the colony, and an assent on his part to their introduction, so far as he can properly give such assent, there cannot exist that frank and confidential relationship between the governor and his advisers which must be always conducive to the harmonious working of government.

I am, however, unable to say that it is indispensable that this concurrence should be obtained, or that governors are bound to enforce the practice.

I am advised that there is no law or rule which renders indispensable such a practice in England, except when a measure is in progress affecting the rights of the Crown; and in this case the rule applies to private members as much as to the government of the day. With this qualification, no exception would be taken in parliament to a measure proposed by a minister of the Crown on the ground that it is alleged or even admitted not to have received the previous assent of the Crown. Whether it has or not been submitted to the sovereign, is a matter between the sovereign and the minister. In practice, no doubt, the sovereign, if he disapproved of a measure introduced by his ministers, would have the constitutional right to dismiss them; but whether he would choose to exercise this right would depend upon other constitutional considerations bearing on the expediency of a change of ministers.

This being the relation of your executive council towards yourself, as representing the sovereign authority of the queen, I think that you are at liberty, or rather that you would be bound in fairness, to inform them of the course you proposed to take respecting any particular measure proposed by them, whether by giving it, when passed, the assent of the Crown, by refusing that assent, or by reserving it for the signification of her Majesty's pleasure.[g]

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[g] Queensland Leg. Assem. Votes, 1867, p. 84. We have already considered the circumstances under which a governor would be

Governor's duty to uphold the law.

But while "it is the desire of her Majesty's government to observe to the utmost, the principle which establishes ministerial responsibility in the administration of colonial affairs, . . . nevertheless, it is always the plain and paramount duty of the queen's representative to obey the law, and to take care that the authority of the Crown, derived to his ministers through him, is exercised only in conformity with the law." [h]

An instance of the strictness with which this principle is maintained by the imperial government, and of the serious consequences attending upon any deviation therefrom on the part of a colonial governor, is afforded in the case of Sir Charles Darling, who was recalled from his post as governor of Victoria, in 1866, because of his departure from the rule of conduct prescribed by the queen's government, of a rigid adherence to law in all affairs of state.[i]

Another remarkable and instructive exemplification of the same principle occurred in New South Wales, under the following circumstances: —

Responsible government was introduced into New South Wales in 1855. Three years afterwards, the frequent delays which attended the passing of the estimates gave rise to an irregular practice of permitting public expenditure to be incurred under the authority of the governor in council, pursuant to votes of credit and resolutions of the Assembly, in anticipation of the passing of appropriation acts by the local parliament. This practice continued to be observed until the appointment of the Earl of Belmore to be governor, in 1867.

No sooner had Lord Belmore assumed the reigns of go-

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justified in refusing his assent to bills proposed to be submitted by his ministers to the local legislature; see *ante*, p. 134, *et seq.*

[h] Mr. Secretary Caldwell to Governor Sir C. Darling, January 26, 1866; Commons Papers, **1866**, vol. I. p. 697.

[i] Particulars of this case have been already given; see *ante*, pp. 103–108. See also the reprimand administered to Governor Bowen, in 1878, for failing to uphold the supremacy of the law at all hazards: *post*, pp. 508, 511.

vernment than he immediately turned his attention to this matter. He perceived the grave objections to the continuance of a practice so unlawful, and was keenly alive to the personal responsibility which he himself incurred by issuing his warrant to authorize expenditure which had not been sanctioned by both branches of the legislature.

His duty to prevent unauthorized expenditure.

He accordingly wrote to the colonial secretary (the Duke of Buckingham) for instructions, as to whether he was legally and constitutionally competent to exercise a discretionary power, under such circumstances, as had been done by his predecessors in office since 1858.

In reply, he was informed that a governor could not legally authorize the expenditure of public money, without an appropriation act; and that he was bound to refuse to sign a warrant sanctioning any such expenditure which had not been authorized by law. But that, as in England so in New South Wales, occasions of supreme emergency might arise, which would justify a departure from ordinary rules, and wherein, upon the advice and responsibility of his ministers, and after a careful consideration of the particular circumstances, the governor might exercise such an authority.

Every case of this kind must be determined on its own merits; but, as a rule, the secretary of state was of opinion that such irregular expenditure could only be justified, "first, on the ground of necessity; or, secondly, on the ground that it is sure to be subsequently sanctioned, — joined to strong grounds of expediency, even though short of actual necessity."[j]

A few months afterwards, Governor Belmore again addressed the colonial secretary on this subject, alleging that the Legislative Council of the colony had taken umbrage at certain unauthorized expenditure which had been avowedly incurred by government, without an act of appropriation; and that the council had protested against the proceeding, as being "derogatory to the privileges of parliament, and subversive of the constitution."

The governor explained that, in this instance, the payment had been merely of certain official salaries, in anticipation of

[j] Secretary of State's despatch to Governor Belmore, of Sept. 30, 1868; in Commons Papers, **1878**, C. 2173, p. 117.

the appropriation act, the passing of which had been inadvertently delayed by a parliamentary adjournment; and that there had been no intentional infringement of the privileges of the Legislative Council.

The colonial secretary (Earl Granville), in a despatch dated June 16, 1869, pointed out that any such proceeding was at variance with the instructions contained in the foregoing despatch from the Duke of Buckingham; and observed that a temporary inconvenience to certain civil servants could not be regarded as "an unforeseen emergency," or as a case of expediency that would justify a violation of law. He added that, "except in case of absolute and immediate necessity (such, for example, as the preservation of life), no expenditure of public money should be incurred, without sanction of law; unless it may be presumed not only that both branches of the legislature will hold the expenditure itself unobjectionable, but also that they will approve of that expenditure being made in anticipation of their consent." [k]

Upon the governor communicating this despatch to his ministers, they sent him in reply a minute, which, while explaining the practice heretofore pursued in such cases, was in effect a protest against the instructions issued by her Majesty's secretary of state to the governor, as being an interference, in a matter of local concern, with their responsibility as ministers of the Crown and representatives of the parliament and people of New South Wales, upon a question having no relation to imperial interests.

His Excellency forwarded this minute to the colonial secretary, who, in a despatch dated Jan. 7, 1870, commented upon it. Admitting unreservedly that the matter in hand was a purely local question, her Majesty's government were nevertheless anxious that the governor's conduct should be in conformity with the public will, "when constitutionally ascertained." That will was authoritatively expressed "through two channels, — the legislature and the executive government." The governor was justified in accepting, as the interpreter of the public will, a ministry presumed to possess the confidence of the legislature. But, if the law required him to do one thing, and his ministers recommended him another

[k] Commons Papers, 1878, C. 2173, p. 119.

course, it was his plain duty to obey the law; and it would be idle to object that such obedience was unconstitutional; for the governor is himself a branch of the legislature. Obligations of law in all local matters.

In a case of emergency, it might become necessary to overstep the law; but some one must decide whether, in fact, such a contingency had arisen. The ministry claim that they should determine this question. "But, so long as the letter of the law imposes on 'the governor' the responsibility of preventing a breach of the law, this duty must be fulfilled by him. The personal responsibility of the governor in no way absolves him from attaching great weight to the opinions of his ministers, in respect to fact, law, or expediency." But "he remains, in the last resort, the judge of his own duty, and is not at liberty, on the advice of his ministers, . . . to commit an act contrary not only to the letter but to the spirit of the law."

The secretary of state was therefore unable to recall the instructions already given on this subject. The governor was bound to obey the law, even if adherence to his instructions should bring him into collision with his ministers. A difference with them would render it necessary to ascertain the wishes of the colony. The colony would probably pronounce in favour of retaining the personal sanction of the governor (in addition to that of the ministry) as a useful obstacle against unauthorized expenditure.

But if both branches of the legislature should agree to dispense with this injunction of the law, and desire that the governor should hereafter be guided by the advice of his ministers in the performance of this duty, her Majesty's government would not object to this conclusion, and would then free the governor from personal responsibility in the matter.

Lord Belmore, in a despatch dated May 10, 1870, informed the colonial secretary that he had caused the foregoing despatch to be communicated to the local parliament, and that a bill had been passed, which, though it did not relieve the governor of personal responsibility in regard to public expenditure, would establish a better system for the receipt, custody, and issue of the public moneys, and provide for the audit of the public accounts. His Excellency added that he had notified his ministers that it would be incumbent upon him to obey the instructions of the secretary of state "at all risks."

He had also suggested certain changes in the present mode of issuing public money, which it would be desirable, in the public interest, to adopt. And he had plainly stated his conviction that it was the duty of the people of the colony, not only to support the governor in the onerous responsibility which devolved upon him of controlling unauthorized expenditure, but that they should facilitate his performance of the same. It is gratifying to know that the discussion of this difficult question did not impair the cordiality which should always subsist between the governor and his responsible advisers.[l]

Co-operation between governor and ministers.

But, while a constitutional governor is bound to insist upon a strict conformity to law on the part of his responsible advisers in every act of administration, he is equally bound on his own behalf to afford to his ministers for the time being a cordial support and co-operation. This support should be entirely irrespective of party predilections. A governor, like the sovereign whom he represents, is removed out of the political arena, and placed above and beyond its strifes and temptations. His first duty is to be impartial and just to all, and, while he refrains from any act which could possibly be regarded as indicative of personal preference to either political party, he is in a position to exert a moderating and conciliatory influence with both parties. This will enable him at all times to bring an even and unbiassed judgment to bear upon whatever may need to be submitted for his consideration and approval.[m]

Routine business.

Mere matters of ordinary routine in the administration of public business, which under the old colonial polity were settled by the governor, or at any rate submitted for his sanction, are, under responsible

[l] Commons Papers, **1878**, C. 2173, pp. 119–132.

[m] See despatch to Governor Bowen, of Victoria, from the colonial secretary (Earl Carnarvon) of Nov. 16, 1876, and others to the same effect, quoted in Governor Bowen's despatch, of Sept. 19, 1877, and Secretary Sir M. Hicks-Beach's despatch, of Feb. 28, 1878, approving of the same: in Commons Papers, **1878**, C. 1982.

government, disposed of at once by the minister in charge of the department immediately concerned therein. But all documents which require the individual action of the governor — such as warrants upon the treasury, deeds for signature, applications for remissions of punishment and the like — should be submitted to him in proper course through a minister of the Crown.[n]

In colonies under responsible government, "the governor takes no part in the settlement of the estimates, which are prepared by the responsible ministers at the head of the several departments of the public service." His signature to a message to enable the Assembly constitutionally to take into their consideration any proposed vote of public money is, therefore, under ordinary circumstances, "a formal act," which does not necessarily express or imply a personal opinion with regard to the policy of the proceeding which, upon the advice of his ministers, he has thus initiated and authorized.[o]

Formal acts by a governor.

Bearing in mind this rule, Governor Bowen, of Victoria, on Sept. 19, 1877, telegraphed her Majesty's secretary of state for the colonies to know whether he was at liberty to consent to his ministers placing on the estimates a vote for the payment of members of the local legislature, the principle of which had been twice affirmed by both houses, notwithstanding that, subsequently, separate bills, to authorize the payment of members had been rejected by the Legislative Council.

In reply, the colonial secretary stated that, as the matter was one of purely local concern and involved no question calling for the intervention of the imperial government, responsibility must rest entirely with ministers, and he saw no reason why the governor should hesitate to follow their advice.[p]

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[n] New South Wales, Leg. Assembly Journals, **1859–60**, vol. i. p. 1131.

[o] See this point fully discussed in Governor Bowen's despatch of Sept. 19, 1877: Commons Papers, **1878**, C. 1982.

[p] *Ibid.* Telegram of Sept. 27, and despatch of Dec. 20, 1877. And see *ibid.* C. 2173, p. 56.

Disputes in Victoria in 1867.

It is true that, in 1867, under somewhat similar circumstances, the then governor of Victoria had been instructed by the colonial secretary, in a despatch dated Jan. 1, 1868, to refuse his sanction to placing on the estimates a grant in favour of the wife of ex-Governor Darling. But this objection was based on grounds of imperial policy, which forbade any gift to be received by a colonial governor, or any of his family, from the colony over which he had presided, either during his term of office or upon his retirement.

But, as we have already seen in our narrative of the case,[q] this interposition of the imperial authorities in a matter which, on general principles, ought (at least in this stage of the proceeding) to have been locally decided, gave great umbrage in the colony, and led to a ministerial crisis. Ministers resigned with a protest against the alleged unconstitutional interference of the secretary of state, in disregard of the rights of self-government which had been conceded to Victoria. The Assembly sided with the ex-ministers. After a fruitless attempt to form a new administration, the governor was obliged to recall his late advisers to office. Fortunately at this juncture, the ex-governor himself, for personal reasons, declined the proposed grant, and so further trouble was averted.

But before this happy termination of the controversy, the colonial secretary modified his objection, and wrote a further despatch, intimating his opinion that, upon a review of the case, the proposal of the Victorian ministry did not appear "to call for the extreme measure of forbidding the governor to be a party, under the advice of his responsible ministers, to those formal acts which are necessary to bring the grant [in question] under the consideration of the local parliament."[r]

[q] See ante, pp. 109–122.

[r] Commons Papers, **1867–68**, vol. xlviii. pp. 625–704.

The undoubted fact that the Legislative Council would regard the introduction of the proposed vote into the estimates as being, under the circumstances, an attempt to invade their privileges, — however open to objection such an act might be as between the two houses, — was not a sufficient reason to justify the interposition of the governor in refusing to permit the vote to be submitted to the Assembly. For it is his duty to avoid "the appearance of taking part with one side or the other in controversies which ought to be locally decided," even when they may involve an issue between the two houses. And the governor could not refuse to follow the advice of his ministers in a case wherein neither the prerogatives of the Crown nor other imperial interests were involved, merely because the Legislative Council objected to the course pursued by the Assembly.[s]

The governor in disputes between two houses.

For strife between contending parties is best allayed, and harmony between the two co-ordinate branches of the legislature is best promoted, "by an unflinching maintenance of the principle of ministerial responsibility, and it is better that a governor should be too tardy in relinquishing this palladium of colonial liberty, than too rash in resorting to acts of personal interference." Satisfactory results in such difficulties are more likely to be "reached by a strict application of constitutional principles and by the regular working of the machinery of a free parliament." [t]

In party contests.

These wise and statesmanlike words are extracted from despatches written by Lord Dufferin in 1873,

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[s] Commons Papers, **1878**, C. 2173, pp. 6, 56.

[t] Lord Dufferin's (Governor General of Canada) despatch to the Earl of Kimberley, Aug. 18, 1873; and the Secretary of State's reply, of Nov. 29, 1873; Commons Papers, **1874**, vol. xlv. pp. 81, 267. See also Lord Dufferin's admirable speech at Halifax, in the summer of 1872, wherein, in a popular and witty vein, yet with consummate perspicacity, he describes the true constitutional relations which should always subsist between a governor and his responsible ministers. *Ibid.* p. 20.

Lord Dufferin's action in "Pacific scandal" case.

during his administration of the government of Canada. They express the sentiments which actuated him during his brilliant and successful tenure of office as governor-general of the dominion. But though patient under provocation, and scrupulous to avoid an undue or untimely exercise of prerogative, Lord Dufferin was always prepared, should necessity compel the alternative, to put forth the reserved powers of the Crown rather than permit injustice to be done to the varied and important interests entrusted to his guardianship.

In proof of this, mention may be made of certain political events which transpired in Canada whilst Lord Dufferin was in office, the complete narrative of which will be found in papers laid before the Imperial Parliament. I refer to the so-called "Pacific scandal," which led to the downfall of the Macdonald administration in 1873.

This powerful ministry had continued in office — with the exception of a brief interlude from May, 1862, until March, 1864 — ever since the year 1858.

In April, 1873, shortly after a general election, which had resulted in the return of a considerable majority of government supporters, ministers were accused of having trafficked with certain capitalists, by undertaking to secure for them special privileges, in connection with a project to build a railway across the continent to the Pacific Ocean, in order to obtain funds wherewith to bribe the constituencies of the dominion, and so to secure the return to parliament of a majority in favour of the administration.

Great excitement prevailed throughout Canada at these charges. Public opinion was outraged at the thought that they might possibly be true. Inquiry was instituted in parliament; but, for the lack of inquisitorial powers and authority to take evidence upon oath, it proved abortive. Before other steps could be taken, in due order, to arrive at the facts, the governor was urged by opponents of the ministry to interpose peremptorily to bring them to account, or to dismiss them from his counsels. Partisan newspapers even assailed

his Excellency in outrageous and opprobrious terms. But Lord Dufferin remained firm in his adherence to constitutional order. Whilst active in his endeavours, by every lawful proceeding, to prove or disprove the accuracy of the allegations, he steadily refused, so long as they were unsubstantiated, to withdraw his confidence from his responsible advisers.

Various methods had been proposed to determine the truth of the complaint against ministers, but technical difficulties presented themselves, which provoked delay. At length, by the advice of ministers, a royal commission was appointed to pursue the investigation, cut short by the failure of the parliamentary committee. This commission reported evidence taken before them, but properly refrained from pronouncing judicially thereon, lest their judgment might seem to be to the prejudice of further inquiry by a parliamentary tribunal.

Upon the re-assembling of parliament, the governor caused the evidence taken by the commission, together with his own despatches on the subject to the home government, to be laid before the House of Commons. This led to a protracted and vehement discussion, and to the moving of a vote of censure upon the administration, founded upon the facts disclosed in the evidence reported by the royal commission. As the debate proceeded, it became apparent that the ministerial majority could not be relied upon to sustain the government, in the face of the facts brought to light by the commission, which though they did not prove individual corruption, for personal motives, against particular ministers, sufficed to show that large sums of money had been freely and unjustifiably expended, for the purpose of influencing the dominion elections. In order to prevent the disgrace of defeat, ministers resigned office before a vote was taken, and the leader of the opposition (Mr. Mackenzie) was called upon to form a new administration. He succeeded in this endeavour, and one satisfactory result speedily followed, in the passing of a more stringent election law, with severe penalties against bribery and corrupt practices, an offence which had gradually attained large proportions in Canada, and from which neither party could claim exemption.[u]

[u] See Canada Commons Journals, October Session, **1873**; Commons Papers, **1874**, vol. xlv. pp. 1–269; Tuttle's History of the Do-

Lord Dufferin and the "Pacific scandal."

But we are chiefly concerned with the conduct of Lord Dufferin during this trying time. During a period of extraordinary popular excitement, he held the balance between the contending parties with strict impartiality. Although the question at issue was one of local concern, he did not therefore conclude that he had no authority to determine it. The honour of his ministers and the credit of the country were at stake, and it behooved him to be satisfied that none but men of honour and of personal integrity should fill the place of his constitutional advisers, and should wield the authority of the Crown. But he would not hastily assume corruption until it should be proved to exist. He therefore resolved, in the first instance, to leave to parliament to ascertain the truth or error of the charges, before he pronounced judgment upon the question. And when the parliamentary inquiry temporarily failed upon technical grounds, he promoted and encouraged immediate investigation by means of a royal commission, not with intent to withdraw the case from the ultimate cognizance and control of the House of Commons, but to enable him to obtain from his ministers in open court those explanations in regard to their conduct which circumstances had rendered necessary, and upon which he had a right to insist.

Throughout all these painful and embarrassing events, Lord Dufferin never lost sight of the fact that he possessed reserved powers, amply sufficient for the occasion, whatever might be his final convictions upon the merits of the case. "Of course," he said, in writing to the secretary of state, "it was always open to me to have dismissed my ministers, and to have taken my chance of parliament approving my conduct, but I did not feel myself warranted in hazarding such a step on the data before me." [v]

And the result amply justified his forbearance. Whatever opinion may be formed upon the merits of the charges themselves, the ministers fell after they had every opportunity of stating their case to the country, and of pleading their cause before a full parliament, which comprised a large majority of members avowedly elected in their interest.

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minion of Canada, vol. ii. cc. 35 to 39.

[v] Commons Papers, **1874**, vol. xlv. p. 28.

If, by their resignation of office before a vote was taken, they virtually confessed defeat, and that the verdict had gone against them, they could not attribute their discomfiture to "the uncalled-for intervention" of the governor-general. This result left them with no ground of complaint against the representative of the Crown, who was the last person in the dominion to withdraw his confidence from his constitutional advisers.

In his despatch of Nov. 7, 1873, notifying the Earl of Kimberley of the final issue of this protracted struggle, Lord Dufferin congratulates himself that it had been brought about, "not by an ill-considered and hasty exercise of imperial authority, nor by the application of premature pressure from without, but by the free and spontaneous action of the representatives of the Canadian people." "During the whole of this unfortunate business," he remarks, "I have never doubted but that a strict application of the principles of parliamentary government would be sufficient to resolve every difficulty, and that a result would be eventually arrived at in harmony with the convictions and wishes of the Canadian people." But, he significantly adds, — in reference to the authority vested in him, as representing the Crown in the dominion, — "had it proved otherwise, I still held in reserve a constitutional power, equal to any emergency; and, in the last resort, I should have been quite prepared to have exercised it, in whatever way the circumstances of the case might have justified." [w]

In reply to this despatch, Lord Kimberley says: "I agree with your Lordship in the satisfaction which you express that the result arrived at has been reached by a strict application of constitutional principles, and by the regular working of the machinery of a free parliament; and I have much pleasure in conveying to you her Majesty's entire approval of the manner in which you have acted in circumstances of no ordinary difficulty." [x]

Lord Dufferin as a constitutional governor.

During the remainder of Lord Dufferin's career as governor-general, he acquired the confidence and respect of all political parties in Canada, and won the affections of the

[w] Commons Papers, **1874**, vol. xlv. p. 267.
[x] *Ibid.* p. 268.

people, to an extent previously unparalleled. This was exemplified in the cordial expressions of good-will and admiration embodied in the addresses presented to him upon his departure by the dominion parliament, by provincial legislatures, and by every class in the community, — tributes, not only to his firm yet impartial rule as governor-general, but also in heartfelt acknowledgment of the lively interest he had displayed and the sagacious counsels he had given upon all matters affecting the progress and prosperity of the Canadian people.

Precedents of interposition by governors in local questions.

In further illustration of the position of a constitutional governor, in colonies having responsible government, and of the influence and authority appertaining to the office, notwithstanding the gradual emancipation of such colonies from imperial control, the following cases may be cited : —

Sir W. Denison.

In 1858, Sir William Denison, governor of New South Wales, successfully opposed an endeavour on the part of his responsible advisers to increase largely the number of members of the Legislative Council, for the purpose of securing a ministerial majority in that chamber. In the following year, Governor Denison was obliged to warn his ministers that a certain measure which they had in contemplation was at variance with law, and calculated to override the law, without due warrant of parliament. He succeeded in convincing them of this, else he had resolved to dismiss them from office.[y]

Sir A. Bannerman.

In 1861, Sir Alexander Bannerman, the lieutenant-governor of Newfoundland, being dissatisfied with the reasons given to him by his prime minister (Mr. Kent) for submitting to the local legislature a bill affecting the salaries of employés in the civil service of the island, dismissed the ministry, and entrusted the formation of a new administration to Mr. Hoyles, the leader of the opposition in the Assembly. Mr. Hoyles succeeded in this undertaking, but, being in a minority in the Assembly, requested the governor to dissolve the legis-

[y] Denison's Viceregal Life, vol. i. pp. 435, 468.

lature, to which his Excellency acceded. Meanwhile, the Assembly, on March 5, 1861, passed resolutions protesting against the change of ministry and the proposed dissolution, and negatived a motion to go into a committee of the whole house on ways and means. Whereupon, two days afterwards, the legislature was dissolved by proclamation; a certain bill, which had passed both houses, having been previously assented to by proclamation. The result of the elections was favourable to the new ministry, and the objectionable measure which had been disapproved by the governor was not again brought forward.

In a despatch to the secretary of state for the colonies, narrating these events, Governor Bannerman remarks: "Mr. Kent's affair was a serious one. The new system of [responsible] government, which was conceded in 1855, instead of lessening, increases a governor's responsibility. A bad ministry, with a corrupt majority, may do many things which a governor cannot help. But I could not for a day continue to administer the government of a colony, unless I had the power to dispense with the services of my ministers, and appeal to the country. But in doing this a governor must submit to many things, and look to what the consequences may be to the interests of the people." [z]

In January, 1865, Mr. Martin, prime minister of New South Wales, urged upon the governor of the colony (Sir John Young, afterwards Lord Lisgar) the expediency of appointing two additional members to the Legislative Council. The governor declined to sanction this proceeding, on the ground that it was at variance with an implied understanding in regard to such appointments, which ought only to be made for the convenience of legislation, and not in order to strengthen a party. This refusal led to the resignation of the ministry. The secretary of state, however, in a despatch dated May 26, 1865, expressed his approval of the governor's conduct, and his belief that the reasons alleged for refusing compliance with the recommendation of ministers were sound

Sir J. Young.

[z] This despatch is cited in a letter to the Reform Association of Ontario, from ex-Governor Letellier, dated Oct. 2, 1879, in the Toronto "Globe," of Oct. 3. And see Newfoundland Assem. Journals, March 5 and 6, 1861.

and convincing. Four years afterwards, a similar request was preferred by the then premier (Mr. Robertson) to the governor (Lord Belmore), to the effect that three new members should be added to the upper chamber. But Lord Belmore declined to act upon this advice; and the appointments were not made. Shortly after, the premier resigned, but for reasons unconnected with this decision of the governor. Upon being informed of Lord Belmore's refusal to accept this recommendation, the secretary of state approved of the governor's determination.[a]

Lord Belmore.

In 1872, the question was again mooted; and Mr. Parkes, the premier at that period, expressed a strong desire that the existing tenure of legislative councillors — by nomination of the Crown — should be exchanged for that of popular election. In a minute submitted to the governor upon the general question, Mr. Parkes stated "that the working of the principle upon which the council is based has invoked the interference of her Majesty's secretary of state, in a manner not expressly sanctioned by law; and which, with expressions of deep regret, your Excellency's advisers cannot but consider incompatible with the rights of self-government, secured to the colony by the constitution."

At this time, Sir Hercules Robinson was governor of the colony; and he met Mr. Parkes's complaint by pointing out that it was founded upon a misapprehension. He showed, "that in every instance, when questions have arisen as to the appointment of additional members of council, the governor has acted on his own responsibility, without previous reference to the secretary of state, and that, when the course adopted has been reported home, the secretary of state has simply expressed his opinion as to the propriety or otherwise of the governor's proceedings, — an opinion which, on one of the occasions referred to, was specially invited by the minister who conceived himself aggrieved by the governor's decision. The understanding between the leading politicians in 1861, as to a limitation in the ordinary number of the council, was not come to in conse-

Sir H. Robinson.

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[a] New South Wales Leg. Assem. Votes, &c., 1872-73, vol. i. pp. 534, 535.

quence of any suggestion from home, nor was it even reported to the secretary of state for several years."

Sir Hercules Robinson's explanation on this subject was confirmed by the colonial secretary (Lord Kimberley), who, in a despatch dated Nov. 29, 1872, — while he deprecated any hasty legislation upon a matter so difficult and momentous as an amendment to the constitution, — expressed a hope that the local ministry would refrain from such an act "for the sake of the permanent interests of constitutional government in the colony, in the working of which her Majesty's government cannot but take a deep interest, although they seek in no way to interfere with its internal administration." [b]

The project for changing the constitution of the Legislative Council in New South Wales was afterwards abandoned. On March 14, 1876, a motion in favour of an elective Legislative Council was negatived, in the Legislative Assembly, by a vote of thirty-three to five,[c] and the upper chamber in that colony continues to be nominated by the Crown.

Governor Gordon on the union question.

In the colony of New Brunswick, in April, 1866, a ministerial crisis occurred, in consequence of the action taken by the lieutenant-governor (Mr. A. H. Gordon) in furtherance of the proposed confederation of the British colonies in North America. The expediency of agreeing to this union — upon certain terms, arranged at a conference of delegates from the several colonies concerned, which was held in Quebec in October, 1864 — was a test question at the New Brunswick general elections, in 1865; and a large majority of members, opposed to the union, were returned to the Assembly, at that time.

The lieutenant-governor was, nevertheless, of opinion that the earnest desire which the imperial government had expressed in favour of the union, justified him in again recommending the question to the consideration of the local legislature; more especially as he believed that a vast change had recently taken place in the public sentiment on this question. Ministers differed with the governor in this conclusion, and

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[b] New South Wales Leg. Assem. Votes, &c., **1872-73**, vol. i. p. 536.
[c] *Ibid.* **1875-76**, p. 214. But see *post*, p. 522.

objected to the course he proposed to take. They reluctantly consented, however, to a less formal discussion of the union question, with a view to discover whether some basis of agreement in accordance with the declared wishes of the home government might not be found. At this juncture, the Legislative Council passed an address to the queen, in favour of the projected union, and presented the same to the governor, for transmission to her Majesty. In acknowledging the receipt of this address, the governor made use of language which his ministers deemed to be inconsistent with their policy on this question. They accordingly resigned; although, at the time, they were able to command a majority in the House of Assembly. His Excellency at once formed a new ministry, who undertook to sustain his action in the matter.

A series of resolutions, condemnatory of the address of the Legislative Council, and expressing disapproval of the governor's conduct, were about to be proposed in the House of Assembly, when, upon the advice of the new administration, the legislature was prorogued, and shortly afterwards dissolved. The ex-ministers, and their supporters, who constituted a majority in the Assembly, were indignant at this proceeding, and forwarded, through the governor, an address of remonstrance to the queen. But, at the ensuing general elections, a large majority of members, in favour of a union of the provinces, was returned. Upon the reassembling of the legislature, the new Assembly passed an address, expressing their belief that the constituencies had justified the course adopted by the governor, upon this occasion.[d]

A still more remarkable instance of prompt and decisive action, on the part of a governor, in the interest of the colony over which he presided, but in direct opposition to his ministry, for the time being, — and notwithstanding their possessing the confidence of the local parliament, — took place in New Brunswick, a few years previous to the events above narrated.

In 1855, a prohibitory liquor law was passed by the New

[d] New Brunswick Assem. Journals, **1866**, pp. 74, 83, 202, 224.

Brunswick legislature. But the act proved to be wholly inoperative, and incapable of enforcement. Whereupon the lieutenant-governor (J. H. Manners Sutton), without expressing any opinion upon the principle of prohibitory legislation, sent a memorandum to his ministers, in which he expressed his conviction that a continuance of the existing condition of affairs was fraught with peril to the best interests of the community, and called for immediate remedy. He, therefore, suggested a dissolution of parliament, with a view to a decided expression of public opinion in favour of, or in opposition to, the prohibitory principle. Ministers dissented, altogether, from his Excellency's conclusions, and would not advise a dissolution. Further correspondence ensued, without a change of opinion on either side. Finally, the lieutenant-governor stated that, as he "never contemplated a dissolution of the Assembly without the concurrence of responsible advisers," he claimed that either the executive council should assume the responsibility for the issue of a proclamation of dissolution or that they should retire, and enable him to seek for other advisers, who would consent to this act. As ministers still demurred to either course, his Excellency directed the provincial secretary to prepare and countersign a proclamation dissolving the Assembly. His request was complied with, but immediately afterwards the ministry resigned. The governor requested them to retain office until their successors were appointed. In nine days, he notified them that he had succeeded in forming a new administration, who, agreeing with him in the necessity for an immediate dissolution of parliament, were prepared to assume responsibility for the same.

Governor Manners Sutton on prohibitory liquor act.

The elections were held without delay; and, in less than three months after the change of ministry, an extra session of the legislature was convened. It was of very brief duration. But, in answer to the speech from the throne, both houses expressed their satisfaction at the governor's judicious exercise of his constitutional powers, and at the promptitude with which he had had recourse to the advice of parliament. A bill to repeal the prohibitory liquor law was submitted to the Assembly, as a ministerial measure. It passed, by a vote of 38 to 2; and was agreed to by the Legislative Council without a division. Thus, both the constitutionality and the expedi-

ency of the governor's action, on this occasion, were distinctly ratified by both houses.[e]

Governor Denison on a land-grant.

In 1861, Sir William Denison, governor of New South Wales, being about to relinquish his office, and desirous before his departure to settle a long-standing dispute, in reference to a land claim, in conformity with instructions received from the imperial government, requested the colonial secretary to affix the great seal of the colony to a grant of land to the claimant. The secretary disapproved of the proposed grant, and declined to be a party to the proceeding, or to become responsible for it. The governor then desired him to hand over the seal and his Excellency sealed the document himself. This irregular proceeding led to the resignation of the whole ministry. Shortly afterwards, the local parliament met, when an attempt was made in the Legislative Assembly to pass a vote of censure upon the ex-governor for his conduct on this occasion. But the motion was negatived upon the previous question being proposed thereon.[f]

Sir H. Robinson.

In 1876, the then governor of New South Wales (Sir Hercules Robinson) objected to affix his sign-manual to land grants, until some more effectual system had been devised to ensure genuineness, and to prevent fraud by the tender of spurious grants for his sanction and signature. This led to the adoption of improved regulations in the premises, and of a constitutional rule that each deed should be duly authenticated by the signature of the minister for lands before it was submitted for the governor's signature.[g] By this method, unity of action between the governor and his ministers in such matters was secured, and the liability of fraudulent grants being surreptitiously obtained was proportionably diminished.

Governor Weld on unauthorized expenditure.

On April 23, 1877, the sanction of the governor of Tasmania was requested, by ministers in council, to the payment of a certain sum to an individual pursuant to an award upon a claim against government. His Excellency objected to the payment, because the previous sanction of parliament to this appropriation of public money had not been given; and the

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[e] New Brunswick Assem. Journals, **1856**, pp. 8, 23, and **1857**, p. 88.

[f] New South Wales Assem. Votes, **1861**, vol. i. pp. 58, 416, 647–743.

[g] *Ibid.* **1876–77**, vol. i. pp. 208, 693.

matter was dropped. At a later meeting of council, however, the prime minister informed the governor that, unknown to himself and in anticipation of the governor's assent, the sum awarded had actually been paid to the claimant, prior to his Excellency's refusal to sanction the same on April 23. Thereupon the governor recorded in a formal minute his desire "to impress upon ministers the impropriety of signifying his assent" to any matter, not of mere routine, before it had been actually given.

The governor was aware that, in all colonies and under all governments, it has been usual in mere matters of routine, when it would be inconvenient to see the governor, that a minister should, on his own responsibility, assume a consent that would certainly be afforded. And, in the present instance, the governor was entirely satisfied that the departure from regular practice had been accidental and unpremeditated. Being also convinced, from the explanations offered by ministers, that there was every reason to suppose that parliament would approve of this expenditure, he stated that he would not refuse to legalize an act already performed, as he believed, in good faith by his ministers in a purely colonial matter.[h]

Governor Normanby on appointing legislative councillors.

In New Zealand, in November, 1877, ministers submitted to the governor (the Marquis of Normanby) a request that he would appoint Mr. J. N. Wilson to a seat in the Legislative Council. At the time this advice was tendered, a vote of want of confidence in ministers was pending in the House of Representatives. Under these circumstances, the governor objected to make the appointment; unless it was proposed to confer ministerial office on Mr. Wilson (which appears not to have been the case): but he declared that, in the event of the ministry being sustained on the confidence motion, he would readily consent to the application.

The governor's memorandum, on this subject, was, on the advice of ministers, laid upon the table of the house. Whereupon, on Nov. 5, the house agreed to a resolution censuring his Excellency for "noticing a matter in agitation or debate in the house, as a reason for refusing to accede to advice tendered by his ministers." Certain of the ministry

[h] Tasmania, Leg. Council Journals, **1877**, sess. 4, appx. no. 11, p. 13.

voted in favour of this resolution, which was directed to be transmitted to the governor by an address.

Meanwhile, on Nov. 6, the vote of want of confidence was negatived, but only by the casting vote of the speaker.[i] Whereupon the governor, as he had promised, summoned Mr. Wilson to a seat in the Legislative Council.

Upon his receipt of the address above mentioned, transmitting to him the vote of censure, the governor forwarded the same to his ministers. He then sent a message to the house, stating that, as soon as he had been advised what reply to make to this communication, he would notify the same to the house. But the ministry refused to interpose on the governor's behalf. His Excellency demurred to this conduct, and referred them to the constitutional rule that "it is the government, and not the governor, who must, so long as they remain his advisers, be solely responsible to parliament for his acts." He pointed out that, if ministers were not prepared to accept and defend a particular act of the governor, it was their duty to resign, and thus afford the governor an opportunity of forming a ministry who would sustain him; leaving it to the governor to justify his own course to the imperial government, to which alone he is personally responsible. The ministry, however, adhered to their view that the governor was to blame, on the abstract question of refusing to take their advice in respect to a nomination to the Legislative Council, because a vote of censure was under discussion. Neither would they admit their own responsibility for the governor's actions to the full extent of the rule above cited. Accordingly, the governor announced his intention of submitting the question to the secretary of state for the colonies, and of transmitting the whole correspondence to the local parliament.[j]

No further action was taken by the New Zealand legislature upon this case. But, in a despatch dated Jan. 15, 1878, the governor was informed that his conduct in this occurrence was entirely approved by her Majesty's government.[k]

In December, 1877, the premier of New Zealand advised the governor to refuse the royal assent to a bill, intituled

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[i] As to the duty of a speaker, under such circumstances, see *post*, p. 484 *n*.
[j] New Zealand Official Papers, **1877–78**.
[k] New Zealand Official "Gazette," June 21, 1878.

"the land act," which had been agreed to by both houses of the local parliament. This advice was given, because the bill had been introduced by the late government, though afterwards forwarded by the new ministry, but it had been amended, during its progress through parliament, in a manner objectionable to ministers. The governor demurred to the course proposed. He considered that ministers would have been entitled to oppose, to the extent of their ability, the passing of the bill; but he saw no reason why he should take the unusual course of vetoing the measure. Vexed at this refusal, the premier at first declined to attach his name to the formal certificate, recommending the governor to assent to it. Ultimately, however, he agreed to do so, and the bill was assented to. The secretary of state for the colonies, in a despatch dated Feb. 15, 1878, approved of the action taken by the governor upon this occasion, in declining, under the circumstances he had explained, to refuse his assent to this bill.[1]

Governor Normanby assents to a bill against advice of ministers.

Similar instances of the active interposition of a governor, within the proper limits of his office, as representing the authority of the Crown in the provincial constitutions, have recently occurred in the dominion of Canada.

In 1878, Governor Letellier, of the province of Quebec, dismissed his ministry, because, in his judgment, they had failed to recognize the deference due to his office, and had recommended certain measures to the consideration of the local legislature of which he had not approved. At the time of their dismissal, this ministry were able to command a majority in the Assembly of twenty in a house consisting of sixty-five members. When their successors were appointed, the governor was advised to dissolve the legislature. The result of an appeal to the constituencies was, that the new ministry

Lieutenant-governor Letellier dismisses his ministry.

[1] See the despatches in the supplement to New Zealand "Gazette," 1878, p. 912. But if the governor had seen good to approve of the advice of his ministers, there was no constitutional reason why the royal assent should not have been withheld from this bill; see a case noted in Todd, Parl. Gov. vol. ii. p. 319.

were sustained in the new Assembly by a small majority, sufficient to enable them to carry on the government.[m]

In the province of Manitoba, in 1879, upon two vacancies occurring in the local cabinet whilst the legislature was in session, the premier advised lieutenant-governor Cauchon to defer filling up the same until after the prorogation. The lieutenant-governor replied that he could not accede to such a proposition, "so contrary to the spirit and meaning of the constitution." Whereupon ministers agreed that the vacancies should be filled up with the least possible delay.[n]

Lieutenant-governor Cauchon on cabinet vacancies.

The foregoing precedents will suffice to establish the doctrine contended for elsewhere in this treatise,[o] that, wherever parliamentary institutions are established and the system of ministerial responsibility prevails, the executive officer specially charged with representing the Crown in the particular colony or province — whether he be a governor-general, governor, or lieutenant-governor — must be regarded as possessing, within the prescribed limits of his rule and jurisdiction, substantially the same powers that belong to the sovereign in the British constitution.

Constitutional powers of a governor.

Nay more, it may be safely asserted that the direct power of a constitutional governor in the colony over which he presides is practically greater than that of the sovereign in the mother-country, inasmuch as a governor is personally responsible to a higher authority for the maintenance of the royal prerogatives, and for administering his government in accordance with the instructions he has received from the Imperial Crown. A governor, like every other agent, has a double relation: first, to his principal; and, secondly, to the party with whom he transacts the affairs of his principal;[p] and

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[m] See *ante*, pp. 405, 420. See ex-Governor Letellier's able letter to the Reform Association of Toronto, in the "Toronto Globe" of Oct. 3, 1879.

[n] "The Colonies," newspaper, July 5, 1879, p. 11.

[o] See *ante*, p. 29, *et seq.*

[p] Hearn, Govt. of England, p. 129. See the remarks of Gover-

every statesman conversant with colonial politics is aware that in a colony very many occasions will arise where the prerogative of the Crown would need to be exercised under circumstances which would not necessitate, and perhaps would not justify, a similar procedure in England. Striking examples of this fact will be apparent when we review the constitutional rights of a governor in the exercise of the prerogative of dissolution.

Beneficial exercise of a governor's powers.

The lawful authority of the Crown in connection with parliamentary government — though apt to be disregarded by theoretical politicians, and subject to be weakened by the increasing prevalence of democratic ideas — is essential to the efficiency and stability of parliamentary institutions. Such authority, when constitutionally exercised, is calculated to be especially beneficial in colonies where imperial interference with the rights of local self-government has been reduced to a minimum, for it then becomes the sole expression of the monarchical principle in the colonial polity.[q]

The framers of the American constitution deemed it necessary, in the interest of the nation, to entrust large powers to the president, including a right to veto the legislation of Congress, unless, upon reconsideration, two thirds of both houses should require the passing of a measure of which the president had disapproved.

In view of the more extended powers which are

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nor Mulgrave, of Nova Scotia, on this point, in a despatch to the colonial secretary, dated June 23, 1860; in Nova Scotia Assem. Journals, **1861**, appx. no. 2, p. 5. See also Lord Carnarvon's circular despatch to Australian governors, of May 4, 1875. Commons Papers, **1875**, vol. liii. p. 696.

[q] See *ante*, p. 33. On July 1, 1863, the late well-known Canadian statesman, Thomas D'Arcy McGee, wrote an able letter to the "Montreal Gazette," pointing out to all who wished to maintain British connection, and to save Canada from drifting into a democracy, the need of rallying in defence of the principle of "the equal union of authority and liberty, hitherto found possible only under the forms of constitutional monarchy." He appealed to every patriotic Canadian to "manfully do his part towards conserving the monarchical principle in our constitution."

practically confided to a parliamentary ministry able to command a majority in the popular chamber, it is evident that some restraint upon their actions is needful to counteract possible corruption or abuse. This restraint is afforded by the vigilant oversight of the sovereign or her representative.

Whatever measures may be framed, whatever policy propounded, by a parliamentary ministry, must be subjected to the scrutiny and must obtain the approbation of the Crown. In a British colony, the representative of the Crown is usually a man of special qualifications for his exalted office. Necessarily impartial, and usually experienced in the science of government, the statesmen to whom such eminent functions are entrusted rarely fail to win the respect and confidence of the people as well as to merit the favour of their sovereign. For their powers are conferred upon them in trust for the welfare of the people, to whom in the last resort every governor must appeal, when in the discharge of his constitutional rights he dismisses an incompetent or unworthy ministry, or asks for a verdict to ratify or to disallow a decision of the popular assembly. This method affords the best security attainable in a parliamentary system against the injurious influences of party and the intrigues of faction, while it secures the ultimate triumph of the rights of self-government.

Governor's powers a trust for the public good.

b. *The constitution and powers of Colonial Parliaments, and the position of the governor in relation to the legislative chambers.*

Having discussed the position and functions of a constitutional governor in relation to his ministers, and in view of the rights of local self-government conceded to colonies by the grant of parliamentary institutions, it remains to examine the lawful powers of a governor in relation to the local parliament, of which, by virtue of his office, he is a component part.

But we must first endeavour to ascertain what are the rightful powers and privileges of colonial legislative bodies, and what are the constitutional relations which the two legislative chambers should occupy towards each other.

Definition of "parliament."

At the outset, it may be well to consider briefly the propriety of the term "parliament," as applied to a colonial legislature.

It has been urged, with more ingenuity than discrimination, that it is wrong in principle and contrary to imperial practice to designate by this title any of the minor legislative bodies in existence throughout the empire, and that the appellation of "parliament" should be exclusively reserved for the great council of the nation, and for those subordinate legislatures only which (like the dominion parliament in Canada) might be invested with the title by imperial enactment.[r]

But this idea is founded on a fallacy, and is not warranted by imperial usage.

Freeman, whose reputation as a constitutional writer ranks deservedly high, tells us that the word parliament signifies a colloquy or talk. The term appears in French in the twelfth century, and in Latin in the thirteenth. But it is merely a translation of the expression "deep speech," which, according to the English chronicle, King William held with his Witan in the eleventh century. The Parliament of England is historically so called because it was assembled together to *parley*, to talk, to hold high converse on affairs of state with the king.[s]

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[r] Are Legislatures Parliaments? a Study and Review. By Fennings Taylor, Montreal, 1879. Mr. J. S. Watson, in articles in the "Canadian Monthly," for November and December, 1879, on "the powers of Canadian legislatures," shews that the legislatures in Upper and Lower Canada, antecedent to the union of the provinces in 1841, were officially termed "provincial parliaments," deriving their title to this appellation from the fact that they were not subordinate bodies, with municipal functions, but were empowered to make general laws, "for the peace, welfare, and good government of the province."

[s] E. A. Freeman, in North American Review, vol. cxxix. p. 159.

Are all legislatures parliaments?

This derivation of the word would naturally incline us to describe by the name of parliament all legislatures in the British dominions which are substantially entrusted with independent powers of self-government. For they, in their limited spheres of action, are as supreme as the Imperial Parliament itself, and are directly occupied with the consideration of questions of general concern in the particular colony. Since the recognition of the rights of local self-government in the leading British colonies, the Imperial Parliament, as we have seen,[t] has refrained from all interference with the proper functions of colonial legislatures. These bodies are assembled, not merely to pass necessary laws for the good government of the colony, but also "to hold high converse on affairs of state" with the representative of the Crown, to discuss and, by discussion, to influence the policy of the local administration upon all public matters affecting the welfare of the community. They are, therefore, as much entitled to be regarded as "parliaments," in and for their respective colonies, as the "Imperial Parliament" is in and for the whole empire.

It is different when a limited and inferior class of questions only are assigned to the exclusive legislative authority of a subordinate body, whilst the supreme control of state or general affairs is reserved to a superintending power. The functions of the one body, in such a case, are simply municipal and confined to a prescribed field of operation, whilst those of the other are national and comprehensive.

Such, in fact, is the relation borne by the legislatures of the different Canadian provinces towards the federal government of the dominion. The powers and jurisdiction of both are regulated by imperial statute. To the former is delegated the exclusive right to make laws in regard "to matters of a local or private nature" in

[t] See *ante*, p. 172.

each province. To the latter is assigned, not merely authority to legislate upon specified public matters affecting the public interests of the entire dominion, but also to make laws upon whatever may concern "the peace, order, and good government of Canada," save only in matters of such exclusively local description as to be suitably reserved for provincial determination. The general powers conferred upon the federal legislature constitute that body as being emphatically and exclusively the "parliament," which "holds high converse on affairs of state," on whatever may affect the welfare of the Canadian dominion. Subordinate legislatures.

This distinction is justified by the terms employed in the British North America act. Therein the provincial legislative bodies are designated as "legislatures," and the dominion legislature is uniformly described as "the parliament of Canada."

But on turning our attention to colonial legislatures in other parts of the empire, and especially where the system of responsible government prevails, we find that from the period when local self-government was conceded to these colonies their legislatures immediately began to assume the name of parliaments, and that this claim received the sanction of the Crown. Legislatures in self-governing colonies.

In Victoria, Australia, pursuant to the provisions of the Imperial Act, 18 and 19 Vict. c. 55, which enabled the legislature to define, by statute, its own powers and privileges, an act was passed, in 1857, which declared that "the legislature of Victoria shall be and is hereby designated 'the parliament of Victoria.'" [u]

With or without express legislative authority, the appellation of parliament was likewise assumed by all other colonial legislatures in Australasia wherein local self-government had been introduced, and at a subsequent period by the "parliament of the Cape Colony" in South Africa.

[u] Victoria Stats., 20 Vict. no. 1.

Are suitably termed parliaments.

This adoption of a title more dignified than that of legislature, and indicative of the possession of larger powers, was in no respect an act of usurpation or pretence. It was rather a reasonable and most constitutional assertion of an undeniable fact that more extensive powers had actually been conferred by the Crown upon the particular colony.

The propriety of this change of title has, moreover, been explicitly admitted by the imperial government. Whilst in acts passed by the Imperial Parliament referring to the acts and proceedings of colonial legislatures, the formal distinction between the "legislature" of a colony and the "Parliament" of the mother country is still maintained,[v] not merely to prevent confusion, but as an appropriate assertion of the abstract right of general legislation for the empire which necessarily belongs to the Imperial Parliament, this difference is not observed in other official documents. A cursory examination of the despatches addressed by her Majesty's secretary of state to colonial governors, under the parliamentary system, will suffice to show that the local legislatures are usually, if not invariably, referred to therein under the name of parliament.

If the distinction herein noted between legislative bodies which continue to occupy a subordinate and dependent relation to the imperial authority (or, as the case may be, to authority vested in a federal government), and those which have been entrusted, independently, with general powers of self-government, be correct, the appellation of "parliament" to the legislative institutions in self-governing colonies is not merely allowable, but peculiarly appropriate, as marking an epoch in the constitutional progress of the colony, and

[v] Although in the marginal notes to the Canada Reunion Act, 3 and 4 Vict. c. 35, secs. 30 and 31, and to the New South Wales Constitution Act, 18 and 19 Vict. c. 54, schedule, sec. 1, the term "parliament" is applied to these colonial legislatures.

as an evidence that, with the direct consent of the Crown, the right to legislate, in all matters of local concern, has been virtually surrendered to the local government.

Powers and privileges of local legislatures.

Another question presents itself for our consideration in this connection, and one which is of great practical importance; namely, the extent of the powers and privileges that may be rightfully assumed by a colonial legislature.

The answer to this question depends, in no small degree, upon the actual status of the legislative body itself. It may be suitably determined by the mutual agreement of the several branches or estates of the legislature in a formal statute. But if no higher warrant can be shown in favour of an alleged privilege than the assertion of a single branch of the local legislature, on its own behalf, the courts of law will interpose, and limit the claim in accordance with general principles of constitutional law applicable to the case. This has been repeatedly done by colonial courts, and, in the last resort, by the judicial committee of the privy council.[w]

Whilst a colony is in a state of pupilage, and is directly subject to the control of the Crown, it is unnecessary and unbecoming in either branch of the local legislature to insist, for itself collectively, or for its members individually, upon the right to any privileges or powers except such as are indispensably necessary for the efficient performance of its proper functions. But when the status of a colony is raised to that of a self-governing autonomy, — whether its jurisdiction includes the right of general legislation, or is limited to the control and disposition of local questions of minor import, so long as the legislative powers exercised are

[w] See cases cited in Forsyth's Consitutional Law, p. 25; and Doyle *v.* Falconer, Law Rep. P. C. Appeals, vol. i. p. 328.

exclusive and supreme,[x] — it becomes desirable to clothe the legislative body with greater authority. Such legislatures will need to possess inquisitorial powers, to secure themselves from obstruction. They will need coercive powers to enforce every lawful discharge of their appropriate functions, and to vindicate their proceedings from resistance or contempt. But in order to define with precision, and without excess, the powers proper to be conferred upon any legislative body, recourse should be had to statutory enactment. No acts can be passed in any colony except by consent of the Crown. The Crown, therefore, is able to judge what powers and privileges ought to be granted in each particular case, and is in a position to refuse its sanction to all unjustifiable claims. So long as an assertion of privilege is based upon analogy or inference merely, it is liable to exaggeration. But when privilege is defined by law, there is a restraint upon its abuse. This method has accordingly been approved by the Imperial Parliament, in the most recent instances of imperial legislation, to explain or amend colonial constitutions.

Should be defined by statute.

The principle of defining by statute the powers, privileges, and immunities, to be possessed and enjoyed by local legislatures and by their individual members, was first introduced by the express authority of an imperial act. By the thirty-fifth section of the Act 18 and 19 Vict. c. 55, it is declared that it shall be lawful for the legislature of Victoria (Australia) by legislation to define the privileges, immunities, and powers of the Council and Assembly of that colony, and of the members thereof; provided, that the same shall not exceed those now held and exercised by the commons house of parliament or the members thereof.[y]

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[x] As in the case of several provinces in the dominion of Canada; see *ante*, p. 367.

[y] This act, to establish the constitution of Victoria, was passed in the colony, in 1854, under the authority of the Imperial Act 13 and 14 Vict. c. 59, which empowered

As in Victoria.

Accordingly, in 1857, the legislature of Victoria passed an act, which was sanctioned by the Crown, to confer upon their two chambers, and upon the committees and individual members composing the same, the powers and privileges appertaining to the imperial House of Commons.[z]

The British North America act, 1867, section eighteen, (explained by the act 38 and 39 Vict. c. 38,) contains a similar provision empowering the parliament of Canada, to define by statute the powers, privileges, and immunities, of the Senate and House of Commons, and of the members thereof respectively; provided only, that the same shall not exceed those then held, enjoyed, and exercised by the Imperial House of Commons.

In Canada.

Pursuant to this authority, the Canadian Act, 31 Vict. c. 23, was passed by the dominion parliament.[a]

In Tasmania.

In the colony of Tasmania, however, the local legislature, in 1858, passed an act 'to confer certain powers and privileges on the houses of the parliament of Tasmania." No previous authority had been given by the imperial parliament for such legislation other than the general power granted to the several Australian colonies by the Imperial Act 13 and 14 Vict. c. 59, sec. 32, to alter and amend their respective constitutions. This would justify the inference of the Canadian Supreme Court — as hereinafter mentioned — that any legislative

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the several Australian colonies to frame their own constitutions. It was reserved for the pleasure of the Crown, and, as it contained provisions to which her Majesty was not competent to assent without the authority of Parliament, it was submitted to parliamentary consideration, amended in certain particulars, and appended as a schedule to the act, sanctioning and amending it. So that it actually forms part of the Imperial Stat. 18 and 19 Vict. c. 55.

[z] Victoria Stats. 20 Vict. no. 1.

[a] See the case of the oaths bill, which was assented to by the governor-general, under the authority of this statute, but was afterwards disallowed by the Crown upon the ground that it proposed to confer powers in excess of the powers exercised by the House of Commons itself, at the time the Imperial law was enacted: *ante*, p. 146.

body is competent, with the consent of the Crown, to pass an act to define its own powers and privileges.[b]

Privileges restrained when not conferred by statute.

In 1874, the House of Assembly of Nova Scotia adopted certain proceedings in dealing with a refractory member of their body, whom they had resolved to have been guilty of a breach of privilege. They had adjudged him to have committed a contempt of the authority of the house, though he had not obstructed the public business, and had directed his forcible removal from the house until he should apologize for his conduct. Whereupon he brought an action of trespass for assault against the speaker and certain members of the house, and obtained in the Supreme Court of the province a verdict of damages. In 1877, the case was brought on appeal, before the Supreme Court of the dominion. In January, 1878, judgment was rendered by Sir W. B. Richards, chief-justice of the court, and by the other learned judges present. They all agreed in affirming the judgment of the court below, and in dismissing the appeal. The effect of this decision was to declare "that the House of Assembly of Nova Scotia has no power to punish for any offence not an immediate obstruction to the due course of its proceedings and the proper exercise of its functions, such power not being an essential attribute nor essentially necessary for the exercise of its functions by a local legislature, and not belonging to it as a necessary or legal incident; and, that, *without prescription or statute*, local legislatures have not the privileges which belong to the House of Commons of Great Britain by the *lex et consuetudo Parliamenti.*"

The chief-justice, however, adverted to the propriety of provincial legislation on this subject, and remarked that "the legislatures of Ontario and Quebec seemed to have conferred on the House of Assembly in these provinces extensive powers, to enable them effectually

[b] And see Forsyth, Const. Law, p. 26.

to exercise their high functions and discharge the important duties cast on them. It may be necessary still further to extend their powers. The legislatures of the other provinces will probably consider it desirable to take the same course, and in that way unmistakably place these tribunals in the position of dignity and power which it is desirable they should possess." [c]

Privileges may be defined by statute.

This decision affirms the right of the legislatures in the several provinces of the Canadian dominion to confer upon themselves and upon their individual members, by a statute, — to be passed with the consent of the Crown (as expressed by the approval of the same by the governor-general of Canada in council), any powers and privileges which they may deem to be necessary for the efficient discharge of their constitutional functions. Such authority could be exercised either by virtue of their inherent power as legislative bodies (as in the case of Tasmania, above-mentioned), or in pursuance of the ninety-second section of the British North America act, 1867, which authorizes the legislature in each province to amend from time to time — "notwithstanding anything in this act" — "the constitution of the province, except as regards the office of lieutenant-governor." [d]

In Nova Scotia.

Anticipating the suggestion of Chief-Justice Richards, the legislature of Nova Scotia in 1876, while the aforesaid action of Landers *et al. v.* Woodworth was pending, passed an act respecting the legislature, which conferred upon both houses, and upon the members thereof, the same privileges as shall for the time being be enjoyed by the Senate and House of Commons of Canada, their committees and members for the time being.[e] The dominion minister of justice, in reporting upon this statute, drew attention to the fact that, in 1869, acts

[c] Landers *et al. v.* D. B. Woodworth; Canada Supreme Court Rep. vol. ii. pp. 158–215.

[d] See *ibid.* pp. 192, 201.

[e] N. S. Stats. **1876**, c. 22.

purporting to confer upon the legislatures of Ontario and Quebec similar powers had been objected to and disallowed. Again, in 1874, a Manitoba statute to the same effect was likewise disallowed. Subsequently, in 1870 and in 1876, these three provincial legislatures passed other acts to define their privileges and powers, which, though they appeared to be open to very serious question, and though it was considered doubtful whether they were not in excess of the jurisdiction and authority of a local legislature, yet they were left by the dominion government to their operation, upon the understanding that any person who might be aggrieved thereby could raise the question of their validity in a court of law. But inasmuch as the Nova Scotia act of 1876 professed to confer upon the Nova Scotia legislative chambers powers which it had been decided by dominion authority should not be assumed by the legislatures of Ontario, Quebec, and Manitoba, the dominion minister of justice recommended that the objection should be brought under the notice of the lieutenant-governor with a view to the repeal of the clauses to which exception had been taken, before the expiration of the time limited for the disallowance of the act.[f] Nevertheless, it does not appear that this act was either amended or disallowed.

Principle affirmed by Supreme Court.

The principle asserted in the aforesaid judgment of the Canadian Supreme Court, — which affirmed the right of provincial legislatures to confer upon themselves by statute whatever powers and privileges were deemed to be necessary, — whilst it does not debar the Crown from interposing a veto upon an act which should attempt to legalize unwarrantable claims, does in fact render it difficult to object to any powers, proposed to be conferred by statute, that they exceeded

[f] Canada Sess. Papers, **1877**, no. 89, pp. 108–114, 201. Canada Gazette, vol. viii. p. 262. Manitoba Stats. **1873**, c. 2; **1876**, c. 12.

the lawful powers and constitutional competency of a legislature to grant. In this respect, the court recognizes the possession in provincial legislatures of a wider discretion than had been heretofore allowed, either by the dominion government or by the crown law-officers in England;[g] and to this extent it approves of the position taken by the premier and attorney-general of Ontario (Mr. J. Sandfield Macdonald), when, in an able memorandum, he protested against the disallowance of the Ontario statute of 1869, defining the privileges, &c., of the local Assembly. This act had been disallowed, because it was presumed to be *ultra vires*, and inconsistent with the limitations of the British North America act. But, after a careful review of the argument, the attorney-general concludes with the pertinent remark that, in his opinion, "sufficient consideration had not been given to the important distinction between powers claimed by the authority of a statute and powers claimed as inherently belonging to a legislative body."[h]

Two legislative chambers.

The legislatures in the different British colonies wherein parliamentary government is established are, as a rule, composed of two chambers. The only exception is in certain of the provinces which are comprised in the dominion of Canada. In view of the limited jurisdiction and functions of these legislative bodies, one chamber has been accounted sufficient, for the purposes of legislation, in the provinces of Ontario, Manitoba, and British Columbia. In Quebec, Nova Scotia, and Prince Edward Island, the question of abolishing the second chamber is also under consideration; but, though the House of Assembly in these provinces is decidedly in favour of such a modifi-

[g] See *ante*, p. 365.

[h] Canada Sess. Papers, **1877**, no. 89, pp. 202–211, 221. And see S. Austral. Parl. Papers, **1877**, no. 92, p. 6. The legality of the Quebec statute (33 Vict. c. 5) was established in the case of *ex parte* Dansereau; L. C. Jurist, vol. xix. p. 210.

cation of the existing constitution, the Legislative Councils have not yet concurred in this opinion.

Advantages of a second chamber.

In small communities, and in provinces where the business of legislation is mainly of a municipal description, experience has shown that two chambers are cumbrous, and needlessly expensive.[i] But, in colonies entrusted with the powers of local self-government, and where the policy of administration, as well as the making of general laws for the welfare and good government of all classes in the community, are under the control of a local legislature, a second chamber is a most necessary institution.[j] It is a counterpoise to democratic ascendancy in the popular and most powerful assembly, and serves to elicit the sober second thought of the people, in contradistinction to the impulsive first thought of the lower house. These great benefits of a second chamber are in addition to the advantages derived from the revision and amendment of laws, which are too apt to pass through the Assembly in a crude and defective state.[k] Mr. E. A. Freeman is of opinion that, while a second chamber is always valuable in checking and revising the acts of the popular assembly, it is especially indispensable in a federal system, because it is capable of representing therein the wants and wishes of the several states or provinces included in the confederation in their separate standing.[l]

Under parliamentary government, an upper chamber derives special efficacy and importance from the fact

[i] As in the case of the Leeward Islands, see Hans. Deb. vol. ccvi. p. 1023. And see Mr. Kinnear's paper in favour of a single chamber. Fortnightly Review, Sept. 1869.

[j] See Todd, Parl. Govt. vol. i. p. 29.

[k] In addition to the authorities in favour of a second chamber, cited in the preceding reference, see Lecky in North American Review, vol. cxxvi. p. 71; Helps, Thoughts on Government, c. iv.; Hearn, Govt. of England, p. 540; Fortnightly Review, July, 1876, p. 46; Stockmar's Memoirs, vol. ii. c. 28; Hans. Deb. on S. Africa confederation bill, April 23, 1877.

[l] International Review, vol. iii. pp. 724, 741. In regard to the

that, being unable to determine the fate of a ministry, it is much less influenced by party combinations and intrigues than the lower house.[m] "While the upper chambers of all constitutional legislatures recognize their position as one removing them entirely from party considerations, and as designed to be a guard against hasty and immature legislation, they would doubtless feel it to be their duty to weigh with more than ordinary anxiety and care the explicit declarations of public opinion, when deliberately given by all classes of the community upon any measure, after the period of excitement which might have given rise to it had passed away. When such a spirit pervades the upper chamber, there need be no apprehension of a conflict between the two branches composing the legislature."[n]

Constitution of the two chambers.

The two legislative chambers — which, with the governor who represents the Crown, form the parliament in the principal colonies of Great Britain — are not invariably constituted upon a similar basis. With a common design to reproduce in the colony institutions intended to resemble as closely as possible those which exist in the mother country, the upper chamber is in some colonies an elective body, whilst in others it is nominated by the Crown. This diversity of practice is not based upon any definite or abstract principle, but is simply owing to the prevailing tone of popular opinion in the particular colony, to which upon this question the imperial government has invariably deferred.

Thus, in Canada, the Senate is nominated by the Crown. The members require to be of the age of

working of a second chamber in the American republic, see Amer. Law Review, October 1869, p. 18.

[m] See Todd, Parl. Govt. vol. ii. pp. 387, 398.

[n] Report of committee of New Zealand Legislative Council, in 1868, on the powers and privileges of legislative councils in the British colonies. And see a further report in 1869, which cites the opinions of constitutional authorities on the subject. See also Earl Grey's despatch of Nov. 3, 1846, to Governor Harvey, of Nova Scotia; and the Duke of Newcastle's despatch dated Feb. 14, 1862, to Governor Dundas, of Prince Edward Island.

Nominated or elected upper house.

thirty years, and to be in possession of real or personal property to the extent of 4,000 dollars. In New South Wales, the Legislative Council is nominated by the Crown, and there is no qualification, property or otherwise. In Queensland, also, the Legislative Council is nominated by the Crown, and there is no qualification required. At the Cape, the Legislative Council is elected by the same voters as the House of Assembly, but a qualification of £2,000 real or £4,000 personal property is requisite. In South Australia, the Legislative Council is elected by the whole colony voting as one district. There the electors, only, must have a property qualification, while there is no such qualification for electors as regards the House of Assembly. In Victoria, the Legislative Council is elected on a qualification of £2,500 in real property, or £250 a year in real property is required. The electors are also required to have a certain amount of property qualification, — property of the ratable value of £50 per annum, or of the real value of £1,000. In Tasmania, there is no property qualification for members of the Legislative Council, but they are elected by owners of freehold property of the value of £30 a year, or leasehold property of the value of £200. So that, of the colonies here mentioned, the leading colonies possessing representative institutions, there are three in which members of the Legislative Council are nominated by the Crown, namely, Canada, New South Wales, and Queensland; there are two, Victoria and the Cape, in which they are elected with a property qualification for members; and there are two in which they are also elected with a property qualification for electors, but wherein no qualification is required for members themselves, namely, Tasmania and South Australia.[o]

[o] New Zealand Parl. Debates, vol. xxix. p. 248. See further, as to proposals to alter the tenure of upper chambers in the colonies, *post*, p. 521.

Local legislatures in Canada.

So freely has the principle of local self-government been conceded in regard to the composition and constitution of the legislative chambers, that, by the British North America act, the local legislatures in the Canadian provinces are empowered to amend their constitutions at will, except as regards the office of lieutenant-governor,[p] a liberty of which some of the provincial legislatures have, as above mentioned, already availed themselves, by the abolition of a second or upper chamber, and other provinces are contemplating a similar reform.

Constitutional powers of upper house.

But whether constituted by nomination or election, the upper house in every British colony is established for the sole purpose of fulfilling therein "the legislative functions of the House of Lords," whilst the lower house exercises within the same sphere "the rights and powers of the House of Commons."[q] It is, therefore, most desirable that in general persons should be chosen as members of an upper legislative chamber who already possess some measure of parliamentary experience and ability, besides being otherwise qualified for such honourable service.

It is only as a legislative body that the upper house in any colony can claim identity with the House of Lords. No kindred institution created by statute can be the counterpart of that august and venerable chamber, either in respect to its unique position in the English political system, or in the dignity and eminent personal qualities for which its individual members are usually conspicuous. The adoption by a colonial upper chamber of the peculiar forms of parliamentary procedure which regulate the practice of the House of Lords, is indeed a suitable method of marking a difference between themselves and the popular

[p] British North America Act, 1867, sec. 92.
[q] See *ante*, p. 31.

branch. But in no other way should a colonial senate or legislative council invite a comparison between themselves and the time-honoured hereditary House of Peers. It is in order to discountenance such pretensions, and to assign to the upper house in a colonial system its true place as exclusively a legislative institution, and not as an aristocratic body clothed with personal privileges, that the Imperial Parliament has pointed to "the Commons House of Parliament of the United Kingdom," as being equally the example to the Senate or Legislative Council, as well as to the Representative Assembly, of the proper extent and limitation of the privileges, immunities, and powers, to be defined on behalf of each house by a statute to be locally passed for that purpose.[r]

Defined by statute.

Pursuant to such imperial statutes, which authorize certain colonial legislatures, under an expressed limitation, to define their own powers and privileges by an act to be passed for that purpose,[s] the parliaments of New Zealand and of Canada have severally legislated so as to confer upon both their legislative chambers "the like privileges, immunities, and powers" as were actually "enjoyed and exercised by the Commons House of Parliament of the United Kingdom."

In the case of New Zealand, the law was qualified by the addition of the words, "so far as the same are not inconsistent with or repugnant to" the "constitutional act" of the colony,[t] a proviso which does not appear in the Canadian statute.[u] The addition of this proviso, however, does not materially affect the question in its constitutional aspect.

But neither the New Zealand nor the Canadian laws can be so construed as to warrant a claim by the upper

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[r] British North America Act, 1867, sec. 18.

[s] See *ante*, p. 466.

[t] New Zealand Parliamentary Privileges Act, 1865, no. 13, sec. 4.

[u] Canada Stats. 1868, c. 23.

chambers of either parliament to equal rights in matters of aid and supply to those which are "enjoyed and exercised by the Commons House of Parliament of the United Kingdom;" for such a claim, if insisted upon, would, to a like extent, derogate from and diminish the constitutional rights of the representative chamber.

Rights of both houses in supply.

The Victoria Constitution Act, 1855, sec. 56, and the British North America Act, 1867, sec. 53, severally declare that "bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the [Assembly or] House of Commons." No further definition of the relative powers of the two houses is ordinarily made by any statute. But constitutional practice goes much farther than this. It justifies the claim of the Imperial House of Commons (and by parity of reasoning of all representative chambers framed after the model of that house) to a general control over public revenue and expenditure, a control which has been authoritatively defined in the following words: "All aids and supplies, and aids to his Majesty in Parliament, are the sole gift of the Commons, and it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, *which ought not to be changed or altered by the House of Lords.*" [v]

This parliamentary principle, moreover, has been generally, if not universally, admitted in all self-governing British colonies by the adoption in both legislative chambers of standing orders which refer to the rules, forms, usages, and practices of the Imperial Parliament as the guide to each house in cases unprovided for by local regulations.

In 1872, a difference arose between the two houses of the

[v] Resol. House of Commons, July 3, 1678. And see Todd. Parl. Govt. vol. i. p. 458.

Controversy in New Zealand.

New Zealand legislature, as to the statutory right of the Legislative Council to amend bills of supply. The Council contended that the New Zealand "parliamentary privileges act of 1865" had placed both houses upon an equal footing in respect to money bills, and empowered them to amend such bills as freely as other measures. The Assembly resented this pretension, as being an unconstitutional encroachment upon their peculiar privileges. Unable to agree, by mutual consent a case was prepared for the opinion of the law officers of the Crown in England, which was forwarded to her Majesty's secretary of state for the colonies by the governor.

In due course, a reply was received from these eminent legal functionaries, which was transmitted to the governor for the information of the colonial legislature, and is as follows: [w] —

The Law Officers of the Crown to the Earl of Kimberley.

TEMPLE, June 18, 1872.

MY LORD, — We are honoured with your Lordship's commands signified in Mr. Holland's letter of the 12th instant, stating that he was directed by your Lordship to acquaint us that, a difference having arisen between the Legislative Council and House of Assembly of New Zealand concerning certain points of law and privilege, it was agreed that the questions in dispute should be referred for the opinion of the law officers of the Crown in England.

That he (Mr. Holland) was accordingly to request us to favour your Lordship with our opinion upon the accompanying case, which had been prepared by the managers of both houses.

In obedience to your Lordship's commands, we have the honour to report, —

(1.) We are of opinion that, independently of "the parliamentary privileges act, 1865," the Legislative Council was not constitutionally justified in amending "the payments to provinces bill, 1871," by striking out the disputed clause 28. We think the bill was a money bill, and such a bill as the House of Commons in this country would not have allowed

[w] New Zealand Assem. Papers, **1872**, appx. A. no. 1, *b*. p. 6. And see New Zealand Parl. Debates, Sept. 3, 1872.

to be amended by the House of Lords; and that the limitation proposed to be placed by the Legislative Council on bills of aid or supply is too narrow, and would not be recognized by the House of Commons in England.

(2.) We are of opinion that "the parliamentary privileges act, 1865," does not confer on the Legislative Council any larger powers in this respect than it would otherwise have possessed. We think that this act was not intended to affect, and did not affect, the legislative powers of either house of the legislature in New Zealand.

(3.) We think that the claims of the House of Representatives, contained in their message to the Legislative Council, are well founded; subject of course to the limitation that the Legislative Council have a perfect right to reject any bill passed by the House of Representatives having for its object to vary the management or appropriation of money prescribed by an act of the previous session.

We have, &c.,

J. D. COLERIDGE.
G. JESSEL.

THE RIGHT HON. THE EARL OF KIMBERLEY.

This opinion is a direct and unimpeachable settlement of the point at issue; and one that is equally applicable in the interpretation of the Canadian statute of 1868.

British practice the guide.

The relative rights of both houses in matters of aid and supply must be determined, in every British colony, by the ascertained rules of British constitutional practice. The local acts upon the subject must be construed in conformity with that practice wherever the imperial polity is the accepted guide. A claim on the part of a colonial upper chamber to the possession of equal rights with the Assembly to amend a money bill would be inconsistent with the ancient and undeniable control which is exercised by the Imperial House of Commons over all financial measures. It is, therefore, impossible to concede to an upper chamber the right of amending a money bill upon the mere authority of a local statute when such act admits of being construed in accordance

with the well-understood laws and usages of the Imperial Parliament.[x]

Claims of elective upper chambers in supply.

In certain British colonies — as, for example, in South Australia, Tasmania, Victoria, and the Cape of Good Hope — the Legislative Council is elective, whilst generally the system of nomination prevails. The elective councils have plausibly urged that — in accordance with the practice in the United States, where, in Congress, and in the different state legislatures, while the constitution requires that tax bills shall originate in the lower branch, it is customary to provide that the Senate or first branch may concur therein with amendments, as in other bills[y] — they ought to be at liberty to propose amendments to bills of supply. In South Australia, and in Tasmania, this claim has been partially allowed by the lower house; but in Victoria the strictest limitation of the powers of the upper chamber has been insisted upon (as will be presently shown), in conformity with the constitutional practice of the Imperial Parliament.

In South Australia the Legislative Council has denied to the Assembly any exclusive rights over money bills, — except the right of originating such measures, — upon the ground that they were as much representatives of the people as the other chamber.[z] But in November, 1857, both houses came to an agreement, by which the right of making certain amendments to supply and tax bills — though not to the money clauses therein — was acknowledged. It was further understood that the Legislative Council might offer *suggestions*

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[x] See, to the same effect, the despatch of the colonial secretary to the governor of New Zealand, of March 25, 1855, before the passing of the parliamentary privileges act: Commons Papers, **1860**, vol. xlvi. p. 466. For a statement of the respective constitutional rights of the two houses in matters of supply, see a report of a committee of the Leg. Assem. of Victoria, on Oct. 30, 1877; Votes and Proceed. L. A. Vict. **1877-78**, vol. i. pp. 192, 251.

[y] Cushing, Lex Parliamentaria Americana, p. 891.

[z] See South Austral. Parl. Proceed. **1857-58**, vol. i. *passim*, vol. ii. nos. 71 and 101.

for the amendment of such parts of supply or tax bills as dealt with money or taxation. This arrangement was afterwards carried out, at least for a number of years, with mutual satisfaction.[a]

Dispute in South Australia on supply matters.

In the session of 1876, the Legislative Council of South Australia suggested that the Assembly should strike out from a public purposes loan-bill items amounting to about £125,000, for certain local improvements, but the Assembly refused to concur in this suggestion. The Legislative Council, by a bare majority of one, decided not to withdraw their suggested amendments, and the bill was dropped. Whereupon the government introduced another bill, from which they omitted the items objected to by the Council; and this bill was passed, without difficulty by both houses.[b]

In 1877, however, a more serious disagreement occurred in this colony. On June 12, inquiry was made of ministers in the Legislative Council, in regard to certain rumoured preparations for the erection of new parliament buildings. In reply, the Council was informed that the government contemplated the building of a new assembly chamber, as part of a proposed design for the better accommodation of both houses, but that no money had yet been voted for the purpose.

Upon which, on July 5, the Legislative Council resolved, that the action of government, in deciding upon a site, and commencing to build new houses of parliament, without the (previous) sanction of both branches of the legislature is unconstitutional, and does not meet with the approval of this Council.

A private member then gave notice of a motion for an address to the administrator of the government to represent the right of the Legislative Council to be consulted on this subject. Sir Henry Ayers (chief secretary and leader of the

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[a] South Austral. Parl. Proceed. **1874**, vol. i. pp. 27, 33, 51. Assembly Votes, *ibid.* pp. 160, 181. *Ibid.* **1877** (Assembly Papers), no. 92. At the present time (1879) a dead-lock has been threatened between the two houses, owing to the rejection by the Council of bills passed by the Assembly: "The Colonies," Aug. 30, 1879, p. 6.

[b] *Ibid.* **1876**, pp. 125–128, 131. "The Colonies," newspaper, Jan. 20, 1877, p. 2.

government in this house) then gave notice of a motion to resolve, that it is desirable to proceed immediately with the erection of the new assembly chamber.

On July 25, before the aforementioned notices were discussed, it was resolved that the chief secretary, by ignoring the constitutional rights of this Council, and by his conduct generally with reference to the proposed new parliament buildings, has lost the confidence of this Council.

On July 31, in amendment to a motion by the chief secretary that the Council, at its rising, should adjourn to the following day, it was resolved, that this house would not proceed to business so long as the government is represented in the chamber by a member in whom it had no confidence; and therefore that business be postponed for a week, to afford the ministry an opportunity of changing their representative. No such change having taken place, further adjournments were made, for a week at a time, until Aug. 28.

On that day a motion to resolve, that the Council insists upon its rights to be forthwith consulted upon the necessity and expediency of building new houses of parliament at the present time, was negatived upon the previous question. The Council then adjourned.

Leadership in Legislative Council given to a private member.

On Aug. 29, it was resolved, that this Council, while objecting to the leadership of the present chief secretary, will proceed with business, and directs that all public bills received from the Assembly be placed in charge of the Hon. William Morgan, a private member of the house. The council then adjourned until Sept. 4, and afterwards until Sept. 11 and Sept. 18, doing some business at each sitting.

The chief secretary denied the right of the Legislative Council to take the conduct of public business out of his hands without the consent of the governor; but the speaker, on Sept. 18, presented a written statement, confirmatory of a previous ruling, justifying this proceeding; after which Mr. Morgan assumed the leadership. The council then adjourned until Sept. 25.

On Sept. 27, it was moved that an address of remonstrance be presented to the administrator of the government. But, being a complicated question, it was resolved to consider this motion in separate paragraphs. On Oct. 4, the address was agreed to, and ordered to be presented to the governor

(meanwhile, on Oct. 3, the house was informed that Sir William Jervois had been appointed governor). It represented that ministers had begun to erect new parliament buildings, pursuant to a resolution of the house of Assembly, passed Oct. 13, 1876, but without the necessary appropriation for such an expenditure, as required by the constitution act. The works were afterwards stopped; but the Assembly, on June 13, 1877, had resolved that they ought to be immediately resumed, which was done accordingly; though no money had yet been voted, nor had the consent of the Council been given to this expenditure. So far back as in 1864, the Council had addressed the governor, asserting its equal constitutional right with the Assembly to be consulted upon, and to give or withhold its approval to, every grant or appropriation of public money. In reply, Governor Daly had endorsed this principle, and expressed his desire to conform the colonial practice as far as possible to that of the Imperial Parliament, by substituting supply bills for resolutions of the Assembly, which heretofore had been deemed a sufficient warrant for public expenditure.

The address proceeded to recite the resolutions previously passed by the Council on this question, and in regard to the "defiant and discourteous" action of the leader of the government in the Council above-mentioned. It stated their willingness to proceed with all pressing legislation, provided that the business before the Council should be in charge of a leader in whom they had confidence.

Furthermore, they called the attention of the governor to certain proceedings in the Assembly which showed that ministers denied the right of the Council to determine who should act as leader of the house.

The Council had thus far refrained from expressing a want of confidence in the whole ministry, but they now submitted that the premier could not continue to treat with indifference the want of confidence the Council had expressed in the chief secretary, without detriment to the public interests, and great injury to the working of responsible government. Apprehending that the ministerial policy tended to the complete subordination of the Council to the Assembly, and to bring about a collision between the two houses, thereby coercing the Council with the weight of the Assembly's authority,

they concluded by requesting the governor to take such steps as he might deem expedient in the present crisis.

Upon the receipt of this address, on the 9th of October, the governor promised that the important questions referred to therein should receive his best attention. Upon the 23d of October, the governor sent down a formal reply. He assured the Council of his earnest desire to preserve inviolate their constitutional rights and privileges, but expressed his disapproval of their action in taking the conduct of public business from a minister of the Crown, and placing it in the hands of a private member. This step he regarded as "opposed to parliamentary practice, and detrimental to the privileges of the Crown, as well as to the integrity of parliamentary procedure." Ministers had assured him of their sincere desire to avoid a collision between the two houses, that their policy had no tendency to subordinate the Legislative Council to the Assembly, and that they felt it to be not only their interest but their paramount duty to use all legitimate means to promote harmony between both houses. They had, accordingly, stopped the progress of the works objected to, and would incur no further expenditure thereon until due provision had been made by parliament.

Irregular action of Legislative Council on the leadership.

Meanwhile, the House of Assembly had taken up the question. On Oct. 17, the Assembly resolved, that this house disapproves of the action of the ministry in the conduct of its business, as needlessly tending to provoke a collision between the two houses of parliament.[c] This vote led to the resignation of ministers, which took place on Oct. 23,— the very day on which the governor's message in reply to the address of the Legislative Council was communicated to that body.

On Oct. 30, both houses met, and the new ministry appeared in their places.[d] The office of chief secretary had

[c] This resolution was passed by the casting vote of the speaker. The speaker gave his vote without expressing any opinion on the question before the house, but upon the principle which had always guided him when a vote of confidence in ministers was pending, namely, "that when, on a vote of want of confidence, a ministry do not command a majority, it is the duty of the speaker to vote with the ayes." Votes of Assembly, South Australia, **1877**, p. 236. And *ibid.* **1871**, p. 226.

[d] In South Australia, and likewise in New Zealand, the law permits members of either house to accept ministerial office without being required to vacate their seats and offer themselves for re-election. See *ante*, p. 47.

been conferred upon Mr. Morgan, the person who, whilst merely a private member, had been charged by the Legislative Council to act as leader of the house, instead of Sir Henry Ayers. A notice had been put upon the Council paper, for the adoption of a further resolution, justifying the action of the Council in the matter of the leadership, and expressing regret that ministers had advised the governor to disapprove of the same. But, on Nov. 13, this intended motion was, by leave, withdrawn.

On Nov. 6, in the House of Assembly, an item in the estimates for a vote of ten thousand pounds towards the new parliament buildings was struck out on motion of a minister of the Crown. And on Nov. 8, a government bill was introduced, to authorize the construction of new parliament buildings. On Nov. 15, this bill was passed, and sent up for the concurrence of the Legislative Council.

On Nov. 27, in amendment to a motion for the second reading of the new parliament-buildings bill, the Council resolved that the bill be not proceeded with, but that the governor be requested to appoint a commission to inquire into and report upon the necessity for the proposed new buildings. Two days after, however, on motion of the chief secretary (Mr. Morgan), this resolution was rescinded, and the parliament-buildings bill read a second time. It was afterwards passed, with an amendment, which was amended by the Assembly. The Council agreed to this amendment, and the bill became law.

Disputes between two houses settled.

Thus the protracted difficulties between the two houses, upon this question of supply, were brought to a happy termination. The governor, in his speech on proroguing parliament, on Dec. 21, congratulated both houses that, by the exercise of a spirit of conciliation and by mutual concessions, the disputes which had occurred in the early part of the session had been satisfactorily adjusted; and that they had thus avoided the disastrous consequences which must inevitably have ensued from any serious collision between the two branches of the legislature.[e]

In Tasmania, the elective Legislative Council is also per-

[e] South Australia Parl. Proceed. **1877**, vol. i. *passim*. But see *post*, p. 523.

Tasmania Legislative Council in matters of supply.

mitted to amend money bills, even the annual bills of appropriation.[f]

On May 13, 1879, the Legislative Council of Tasmania, on motion for the second reading of the supply bill, resolved, that, inasmuch as this bill provides for an expenditure far in excess of the probable revenue for the current year, the Council deem it inexpedient to authorize any appropriation beyond what may be necessary for the public expenditure of the first *six* months of the said year. The supply bill was accordingly amended to this effect. This proceeding led to much debate between the two houses. Ultimately, the Assembly unanimously agreed to accept a limitation of the grant of supply to *nine* months of the current year.[g]

The Council adhered to their amendment of the supply bill; but agreed, if the Assembly should accept this amendment, to receive favourably a further supply bill, for the additional period which ministers had requested, in order that they might reconsider their financial propositions. In reply, the Assembly, anxious to preserve amicable relations with the other house, expressed their willingness to accept a supply for *eight* months, but declined to embody this intention in a separate bill. Whereupon, the Legislative Council sent a message to the Assembly, adhering to their former offer, and justifying their course by a reference to parliamentary practice.[h] The Council, however, afterwards accepted the amendment made by the Assembly to their own amendment; and so the appropriation bill was passed, providing supplies for eight months only of the current year, of which period nearly six months had expired before the royal assent was given to the bill.

The Council, in agreeing to this compromise, transmitted a resolution to the governor, in explanation of the course they had taken, from which it appeared that considerable arrears of debt had accumulated; for which, as well as to meet accruing liabilities, it was imperative that provision should be made; that the Legislative Council had been assured by ministers that, before the expiration of the period for which supply had been granted, they would be prepared with mea-

[f] Tasmania Leg. Council Journals, **1877**, pp. 39, 40, 117, 119.

[g] Tasmania Leg. Council Votes, June 3, **1879**. And ministerial memorandum, *ibid.* June 10.

[h] *Ibid.* June 10 and 11, **1879**.

sures calculated to meet the present and accruing necessities of the country; that, while the Legislative Council had no desire to interfere irregularly with the exercise of the undoubted prerogative of the Crown, in the summoning, proroguing, and dissolving of parliament, yet they fully relied upon his Excellency to appreciate their endeavour to arrest the growth of financial embarrassment.[i]

On June 17, the governor replied to this address by a message, wherein he "assures the Council that parliament may always rely upon his acting in strict accordance with constitutional usage and precedent in the exercise of the powers intrusted to him by the Crown." Two days later, parliament (which had been in session for eleven months) was prorogued by proclamation. Upon the reassembling of parliament, on Sept. 9, the Legislative Council adopted, on Sept. 11, a protest against the further delay in dealing with the urgent public business of the country, consequent upon an intended adjournment, for the purpose of attending the opening of the great exhibition in Sydney.

Recent intelligence from Tasmania states that there is a growing dissatisfaction in the colony with the extensive powers of control and interference exercised by the Legislative Council in the matter of supply; and that some amendment of the constitution, in this respect, is about to be proposed in the Assembly.[j]

Disputes in Victoria.

In Victoria, the differences between the two houses, in matters of supply, have been of longer duration and have been prosecuted with greater acrimony than in any other colony. Several questions of constitutional importance arose during the course of this protracted controversy. It may be profitable, therefore, to trace briefly the history of these struggles, dwelling particularly upon the last contest, which began in 1877, and has not yet been brought to a satisfactory issue.

In 1865.

From the introduction of parliamentary institutions into Victoria, in 1856, until the year 1865, the two houses worked together, without any serious disagreement. In 1865, the first difficulty occurred. There was a vehement agitation in

[i] Tasmania Leg. Council Votes, and ministerial memorandum, June 12 and 13, 1879.

[j] "The Colonies," newspaper, August 16, 1879, p. 1.

the colony in favour of a change in the financial policy of government. It was known that free-trade principles prevailed in the Legislative Council, whilst the protectionist party had a majority in the Assembly. The ministry remodelled the tariff, in the interest of protection, and then resorted to the unjustifiable expedient of appending the new tariff as "a tack" to the annual appropriation bill. The Council indignantly rejected this composite measure, as being highly irregular and unparliamentary. Ultimately, two separate bills were introduced, and each considered and disposed of upon its own merits. During the continuance of this altercation and dead-lock between the two houses, the conduct of the governor was marked by so much indiscretion as to necessitate his recall. But, as we have already noticed this painful case in a previous section,[k] it will be unnecessary to refer to it again in this place. Suffice it to say that the irregular and partisan action of Governor Darling, on this occasion, has been ever since scrupulously avoided by representatives of the Crown in all parts of the queen's dominions.

In 1867. The next serious dispute between the two chambers in Victoria occurred in 1867. The particulars of this case have likewise engaged our attention.[l] It commenced by an irregular attempt of the Assembly to vote a pecuniary compensation to ex-Governor Darling, for his loss of office, owing to his partisan zeal on their behalf. Debarred by the rules of the colonial service from bestowing gifts upon one in the service of the Crown, the Assembly took the opportunity of his retirement from public employ to vote his wife a gratuity of £ 20,000. Ministers obtained the sanction of the governor to this proposal, as "a formal" though necessary act, in the initiation of a money grant. But the Legislative Council, who judged differently as to the propriety of Sir Charles Darling's conduct as governor, would not agree to the proposed reward. The obnoxious item was included in the appropriation bill, which was accordingly rejected by the upper house. Another "dead-lock" ensued, and various ministerial changes and complications followed. At length peace was unexpectedly restored by the resolution of Sir Charles Dar-

[k] See *ante*, p. 103.

[l] See *ante*, p. 112.

ling to refuse the intended grant, either for himself or his family, on condition that he should be reinstated in the service of the Crown, and allowed a pension as a retired governor.

But the evil was only stayed for a time. In 1877, fresh dissensions broke out between the Assembly and Legislative Council of Victoria. The strife raged with increasing bitterness and still exists. The gravity of the situation, and its extreme complexity, owing to the various elements of distraction which have arisen during this prolonged contest, will justify a fuller examination of this case, than was necessary in former instances of a similar description. In 1877.

The event which gave rise to the present dispute was the introduction, by the Assembly, of a bill to renew an act for the payment of an indemnity to members of the legislature, which was about to expire. The Legislative Council had always been opposed to the principle of paying members of parliament, but had, on two or three previous occasions, reluctantly consented to temporary acts for that purpose. In 1877, a bill to continue the practice for a further term, was sent up by the Assembly for the concurrence of the upper house. Anticipating the probability of its rejection in that chamber, an item was placed in the estimates and inserted in the appropriation bill, to provide for this payment for the current year. Regarding this proceeding as an attempt to evade the consequences of the expected rejection of the members' indemnity bill, the Council laid aside both bills. Ultimately, however, this new dispute was temporarily settled. A new appropriation bill, without the objectionable item, was introduced and passed, while the Council consented to renew the act for the payment of members, during the continuance of the existing parliament.

But both houses were aroused to the necessity of disposing of the main question which lay at the foundation of these frequent disputes; namely, the constitutional rights of the two chambers in matters of supply. Accordingly, bills to amend the constitution upon this point were originated, and have been warmly discussed in each chamber, although hitherto without success.

Before noticing in detail the principal points which were urged on both sides, during this last and most vehement

struggle, it may be observed that the Legislative Council, though repeatedly charged with pressing their rights to an extremity, have uniformly disclaimed any desire to assert a right to control financial legislation. They have, in fact, considered the necessity for the repeated rejection of appropriation bills as in itself an intolerable grievance. They declare that they have been compelled to have recourse to this extreme proceeding, from the reiterated assertion by the Assembly of their right to include in appropriation bills clauses for taxation, and grants involving new and grave questions of public policy, to which the Council were known to be opposed. The Assembly has furthermore claimed the right, upon their own mere resolution, to direct the expenditure of public money; a claim which is well known to be altogether untenable and unconstitutional.[m]

Constitutional points in this dispute.

We will now proceed to examine more minutely certain questions of interest which were brought prominently forward during the progress of these contests.

One point of special magnitude in connection with these disputes between the two houses of parliament has been the attitude which it becomes the governor to assume, when the other branches of the legislature are in collision, upon a question of privilege, or of their several constitutional rights.

Position of governor in disputes between two houses.

We have elsewhere seen that it is the bounden duty of the governor to occupy a position of strict neutrality between contending parties in politics, and of entire impartiality on all party questions which ought to be locally decided, "and in which neither the prerogatives of the Crown nor other imperial interests are involved."[n] Upon such occasions, the governor should refrain, except in the capacity of a mediator, from all personal interference, until at least he is called upon to do or to sanction an act which he might consider to be illegal; in which case, he should promptly and authoritatively interpose.

In the quarrel between the two houses in Victoria, in 1877, the governor (Sir George Bowen) resolved to adhere steadfastly to this rule of non-intervention between the combatants. Accordingly, when the Legislative Council informed

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[m] See *ante*, pp. 104, 479.

[n] See *post*, ch. v.; and Commons Papers, **1878**, C.2173, p. 56.

him by address that they deemed the inclusion of an item for the payment of members in the annual bill of appropriation as an attempt to coerce them in the exercise of their legislative functions, the governor declined to interfere. In reporting this matter to the secretary of state, on Nov. 26, 1877, the governor justified his conduct, by citing from a despatch written by his predecessor, Sir J. Manners Sutton (afterwards Lord Canterbury), to the colonial secretary, dated Oct. 26, 1867.

This despatch asserts the principle that while it should be the governor's "earnest desire to contribute, as far as he can properly contribute, to the removal of existing differences between the two houses, it is clearly undesirable that he should intervene in such a manner as would withdraw these differences from their proper sphere, and so give to them a character which does not naturally belong to them, of a conflict between the majority of one or another of the two houses, and the representative of the Crown."[o]

Governor Bowen's conduct, on this occasion, was moreover in complete accordance with constitutional practice in the mother country. In the memorable contest between the Houses of Lords and Commons in 1860, which followed the rejection by the House of Lords of the bill for the repeal of the paper duty, and which led in the ensuing year to the embodiment of the whole budget resolutions, including one for the repeal of the paper duty, in a single bill, it was reasonably contended that the action of the House of Commons was not in conformity with precedent, and was indeed a high-handed proceeding, resorted to for the avowed purpose of depriving the Lords of the opportunity of exercising a deliberate judgment upon the several and distinct legislative propositions included in this bill of supply. Nevertheless, no attempt was made to involve the Crown in this controversy, or to induce the sovereign to interpose for the purpose of protecting the privileges or securing the independence of the House of Lords.[p]

Failing in their endeavour to persuade the governor to interfere on their behalf, the Legislative Council of Victoria

[o] See Victoria Parl. Papers, **1878**, no. 27, p. 17. Also, Imperial Commons Papers, **1878**, C. 1982.

[p] See Todd, Parl. Govt. vol. i. p. 459.

proceeded to assert their own rights, by rejecting the appropriation bill, and other financial measures of considerable importance. This compelled the government to make large reductions in the public expenditure, with a view to economize the funds remaining at their disposal. The governor, meanwhile, adhered to his attitude of impartial non-intervention.

Undue claims of Legislative Council in Victoria.

But, in reporting these occurrences to the secretary of state, Governor Bowen, in a despatch dated Dec. 26, 1877, pointed out that, in his opinion, as well as in that of his able predecessor in office, the difficulty underlying these political struggles between the two houses was that, while the Assembly were contending for no more than the powers claimed by and conceded to the House of Commons, the Legislative Council refused to be limited by the constitutional practice of the House of Lords, and had put forth a pretension to be, in effect, "a second House of Commons." [q]

The excuse preferred by the Legislative Council for such an extension of the ordinary and appropriate functions of an upper chamber was that being an elective body, whose privileges, immunities, and powers are, equally with those of the Legislative Assembly, declared by statute to be "those of the Commons House of Parliament of Great Britain," they were constitutionally empowered to deal with all questions of legislation upon an equal footing with the Assembly, and that the only qualification of their legislative powers was that imposed by the fifty-sixth section of the constitution act, which provides that "all bills for appropriating any part of the revenue of Victoria, and for imposing any duty, rate, tax, rent, return, or impost, shall originate in the Assembly, and may be rejected but not altered by the Council." [r]

In reply to Governor Bowen's despatch above cited, recapitulating the circumstances attending the rejection by the Council of the appropriation bill and other financial measures, the colonial secretary (Sir M. Hicks-Beach), whilst refraining from an expression of opinion on the merits of the case until he should be more fully informed upon it, conveyed to the governor his approval of his Excellency's efforts to main-

[q] Commons Papers, **1878**, C. 1982, p. 36. Victoria Parl. Papers, **1878**, no. 27, p. 34.

[r] Victoria Papers, **1878**, no. 27, p. 29. 18 and 19 Vict. c. 55, sec. 56.

tain an impartial attitude, and to avoid interference with the responsibility of his advisers.[s]

Issue of supplies on resolution of Assembly.

Meanwhile the Victoria ministers sought to obtain authority to sanction the issue of public money, notwithstanding that the Legislative Council had refused to concur in the bills of supply sent up by the Assembly for their assent. They addressed to the governor a memorandum, wherein they asserted the right of the "governor in council" to sign warrants for the issue of public money, voted by the Assembly for the public service, upon an address of the Legislative Assembly, in the event of the Legislative Council adhering to their determination to reject the bill of supply. They fortified their opinion by that of the law officers of the Crown in the colony, and inquired whether the governor was prepared to give effect to the same.

Governor Bowen, on Dec. 31, 1877, transmitted this memorandum to the colonial secretary, requesting immediate instructions, as to the course he should pursue. In a reply, sent by telegraph, on Feb. 22, Sir M. Hicks-Beach said, "I do not feel justified in volunteering any opinion on the memorandum, which I observe does not invite my intervention. Your duty in this question is clear, namely, to act in accordance with advice of ministers, provided you are satisfied the action advised is lawful. If not so satisfied, take your stand on the law. If doubtful as to the law, have recourse to the legal advice at your command." In a despatch dated Feb. 28, 1878, the colonial secretary reiterated these remarks, and expressed a hope that this question, being of local concern, might be speedily settled by mutual concessions; adding that, unless the controversy should unhappily prove incapable of settlement between the parties interested, he trusted that neither the imperial government nor the governor might be drawn in to any share in it.[t]

Pending the governor's decision as to the signing of money warrants upon an address from the Assembly, ministers recommended certain important reductions in the public service, in order to make the supplies granted for the current year last some two months longer. No dismissals of public

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[s] Victoria Papers, **1878**, no. 27, p. 35.
[t] *Ibid.* pp. 36–39.

Dismissal of officials.

officers had taken place in 1867, when a similar dead-lock had occurred, though salaries were necessarily in arrear, for a considerable period. This time, however, ministers advised that a large number of officials, of various grades, from county court judges to minor functionaries, should be dismissed.

After repeated discussions with ministers on the subject, the governor reluctantly consented to this act, being desirous "to continue to co-operate with them on all occasions for the public good, and to follow generally their advice in all matters of local concern, not repugnant to law." But he declared his determination not to consent to any of the "irregular financial contrivances which were adopted during a former parliamentary dead-lock in Victoria, and which were condemned by the then secretary of state for the colonies." [u] Neither would he sanction any measures to interfere with the currency, or the banks, or which might affect the rights and property of British subjects abroad; for to do so would be a direct violation of the royal instructions.

At this juncture, the Assembly, without concert or communication with the upper house, adjourned for six weeks. Whereupon the Legislative Council, in an address to the governor, remonstrated against this unprecedented interruption to public business, and pointed out its injurious consequences. The governor, in reply to this address, declared it to be his "duty during the controversy which has unfortunately arisen between the two deliberative branches of the legislature, to abstain from all interference, otherwise than by earnestly recommending to both houses, in the interests of the public welfare, mutual forbearance and mutual concession." [v]

Issue of money without assent of Legislative Council.

On Jan. 25, 1878, Governor Bowen forwarded to the colonial secretary an opinion of the attorney-general of Victoria, — concurring in an opinion given by Mr. Fellows, the solicitor-general, in 1858, — that the assent of the Legislative Council to a bill of supply was not necessary in order to give validity to the issue of public money, by the governor in council, inasmuch as "resolutions of the committee of supply, reported and adopted by the house, make the amount *legally available*." But from certain correspondence with the commissioners of

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[u] See *ante*, p. 104.

[v] Commons Papers, **1878**, C. 1985, p. 4. The contents of this paper, as well as of no. 1982, are included in the Victoria Papers, **1878**, no. 27.

audit, accompanying this opinion, it appears that while, for a time, this erroneous idea had prevailed, in 1862 the true constitutional practice had been introduced, and it had since been customary, as in England, to pass acts in anticipation of the annual appropriation act, to legalize the issue of money voted in supply.

Moreover, Mr. Fellows, who as solicitor-general had expressed the opinion above stated, afterwards in a speech delivered in the Legislative Council of Victoria, in 1865, admitted that he had made a mistake. He had since learnt that, in England, money was not issued "upon the vote of the House of Commons," but "only by means of an act passed by both houses, and assented to by her Majesty, and providing expressly that any votes of the House of Commons might be paid out of the moneys standing to the credit of the consolidated fund."[w] Meanwhile, in 1863, the colonial audit commissioners declined to sanction any further issues of public money until they were satisfied that such appropriations had been authorized by both houses of parliament.

Governor would not sanction such a step.

In the dilemma occasioned by these contrary opinions, Governor Bowen requested instructions from the Crown, and if necessary, an opinion from the imperial crown law officers for his guidance. Until otherwise directed, he should adhere to the conviction "that the governor cannot sign warrants for the issue of money from the public treasury without the certificate of the audit commissioners that the money is 'legally available.'" Later on, in a despatch dated March 18, 1878, the governor repeated his request for an opinion, on this point, from the law officers of the Crown in England, in view of the change of practice in Victoria, since 1862, and the fact that the Legislative Council had recently "laid aside" the appropriation bill.[x]

Shortly afterwards, the governor informed the secretary of state that his ministers had protested against his right to decline to follow their advice in matters of purely local concern, and also against his having sought for any other legal advice than that of the colonial law officers. In Australia, it is customary for the law officers of the Crown to be leading mem-

[w] See Victoria Leg. Coun. Journals, **1877–78**, pp. 205, 206. May, Parl. Prac. (ed. 1873) p. 572.

[x] Commons Papers, **1878**, C. 1985, pp. 5–12; and C. 2173, p. 42.

bers of the cabinet; and so the rejection of their advice is equivalent to a rejection of the advice of the cabinet, which is a constitutional ground for the resignation of ministers. This makes "the position of an Australian governor one of rare difficulty and delicacy." [y] In reply to this despatch, on July 5, 1878, Sir M. Hicks-Beach — while recognizing the general obligation of a governor to follow the advice of his ministers in local matters, if only he refrains from sanctioning an illegal act — pointed out that a governor was responsible to the sovereign, whom he represents; and that, if called upon to justify the legality or necessity of any questionable proceeding, he could not shelter himself under the responsibility of his ministers. In all doubtful cases, a governor should require from the colonial law officers a written memorandum, certifying — as the authorized exponents of the law, and not in their capacity of political advisers — that no infraction of the law is involved in advice tendered to him. If they cannot certify this, — whenever the governor is urgently pressed to sanction a doubtful act, or if he is unable to accept their interpretation of the law, — his personal responsibility to the Crown may require that he should delay acting on the advice given, until he can decide "whether the emergency is of that grave and urgent character which alone could justify him in consenting to perform the act advised, or whether he should inform his ministers that he must decline to do so, even at the cost of having to accept their resignation of office." [z]

Anticipating somewhat the course of our narrative, it may be here stated that the law officers of the Crown in England reported, for the information of the governor, that money voted in committee of supply "is not available until it has been appropriated by an act of the Victoria legislature." [a]

On Jan. 26, 1878, Governor Bowen addressed a further despatch to the colonial secretary, enclosing a copy of a memorandum which he had communicated to the premier, representing that certain acts which had been performed by ministers, and measures which they had advised, — with a

[y] Commons Papers, **1878**, C. 2173, p. 49.

[z] *Ibid.* p. 81. In regard to law officers of the Crown in the double capacity of ministers, and of legal advisers, see *ante*, p. 134.

[a] Commons Papers, 1878, C. 2173, p. 97. And see *post*, p. 505.

view to reductions in the public service, rendered necessary owing to the rejection of the appropriation bill by the Legislative Council,—were illegal. In this paper,—while acknowledging that he was bound to afford to his ministers for the time being all just and reasonable support, consistently with obedience to the law,—the governor remarked that, if occasion should occur wherein it was "clear to his judgment that the advice of his ministers involves a violation of law, in such a case it would doubtless be his duty to refuse compliance, and to endeavour to obtain the aid of other ministers." This principle had been approved by her Majesty's government, who at the same time had disavowed any "wish to interfere in any questions of purely colonial policy; and only desire that the colony should be governed in conformity with the principles of responsible and constitutional government, subject always to the paramount authority of the law." Accordingly, the governor felt it to be his duty to request ministers to cancel forthwith certain notices in the "Official Gazette," dispensing with the services of certain judicial officers of various degrees; "and every other act or notice whatsoever which has involved or may involve a violation of the law." This firm and decided stand taken by the governor was duly responded to by his ministers, who promptly "consented to retrace their steps in the manner proposed," and to limit themselves to making such reductions in the public service as to which they believed that no exception could be raised on the score of illegality.[b]

Governor objects to illegal dismissals.

On the same day as that on which the preceding despatch was written, Governor Bowen transmitted to the colonial secretary an address to her Majesty from the Legislative Council, reciting the recent events in this controversy, and accusing his Excellency of grave dereliction of duty, in lending his authority and influence to coerce the Legislative Council in the performance of their proper functions, and in plunging colonial affairs into confusion. He forwarded, with this address, a memorandum from ministers, defending the governor from these aspersions, and also observations of his own, wherein he charged the Legislative Council with being responsible for the present "dead-lock" and its results, inasmuch as they

[b] Commons Papers, **1878**, C. 1985, p. 32.

Governor defends his conduct.

claimed to be practically supreme in the colony, and had refused to settle their differences with the Assembly upon the basis of imperial parliamentary precedent. He pointed out, furthermore, that it was in the power of the Council to remove at once the existing confusion and uncertainty in the colony, by resuming amicable relations with the Assembly, and confining themselves to the powers practically exercised by the House of Lords in matters of finance.[c] The governor likewise vindicated himself from the charges made against him in this address, urging that it was unconstitutional to hold him personally responsible for the acts of his ministers, and thereby to ignore his own especial duty, — to maintain a strict neutrality in the differences which had arisen between the two houses.[d]

On Feb. 18, 1878, Governor Bowen transmitted an address to the queen from the Legislative Assembly, on the political condition of the colony. This address recapitulated the events which had led to the present crisis, and charged the Legislative Council with having thrown the affairs of the colony into distraction, by their persistent determination to exercise a control over public expenditure which had long ago been relinquished by the House of Lords. The address furthermore proceeded to justify the proceedings of the governor and his ministers in this emergency.[e] After passing the address, the Assembly adjourned until March 5.

Three days later, the governor forwarded to the queen a second address from the Legislative Council, vindicating their proceedings from the interpretation placed upon them by the aforesaid address from the Assembly, and correcting certain erroneous statements therein. The Council alleged that they had been compelled, on the four occasions on which they had rejected appropriation bills, to take this extreme course as the only means of asserting and maintaining their independence as a distinct branch of the legislature. They could only presume that the Assembly desired to ignore or get rid

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[c] But see the defence offered by the Council in their address to the Queen, recorded in their Journals of Feb. 19, 1878.

[d] Commons Papers, **1878**, C. 1985, pp. 33-45. See also the governor's reply to an address of the Leg. Council, in their Journals of Feb. 19, 1878.

[e] Commons Papers, **1878**, C. 2173, p. 11.

of the second chamber, and of the restraints which it imposed upon the Assembly, in their endeavour to exercise unlimited control over all measures involving the expenditure of public money. The Council were now, as heretofore, ready to submit the differences as to the construction of the constitution act to the judicial committee of the privy council; but the Assembly would not consent to do so. They therefore, assured of their own loyalty to the queen and constitution, protested against the conduct of the Assembly, in seeking to authorize expenditure upon the authority of their own resolutions, without the sanction of the Council.[f]

Very little business was done by the Assembly after their reassembling, until March 28, when the house being informed that the Legislative Council had agreed to a compromise, whereby the expiring law for the payment of members would be continued in a separate bill, the appropriation bill, which had been laid aside by the Council, was again introduced, passed, and agreed to by the Council.

Temporary agreement between the two houses.

This grave and serious controversy being ended, for a time, the Assembly just before the close of the session, on April 9, 1878, agreed to an address to Governor Bowen, expressing their appreciation of his impartial and constitutional attitude during this protracted conflict. They testified that his Excellency had manifested, in his relations to parliament, to his ministers, and to the Crown, "a constant desire to preserve to each its legitimate authority; and, in after times, we doubt not the example which you have set, in a grave public emergency, will be cited as a model for constitutional governors."[g]

The governor in his speech, at the prorogation of parliament, stated that, during this protracted and memorable session (which lasted from June 26, 1877, to April 9, 1878),[h] "grave questions of constitutional rights and powers have arisen, and been debated and maintained [on the part of the

[f] Commons Papers, 1878, C. 2173, p. 15.

[g] Victoria Assembly Votes, 1877–78, vol. i. pp. 289–314.

[h] It should be stated that the session actually began on May 22, which was the first day of a new parliament, but on that day no business was done, except the election of a speaker, and his presentation to the governor. Both houses then adjourned until June 26, on account of a change of ministry on May 21, and to enable the new ministers to go for re-election.

Legislative Assembly] with inflexible resolution; but I rejoice to add that a settlement has been ultimately found, not inconsistent with the principles of responsible government and the spirit of the constitution. To avoid, however, the possibility of the recurrence of such a conflict in the future, my advisers will, with all possible despatch, prepare a measure to alter and amend the constitution statute."[i]

On April 11, the governor forwarded to the secretary of state a further address to himself, passed on the 2d instant, by the Legislative Council, together with his reply, and a ministerial memorandum on the subject. In this despatch, and in another dated April 12, Sir G. Bowen narrated the efforts he had made to restore harmony between the two houses, and enumerated the reasons which had actuated him in his endeavours, as a constitutional governor, to observe a neutral and impartial position, during the continuance of this dispute. He also defended himself against the complaints urged by the Legislative Council, "that he evinces partiality whenever he declines to obey their behests to overrule his responsible ministers." The governor claimed that his policy had succeeded in bringing the parliamentary crisis to a close, without a social and political convulsion. And that the outcry raised against him was akin to similar attacks upon other colonial governors, who had been "assailed by beaten minorities, because they steadily supported ministries possessing the confidence of the majority of the colonial" assemblies.[j]

Conduct of Governor Bowen considered.

The news of the happy termination of this long-continued struggle reached the colonial office by telegram, just as the colonial secretary was about to write to Governor Bowen, to intimate his satisfaction at receiving explanations from his Excellency in regard to his conduct in this trying emergency.[k]

In reviewing the part taken by Governor Bowen during this political crisis, it is hard to conjecture what else he could have done to uphold the equilibrium of the state, or to restrain the excesses of either party in the contest. The difficulty began in a conflict between the legislative chambers

[i] Assembly Votes, **1877–78**, vol. i. p. 318.

[j] Commons Papers, **1878**, C. 2173, pp. 54–57, 63.

[k] Commons Papers, **1878**, C. 1985, p. 4. And see Hans. Deb. vol. ccxxviii. p. 1401.

concerning their respective constitutional rights. In this contest, there was obviously nothing to warrant the authoritative interposition of the governor; and it was his duty to avoid any interference with either house whilst they were striving, within the lawful limits of parliamentary warfare, for the maintenance of their several rights and privileges. The only course open to a governor, under such circumstances, is one of friendly mediation between the contending parties. In conformity with British constitutional practice, which regulates the action of the sovereign towards the two houses of parliament, it is always becoming in a governor to endeavour to restore harmony in the body-politic.[1] In this respect it is evident, from the correspondence laid before parliament, that Governor Bowen was not wanting, and that he left no efforts untried, in this direction, which were compatible with his impartial and responsible position. As a last resort, in such an emergency, a governor is constitutionally competent to have recourse to the prerogative of dissolution, and to appeal to the constituent bodies, on the express ground of the existence of disputes between the legislative chambers which render it impossible for them to work together harmoniously. He may thus endeavour to arrive at some common basis of reconciliation and agreement, which would be ratified by public opinion.[m] And if the ministry in power were not willing to become responsible for a dissolution, the governor would be competent and amply warranted, upon a reasonable conviction of the probable success of such an undertaking, in invoking the aid of other ministers, by whose assistance it might be practicable to restore a good understanding between the Council and Assembly, either with or without the necessity for an appeal to the people.[n]

Position of a governor in parliamentary disputes.

It would seem, however, that the alternative of a dissolution of parliament was not available in Victoria at this juncture. Adverting to an observation in an address of the Legislative Council, at this period, that, if ministers would neither defer to the claims of the Council or retire from office, they ought at least to appeal to the people, Governor Bowen alleged

[1] See Todd, Parl. Govt. vol. ii. p. 203.

[m] See Governor Weld's memorandum on this subject, in Tasmania Leg. Coun. Journals, **1877**, sess. 2, appx. no. 45. And *post*, 552.

[n] See Todd, Parl. Govt. vol. ii. p. 405.

"that the present ministry is supported by a majority of about two-thirds of the Legislative Assembly, and that there is no reason to suppose that this proportion would be materially altered by the dissolution of an Assembly which is almost fresh from the country, having been elected only eight months ago."[o] Moreover, ministers, at this particular time, were restrained from advising a dissolution (a course which, if likely to succeed in bringing about a final settlement of the question at issue, they would unhesitatingly have approved) by the reflection that when, during a former contest between the two houses, a ministry supported by a large majority in the Assembly obtained leave to appeal to the people by a dissolution of parliament, the Council afterwards refused to abide by the result of the appeal.[p]

Unable in this exigency to make use of the prerogative of dissolution, as a means of restoring unity in the body-politic, Governor Bowen was confirmed in his conviction that he must adhere to the policy of absolute neutrality, lest the Crown in his persons hould be brought into direct antagonism with the Assembly and with the people.[q]

Lord Canterbury on a governor's position.

For the course ordinarily open to a governor, when he disapproves of the policy of his ministers, of transferring his confidence to other hands, was not available under existing circumstances. The end in view being not so much the adoption of a different policy in the administration of public affairs, as the restoration of harmony between the two houses, Governor Bowen recalled the sagacious words of his experienced predecessor, Lord Canterbury, uttered in reference to the parliamentary "dead-lock" of 1867–68, "it is the first duty of a governor to abstain from taking any step which would identify him with either or any of the contending political parties in the colony," and "the displacement of ministers, supported continuously by a majority of the lower house, is a step which could not properly be taken by the governor without a fair prospect, at least, of that success by which alone, as is admitted by all constitutional authorities, such an exceptional exercise of the prerogative can be justified. It has

[o] Commons Papers, **1878**, C. 1985, p. 43.
[p] Vict. Assembly Journals, **1877–78**, vol. i. p. 291.
[q] Commons Papers, **1878**, C. 1985, p. 43.

therefore been the duty of the governor, throughout the parliamentary contests which have for some months impeded, and have now stopped financial legislation, to confine his endeavours to restore united action in the legislature within the limits prescribed by neutrality on the points at issue between the two houses, and by the constitutional right of an existing government to the fair support of the governor." These observations of Lord Canterbury, which were entirely approved by the imperial authorities, were regarded by Sir G. Bowen as equally applicable to himself on the present occasion, and as being in exact agreement with his own rule of conduct in past times.[r]

Before proceeding to record subsequent events, which speedily fanned the embers of these vexatious contests into a fierce flame, mention should be made of one or two other points of interest, which claim our notice at this stage of our narrative.

Dismissed officials appeal to Supreme Court.

In Victoria, under the crown remedies and liabilities act, 1865 (28 Vict. no. 241), a person who may feel himself aggrieved by any action of the government, may seek redress from the Supreme Court, the decisions of which tribunal would of course be carried into execution by the civil authorities.

Accordingly, on Feb. 9, 1878, application was made to the Supreme Court to test the legality of the proceedings of the Victoria government, to which we have already referred,[s] in removing from office certain county judges, holding office "during pleasure," and whose salaries had ceased with the "stoppage of supplies." But the court refused to interfere, declaring that this point could only be properly disposed of by a writ of error.[t] Ere long, as we shall presently see, the home government interposed, and called the attention of the governor to the highly objectionable character of the proceeding in question.

Meanwhile, on April 10, 1878, a deputation of magistrates, merchants, and others, connected with the Australian colonies, waited upon Sir M. Hicks-Beach (the colonial secretary), to express their satisfaction at the temporary adjustment of the

[r] Commons Papers, **1878**, C. 2173, p. 6.
[s] See *ante*, p. 494.
[t] Commons Papers, **1878**, C. 2173, pp. 2–6.

Colonial secretary appealed to against the governor.

dispute between the two houses in Victoria, to point out the errors into which they believed Sir G. Bowen to have fallen during the continuance of the crisis in that colony, and to justify the action taken by the Legislative Council. In reply, the secretary of state expressed to these gentlemen his willingness to give a careful consideration to their statements, but declined to discuss with them the merits of the controversy in Victoria. He added that, "if the action or advice or assistance of the home government should be desired by the colony, it will be most readily given." Until then, "it would be impossible for the home government to interfere." While, "as a general rule, the governor of a colony ought to act upon the advice of his responsible ministry," he "is placed in a position of great responsibility, difficulty, and isolation." "No one could wish to see him reduced to the position of a machine, or that his action should be merely that of a clerk, unable to decide on any particular matter until he received his instructions from Downing Street. We endeavour to make our colonial governorships positions of high dignity, and considerable emoluments, in order to obtain the services in those positions of capable men, — men who are able and ready to act for themselves with clear-sightedness, firmness, and wisdom, in any emergency." Such men are entitled to great confidence, and their acts should not be hastily criticised and until we are fully acquainted with all the facts. If, hereafter, "it should appear that in any point Sir George Bowen has been properly to blame, I shall not hesitate to express my opinion upon it." [u]

In acknowledging the receipt of the addresses to the queen from both houses of the Victoria parliament, Sir M. Hicks-Beach, in his despatches of April 24 and 30, expressed himself to the same effect, with a general though guarded approval of the conduct of Governor Bowen.[v]

On March 17, 1878, Governor Bowen reported to the secretary of state a decision of the Legislative Assembly upon a curious point, elsewhere noticed;[w] namely, that, under the forty-fifth section of the Victoria constitution act, authority was given for the appropriation of so much of the consolidated revenue of the colony as might be necessary to defray the

[u] *Ibid.* pp. 22–30, and see p. 85.
[v] *Ibid.* pp. 30, 31.
[w] See *ante*, p. 175.

charges incident to the collection, management, and receipt thereof, without the need of a parliamentary vote on this behalf. The law officers of the Crown, the audit commissioners, and certain eminent lawyers in Victoria, disconnected with party politics, had all concurred in this interpretation of the imperial statute. Ministers had, accordingly, advised the governor to sign a treasury warrant authorizing the resort to this mode of providing funds to maintain "establishments absolutely necessary for the protection of life and property in this colony," during the "stoppage of the supplies." Assuming this to be "an affair of purely colonial concern, and not repugnant to the law and to the constitution," the governor agreed to take this course, should it prove to be impossible to arrive at an amicable arrangement of the differences between the two houses, by the passing of the annual appropriation bill.[x] The Legislative Council, however, protested against this novel proceeding, and contended that it was based upon a misconstruction of the imperial act.[y] Luckily, the amicable settlement of the parliamentary "dead-lock" rendered it unnecessary to adopt this extraordinary method of obtaining the "legal issue" of public money.[z]

Appropriation of colonial funds under imperial statute.

But before an amicable understanding had been come to, the governor had applied to England for advice upon this question, as well as upon the question whether resolutions adopted by the Assembly, in committee of supply, sufficed to render "legally available" for public expenditure money in the public chest. Both these queries were answered by the secretary of state, in a despatch dated Aug. 17, 1878. As regards the interpretation to be put upon the Imperial Act 18 and 19 Vict. c. 55, sec. 45, the law officers of the Crown were of opinion that the moneys necessary to defray the costs, charges, and other expenditure mentioned in that section were legally available, without further parliamentary warrant, being, in fact, specifically appropriated by the imperial statute. But that money merely voted in committee of supply was not available, until it had been specifically appropriated to the intended purpose by an act of the Victorian legislature.[a]

Replying to this despatch, on Oct. 16, 1878, the Governor

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[x] Commons Papers, **1878**, C. 2173, pp. 32–42.

[y] *Ibid.* p. 60.

[z] Commons Papers, **1878**, C. 2173, p. 96.

[a] *Ibid.* p. 97.

expressed his satisfaction at learning that he had been right in his intended sanction of the ministerial advice that he should sign warrants for the issue of public money under the forty-fifth section of the Constitution Act as aforesaid; and also in refusing to sign warrants at the request of ministers for any other treasury advances except by authority of a colonial statute.[b]

Dismissed officials replaced.

After the crisis of 1878 had terminated, and the appropriation bill had become law, steps were immediately taken to reinstate certain public officers in the judicial and civil departments who had been dismissed on account of the "stoppage of the supplies." Nearly all the judicial and legal officials were replaced; but ministers decided to take this opportunity to reduce an overgrown and costly civil service, and to reinstate "only such officers as are required for the proper working of the civil service, while the remainder shall receive the liberal pensions, superannuations, and other compensations for loss of office, provided by law."

The governor, both now and at a later period, remonstrated with his ministers on this matter. He urged them to consent to a general reinstatement of all civil-service employés whose services had been dispensed with pursuant to the ministerial memorandum of Jan. 8, 1878; but, this being a local and not an imperial question, the governor did not claim to interfere with authority. He simply expressed an earnest hope that ministers would deal equitably, wisely, and liberally, in the case. Ministers, however, in a communication dated May 6, stated that they did not consider a general reinstatement of all officers who had been discharged to be advisable. The course they had taken had been approved by the Assembly. They insisted, moreover, "that the mode of dealing with the civil service of Victoria, is purely a matter of Victorian concern," and that, irrespective of any interference or suggestion on the part of the governor, they had "the exclusive right of dealing with it on their own responsibility." Being himself persuaded, however erroneously, that ministers had ample authority for this position, his Excellency undertook to defend it in a despatch to the secretary of state, dated May 8, 1878.[c]

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[b] Commons Papers, **1878–79**, C. 2217, p. 35.
[c] *Ibid.* **1878**, C. 2173, p. 70.

Subsequently, a Mr. Gaunt, a police magistrate whose services had been dispensed with at this juncture, petitioned the queen for redress. This petition, as required by the Colonial Regulations (c. 7, sec. 6), was duly forwarded through the governor. In reply, his Excellency was requested to notify Mr. Gaunt that the secretary of state had been unable to advise her Majesty to take any action in the matter, it being one which, under the colonial constitution, was within the jurisdiction of the governor and his executive council. The governor afterwards reported that Mr. Gaunt, upon formal application, had received the compensation for loss of office to which he was legally entitled.[d]

Legality of official dismissals

In answer to the aforementioned despatch from Governor Bowen, of May 8, 1878, Secretary Sir M. Hicks-Beach, in a despatch dated Aug. 25, while disclaiming any desire to encroach upon the responsibility of the local ministers in matters within their peculiar jurisdiction, animadverted upon the personal responsibility which attached to the governor in approving the advice given as to the partial reinstatement of civil servants who had been removed from office in January last.

questioned by imperial government.

The question was undoubtedly within the discretion of the local government; that is to say, of the governor acting by and with the advice of his ministers. In all questions of a local nature the governor would, as a general rule, be guided by the advice of his ministers; but he has a right to discuss with them any topic that may arise, and to express freely his opinions and suggestions thereon. Under ordinary circumstances, if satisfied as to his duty to the law or the constitution, the governor would follow, as of course, the advice received, and his action would not come under the review of her Majesty's government.

"But it is very obvious that the recent removal from office of a large number of the civil servants of Victoria was no ordinary occasion, and involved constitutional principles of great importance not only to Victoria, but (as being a prece-

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[d] Commons Papers, **1878**, C. 2173, pp. 78, 84, 102. See also the case of Mr. G. Gordon, late chief engineer of water supply, who, having petitioned her Majesty against his alleged wrongful dismissal by the minister of mines in Victoria, was, in like manner, referred back to the governor in council. Commons Papers, **1878-79**, C. 2339, pp. 1, 13.

dent) to all colonies living under constitutions granted by the Crown or by the Parliament of Great Britain." It is an element of these constitutions to uphold and secure a permanent civil service, only subject to removal by the executive government for specific misconduct, or to carry out a scheme of reductions which had been duly considered and approved by the legislature.

It is clear, however, that the case of a large number of civil servants lately discharged in Victoria had not been dealt with on these principles; but avowedly "with a view to economize the funds at the disposal of the government," and to enable them to surmount a serious financial difficulty, which has since been wholly removed by the passing of the appropriation act.

It therefore became the duty of the governor, before consenting to this transaction, to satisfy himself that the proposed proceeding was justifiable in the interests of the public at large. No claim to "exclusive" responsibility, on the part of ministers, could relieve the governor of this obligation. He would have done better, in the opinion of the secretary of state, as well for the colony as in the maintenance of the principles of parliamentary government, had he notified his ministers that he felt unable to put his name to the documents directing the removal of these officers.

This course might have involved the resignation of the ministry. But it might also have led to the adoption of other and less objectionable means for surmounting the difficulty. If not, and if after their resignation it became necessary to recall the ministers to office, "either on the failure of others to form an administration, or after a dissolution, it would have been of some advantage that an opportunity should have been afforded to the colony for the full and serious discussion of the step proposed."

This frank expression of opinion, in regard to the course he should have pursued, was not intended as a censure upon Sir George Bowen, whose long and distinguished public career, and whose strenuous efforts to settle the serious dispute between the two houses in Victoria, were highly appreciated by her Majesty's government.[e]

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[e] Commons Papers, **1878**, C. 2173, p. 99.

Before the receipt of this despatch, Sir G. Bowen, on June 29, 1878, had written to the secretary of state, that, while the removal of so many judicial and civil officers had not been declared illegal, by any competent colonial authority, although the question had been twice considered by the Supreme Court, on a test case, to try the legality of the act of government in removing the county-court judges, on the plea that they did not hold office during pleasure, which had resulted in the dismissal of the complaint, a majority of the court holding that these functionaries were removable at the pleasure of the Crown, he had always considered these removals to be objectionable, both on legal and on constitutional grounds; "but that, after anxious consideration and careful searching for precedents, he believed that they would prove a less formidable evil than the practical dismissal of a ministry possessing an overwhelming majority in the Assembly and in the constituencies, and the consequent endangering of the internal tranquillity of the colony, and of its existing happy relations with the imperial government."[f] Governor Bowen's defence to colonial secretary.

In fact, owing in great measure to the restraints put upon the aggressive action of his ministers by Governor Bowen, only sixty individuals were permanently displaced, out of a civil service numbering 1,626 persons; and these individuals received £45,000 in compensation for the loss of office, and £3,500 in annual retiring allowances. Moreover, the civil service of Victoria was notoriously overgrown, and there had long been a demand for its reduction, and especially for the removal of certain incompetent and superfluous officials. Had parliament been dissolved upon this question, Governor Bowen believed that it would have strengthened ministers, and reduced the small band of the opposition. In this event, there was reason to fear that the entire civil service would have been dismissed and replaced, after the American fashion, by partisans of the Berry administration.[g]

In a further despatch, dated Nov. 22, 1878, Governor Bowen replied to Sir M. Hicks-Beach's despatch of Aug. 25. His term of service in Victoria having nearly expired, and he being about to assume another governorship, he took occa-

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[f] Commons Papers, **1878**, C. 2173, p. 101. And *ibid.* **1878–79**, C. 2217, pp. 22–34.

[g] Private information. But later official returns give a much larger number of removals.

sion to recount the leading events of his administration, and to explain the principles which had actuated him in his government of the colony, during the continuance of the existing difficulties.

He remarks, in this despatch, that Mr. Berry's ministry was "the most powerful ministry hitherto known in Australia," and that "it was universally agreed that so strong was the feeling in the country during the late parliamentary crisis that a dissolution on the question of the reduction in the civil service could have had no result but to restore Mr. Berry and his friends to power, with greatly increased strength, and regarding the governor 'as an aggressor and beaten foe,' and thus deprive him of the moderating influence by the use of which I have been able to avert many evils." Sir G. Bowen adds, "it would be an act of perilous infatuation in any colonial governor to remove, solely because he personally disagreed with them on a measure of colonial policy, not repugnant to law nor to imperial interests, a ministry trusted by parliament; unless indeed he were well assured that he would be able to replace them, either before or after a dissolution, by a new ministry, commanding at least a working majority."

While admitting it to be the paramount duty of a colonial governor to carry out, loyally, his instructions from her Majesty's secretary of state, Governor Bowen begged leave respectfully to represent that he had pursued, under very trying circumstances, as he believed the only possible course, and one most in harmony with the spirit of his instructions, and with the precedents established by other governors throughout the queen's dominions.

The governor and his ministers.

In a postscript to this despatch, Governor Bowen explains that he had, on a former occasion, conveyed a wrong impression to the colonial secretary, in representing that his ministers deemed his action "in even questioning the course taken with regard to" the dismissal of certain public officers as being, "to some extent, an interference with the due course of responsible government." Ministers had requested him to state that they "entirely disclaim" any such opinions. In fact, "they have never resisted my constant practice of discussing with them, as with all preceding ministers, all public topics whatsoever, and of recommending the withdrawal or

modification of all measures which I may deem objectionable. They have always been ready to defer to my opinion on matters of imperial interest, and also (I may add) on many questions of local policy, in which they were not fettered by convictions previously expressed, or by party and parliamentary exigencies."[h]

Colonial secretary on the governor's conduct.

The secretary of state, in replying to this despatch, on Feb. 17, 1879, expresses his regret that the arguments therein contained had not sufficed to change his opinion in disapprobation of Governor Bowen's conduct in respect to the removal of the judicial and civil servants in Victoria. A non-compliance with the advice of his ministers, on this occasion, would not necessarily have led to their resignation, and might have induced them to agree to a less objectionable measure to meet the temporary financial difficulty. His Excellency's despatch, however, with the other papers on the subject, should be published, as being explanatory of the views and principles which had governed his actions in a position of much difficulty. The assurance that the Victorian ministers disclaimed the opinion that the action of the governor, in questioning the course they had taken in this matter, was an interference with the due course of responsible government had been received by the secretary of state with much satisfaction.[i]

Sir M. Hicks-Beach conveyed to Governor Bowen, in this despatch, his desire that the voluminous correspondence in reference to the constitutional question in Victoria should now close. In fact, before the final despatch from the secretary of state could reach Sir George Bowen, his successor had arrived, and he himself had received another appointment, as Governor of Mauritius. It will be necessary for us, however, to retrace our steps, and note the new phase which this great controversy assumed, upon the reassembling of the Victorian parliament.

On July 9, 1878, the second session of the ninth parliament of Victoria was opened by his Excellency Sir George Bowen. In the speech from the throne, mention was made of the disputes between the two houses in the interpretation

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[h] Commons Papers, 1878-79, C. 2217, pp. 42-48.

[i] Commons Papers, 1878-79, C. 2217, pp. 75, 76.

Proposed amendment of Victorian constitution.

of their several powers under the Constitution Act, whereby, on four distinct occasions, the machinery of legislation had been brought to a standstill; and an amendment to the constitution was suggested, as essential to the final adjustment of the legislative functions of the Council and the Assembly.

On July 17, a ministerial bill for this purpose was submitted to the Assembly by Mr. Berry, the premier. It proposed that all money and tax bills passed by the Assembly, if not concurred in by the Council within one month, should be deemed to have received the assent of that house, and should be presented to the governor for the royal assent; and that all other bills passed in two consecutive sessions by the Assembly shall, if rejected by the Council, in like manner become law, — except that, at the request of the Legislative Council, any such bills may be submitted to a popular vote of the electors of the Assembly, and, if approved at a general poll, shall be tendered for the royal assent.[j]

In despatches dated Oct. 31 and Nov. 28, 1878, Governor Bowen reported to the secretary of state that the two houses of parliament had been unable to agree upon the foregoing or any other measure of constitutional reform. The further consideration of the question had accordingly been postponed until the next session, to be held in the summer of 1879. Meanwhile, a parliamentary delegation, which should include the premier (Mr. Graham Berry), would proceed to England to confer with her Majesty's government on the subject.[k]

The Legislative Council, at this session, did not refuse to pass the appropriation bill, although it contained an item granting three thousand pounds to defray the expense of the proposed delegation. But they addressed a protest and a manifesto to the governor against the mission and its professed object, in which they vindicated the course they had pursued since the introduction of responsible government, and justified their opposition to the plans of the dominant party in the Assembly. They deprecated the adoption of any measure which would destroy the present constitution of Victoria, and substitute one legislative chamber for two; and they urged that the intended reform bill should be first submitted to the constituencies of the Assembly for their verdict

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[j] Commons Papers, **1878–79**, C. 2217, pp. 1–19. [k] *Ibid.* p. 35.

thereon, before it was decided upon in the local parliament. The attorney-general, however, advised the governor that this protest did not in any degree invalidate or hinder the proposed delegation which would be sent on behalf of the executive government and with the sanction of the Assembly.[l]

Unsatisfactory relations between the two houses.

Parliament was prorogued on Dec. 6, 1878. The session had not been unproductive of useful legislation; but no progress had been made towards the solution of the important question of constitutional reform. In the closing speech from the throne, reference was made to the ministerial deputation to confer with the imperial authorities respecting existing defects in the constitution act, with a view to the satisfactory adjustment of the relations between the Council and the Assembly.

In contravention of the remonstrance from the Legislative Council, the governor was requested by ministers in December, 1878, to solicit attention to an address from the Assembly to the queen, adopted in the preceding February, wherein would be found the view of the situation entertained by that chamber. In this address, the Council was charged with reckless and unconstitutional proceedings, in endeavouring to limit "the exclusive right to initiate taxation and appropriation" which constitutionally appertains to the Assembly, while the Legislative Council are expressly debarred from amending any such measures. The address further states that, in spite of repeated remonstrances, the Council "persist in claiming and attempting to exercise a power in financial questions far beyond that exercised by the House of Lords." And that, in reflecting upon the conduct of the governor during the continuance of this crisis, the Legislative Council had ignored fundamental constitutional maxims which assign to the sworn councillors of the Crown the responsibility for all public acts of a sovereign or a governor, and refuse to place any personal or individual responsibility for the same on the Crown or its representative.[m]

At the same time, the governor transmitted to the secretary of state a ministerial memorandum commenting upon the aforesaid manifesto from the Legislative Council. This memo-

[l] Commons Papers, **1878-79**, C. 2217, pp. 49-60, 71, 72.
[m] *Ibid.* p. 60.

randum alleged that the Council, since its establishment in 1854, had obstructed general legislation by rejecting over eighty bills, and so amending upwards of twenty others that they had been abandoned by the Assembly. It pointed to the absolute need of a radical reform in the constitution of the Council as the only means of bringing it into harmony with the Assembly; and it declared that the proper functions of a second house were "to offer counsel and to give time for deliberation;" while both counsel and delay would be most readily appreciated if it was understood that resistance had its limit and could not be protracted beyond a definite period.[n]

Ministerial deputation to England.

It was in anticipation of the resolve of the Legislative Council to refuse their assent to the government scheme for the amendment of the constitution act, that the local ministry had concluded to despatch two of their number to England to obtain an act of the Imperial Parliament to amend the constitution in the direction above explained. So far back as on Aug. 6, 1878, Governor Bowen forwarded to the secretary of state, but without comment, a ministerial memorandum in which this determination was expressed.

Sir M. Hicks-Beach, in a despatch dated Oct. 1, 1878, written for the information of ministers, plainly stated that, in his opinion, no sufficient cause had yet been shown for the proposed intervention of the Imperial Parliament. However justifiable as a last resort, and as the only way to give effect to the deliberately expressed will of the people of Victoria, it is evident that the present proposal is altogether new and includes changes, — such as the *plébiscite* which has never been directly submitted to the constituencies at a general election. Under these circumstances, the rejection of this scheme by the Legislative Council would not justify so exceptional a course as an application to the Imperial Parliament to alter, without the previous assent of the Victorian legislature, a constitution originally framed in the colony, and merely confirmed by an imperial act.

The secretary of state, however, expressed his willingness to receive any deputation on the subject, hoping to be able to agree with them upon certain principles, as a basis for the

[n] Commons Papers, **1878-79**, C. 2217, pp. 63-70.

future settlement of this difficult question, which might prove generally acceptable to all parties.[o]

This despatch did not arrive until after the question had been disposed of by the Victoria Assembly. It was at once published, however, in the "Official Gazette." Governor Bowen, in a despatch of Dec. 27, 1878, declared his entire agreement in the opinions therein expressed, and stated it to be his own conviction that public opinion in Victoria was still undecided on the subject, though inclining to a reaction against extreme views on either side. In one respect, however, he thought the intended mission was satisfactory. A few years ago, the Assembly had vehemently repudiated the idea of imperial interference, regarding it as an infringement of the rights of local self-government, whereas now the counsel and aid of the imperial government is directly invited.

Constitution of Legislative Council.

Believing that a spirit of compromise and of mutual forbearance was essential to the harmonious working of two deliberative chambers, Governor Bowen was also inclined to think that a nominated second chamber was preferable to one constituted upon the elective principle. He was of opinion that the adoption of the nominative system, with certain restrictions and safeguards, would ultimately be accepted in Victoria, as the best practicable escape from past difficulties and dangers. A nominated chamber would never claim to be "a second House of Commons," but would naturally imitate the wisdom and forbearance of the House of Lords, in its attitude towards, and transactions with, the other house of the Imperial Parliament. And with authority to the executive government to add fresh members, in extreme cases, a nominated chamber would be endowed with a safety-valve, against prolonged collisions, analogous to the power of dissolving the popular chamber. Sir George Bowen's convictions on this subject were the result of long experience in colonial governments, and were confirmed by his belief that, in colonies possessing a nominated upper house, there had never been any serious collisions between the two chambers.[p]

Soon after the close of the session, the ministerial delegation, consisting of Mr. Graham Berry (the premier) and Mr.

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[o] Commons Papers, **1878–79**, C. 2217, pp. 19–21.
[p] *Ibid.* pp. 73–75.

Victorian delegation in England.

C. H. Pearson, proceeded to England. Upon their arrival, Mr. Berry wrote to the secretary of state for the colonies, referring to his despatch, above mentioned, of Oct. 1, 1878. This despatch did not reach Victoria until after the prorogation of parliament, otherwise it would have received consideration in parliament. The electorate in Victoria were agreed as to the necessity for a reform which should empower the representative chamber to give effect to the will of the people, without being controlled, as at present, by the veto of the upper house. Ministers had therefore decided to apply to the Imperial Parliament for an alteration of the sixtieth section of the constitution act, so as to enable the Legislative Assembly to enact, in two consecutive sessions, with a general election intervening, a measure for the reform of the constitution. Such an amendment was urgently needed, as it is believed that no ministry can carry on the queen's government satisfactorily in Victoria, if some solution to the present difficulties be not provided.

Departure of Governor Bowen.

On Jan. 25, 1879, Governor Bowen addressed another despatch to the secretary of state, wherein he referred to his official career in Australasia, during the past twenty years, as governor, in succession, of three great colonies, and to his inflexible adherence, whilst in Victoria, to the constitutional rule of giving a fair and just support, in all matters not repugnant to law, or to imperial interests, to his ministers for the time being. He also declared his belief that a reaction had commenced in the colony against the violence of extremists on both sides, which would eventually compel an amicable settlement of the present controversy.

On Feb. 21, the day before he left for his new government, Sir George Bowen sent final despatches to the colonial secretary, enclosing copies of numerous farewell addresses, from various parts of Victoria, expressing approval of his public conduct, and regret at his departure.

Frequent conferences were held at the colonial office in London between the Victorian delegates and the secretary of state, and the result of these deliberations was embodied in a despatch, addressed to the Marquis of Normanby, who replaced Sir G. Bowen as governor of Victoria.[q] A copy of

[q] Commons Papers, **1878-79**, C. 2339, p. 20.

Imperial despatch on the Victorian disputes.

this despatch was confidentially communicated beforehand, to Mr. Berry for the information of the delegates. The great importance of this state paper, as an expression of the views of her Majesty's government upon the leading points of difference between the two houses in Victoria, justifies us in presenting it to our readers without abridgment. It is as follows:—

DOWNING STREET, May 3, 1879.

MY LORD, — In his despatch of Dec. 27, 1878,* Sir George Bowen informed me that the Legislative Assembly of Victoria had authorized Mr. Graham Berry, the chief-secretary and prime minister, and Mr. Pearson, a member of the Assembly, to proceed to London, as commissioners or delegates, to solicit my advice and assistance, and to lay before me the views on the political affairs of Victoria entertained by the majority of the Assembly; and by the same mail he forwarded to me a statement that had been adopted by the Council, and other documents bearing upon the case. Shortly after the arrival of Mr. Berry and Mr. Pearson in England, I received them at this office, and Mr. Berry then left with me the letter, of which I enclose a copy. The objects of their mission have been since fully discussed between us at several interviews, and I will now proceed to convey to you the opinion which her Majesty's government have formed upon the important question at issue, after full consideration of the statements that have been placed before them on behalf of the government and Assembly of Victoria on the one side, and of the Council on the other.

In a memorandum dated Aug. 6, 1878, Sir George Bowen's ministers had anticipated that they might be "compelled to despatch to England, on behalf of and with the express sanction of the Legislative Assembly, commissioners chosen from leading members of that house, to lay before her Majesty's imperial government the matured result of its deliberation" on constitutional reform, "with a view to get that result embodied in an act of the imperial legislature." On the receipt of that memorandum, I lost no time in placing before the Victorian government the considerations which disposed me to the opinion that no sufficient cause had been

* Commons Papers, 1878-79, C. 2217, p. 73.

shown for the intervention of the Imperial Parliament in the manner suggested.

The request urged by Mr. Berry in his letter of Feb. 26, that Parliament should, "by a simple alteration of the sixtieth section of the constitutional act of Victoria, enable the Legislative Assembly to enact, in two distinct annual sessions, with a general election intervening, any measure for the reform of the constitution," is, in my opinion, even more open to objection than the proposal I understood him to convey in his memorandum of Aug. 6. But it is not necessary to discuss the merits of this or any other proposal, for, though fully recognizing the confidence in the mother country evinced by the reference of so important a question for the counsel and aid of the imperial government, I still feel that the circumstances do not yet justify any imperial legislation for the amendment of that constitution act by which self-government in the form which Victoria desired was conceded to her, and by which the power of amending the constitution was expressly, and as an essential incident of self-government, vested in the colonial legislature with the consent of the Crown. The intervention of the Imperial Parliament would not, in my opinion, be justifiable, except in an extreme emergency, and in compliance with the urgent desire of the people of the colony when all available efforts on their part had been exhausted. But it would, even if thus justified, be attended with much difficulty and risk, and be in itself a matter for grave regret. It would be held to involve an admission that the great colony of Victoria was compelled to ask the Imperial Parliament to resume a power which, desiring to promote her welfare and believing in her capacity for self-government, the Imperial Parliament had voluntarily surrendered, and that this request was made because the leaders of political parties, from a general want of the moderation and sagacity essential to the success of constitutional government, had failed to agree upon any compromise for enabling the business of the colonial parliament to be carried on.

It is, nevertheless, important that the question should be settled as soon as possible, where it can properly be dealt with, — that is, in the colonial parliament; and I shall be glad if, by the observations which I am about to make, I can remove some part of the misunderstanding which has been amongst the chief obstacles to such a settlement.

Following the generally accepted precedent, the constitution act of Victoria established two legislative chambers, — the Council and Assembly, — and laid down, to a certain extent, their mutual relations; of which, it appears to me, a better definition rather than an alteration is now required. For, as no party in Victoria desires to abolish the Council, I feel confident that there can be no wish, in the words of your ministers, to "reduce it to a sham," or, by depriving it of the powers which properly belong to a second chamber, to confer on the Assembly a complete practical supremacy, uncontrolled even by that sense of sole responsibility which might exert a beneficial influence on the action of a single chamber. Nor can I suppose that the extreme view of the position of the Council, which it has recently to a great extent itself disclaimed, can be supported by any who have sufficiently examined the subject.

The recent differences between the two houses of Victoria, like the most serious of those which have preceded it, turned upon the ultimate control of finance. I observe that the address of the Legislative Assembly of Feb. 14, 1878, dwells almost exclusively on the necessity of securing to that house sufficient financial control to enable adequate supplies to be provided for the public service, and it is prominently urged in Mr. Berry's letter of Feb. 26, in proof of the necessity for finding some solution of the present constitutional difficulty, that "scarcely a year passes but it becomes a question whether the supplies necessary for the queen's service will be granted." But this difficulty would not arise if the two houses of Victoria were guided in this matter, as in others, by the practice of the Imperial Parliament, the Council following the practice of the House of Lords, and the Assembly that of the House of Commons. The Assembly, like the House of Commons, would claim and in practice exercise the right of granting aids and supplies to the Crown, of limiting the matter, manner, measure, and time of such grants, and of so framing bills of supply that these rights should be maintained inviolate; and as it would refrain from annexing to a bill of aid or supply any clause or clauses of a nature foreign to or different from the matter of such a bill, so the Council would refrain from any steps so injurious to the public service as the rejection of an appropriation bill.

Imperial despatch on disputes in Victoria.

It would be well if the two houses in Victoria, accepting the view which I have thus indicated of their mutual relations in this important part of their work, would maintain it in future by such a general understanding as would be most in harmony with the spirit of constitutional government. But, after all that has passed, it may be considered necessary to define those relations more closely than has been attempted here, and this might be effected either by adopting a joint standing order, as was proposed in 1867, or by legislation. Of these, the former would seem to be the preferable course, for there might be no slight difficulty in framing a statute to declare the conditions under which one house of parliament, in a colony having two houses, should exercise or refrain from exercising the powers which, though conferred upon it, must not always be asserted. But I must add that the clearest definition of the relative position of the two houses, however arrived at, would not suffice to prevent collisions, unless interpreted with that discretion and mutual forbearance which has been so often exemplified in the history of the Imperial Parliament.

If, however, it should be felt that the respective positions of the two houses in matters of taxation and appropriation can only be defined by an amendment of the Constitution Act, there may be other points — such as the proposal to enact that a dissolution of parliament shall apply to the Legislative Council as well as the Assembly — that might usefully be considered at the same time; but I refrain from discussing them now, feeling that their merits can best be appreciated in the colony itself.

It has been urged that some legislation is necessary to ensure mechanically the termination, after reasonable discussion and delay, of a prolonged difference between the two houses upon questions not connected with finance. I do not yet like to admit that the Council of Victoria will not, like similar bodies in other great colonies, without any such stringent measure, recognize its constitutional position, and so transact its business that the wishes of the people, as clearly and repeatedly expressed, should ultimately prevail; nor have I yet seen any suggestion for such legislation which I can deem free from objection.

I hope that the views which I have expressed may not

be without influence in securing such a mutual agreement between the two houses as to remove any necessity for imperial legislation; and that, as both parties profess to desire only what is reasonable, and as there has been now an interval for reflection, a satisfactory and enduring solution of the difficulty may be arrived at in the colony. The course of action which her Majesty's government might adopt, should this hope unfortunately be disappointed, must in a great degree depend upon the circumstances which may then exist; but I can hardly anticipate that the Imperial Parliament will consent to disturb in any way, at the instance of one house of the colonial legislature, the settlement embodied in the Constitution Act, unless the Council should refuse to concur with the Assembly in some reasonable proposal for regulating the future relations of the two houses in financial matters in accordance with the high constitutional precedent to which I have referred, and should persist in such refusal after the proposals of the Assembly for that purpose, an appeal having been made to the constituencies on the subject, have been ratified by the country, and again sent up by the Assembly for the consideration of the Council.

I have, &c.

(Signed) M. E. HICKS-BEACH.

THE MOST HONOURABLE THE MARQUIS OF NORMANBY.

Should an upper house be elected or nominated?

It will be observed that the preceding despatch, while it suggests a reasonable method of solving the constitutional question which has for so long a period distracted the public mind in Victoria, abstains from endorsing the opinion so emphatically expressed by Sir George Bowen, that a change in the composition of the Legislative Council by the adoption of the principle of nomination in lieu of that of election was desirable. This omission is significant. It implies that in the judgment of her Majesty's government no such change would suffice to remedy existing evils, and to establish harmonious relations between the two chambers in Victoria. The experience of other British colonies, not only in Australia but elsewhere throughout the empire,

does not corroborate Sir George Bowen's idea that colonies possessing a nominated upper house are exempt from serious disputes as to the relative rights and privileges of the two branches of the legislature, especially in matters of supply. A nominated upper chamber, though undoubtedly preferable in certain respects to an elected body, constitutes no efficient or effectual check to democratic ascendancy. And it is obviously not in this direction that we may expect to find the point of agreement which shall reconcile the conflicting claims of colonial legislative bodies. New South Wales, the dominion of Canada, and Queensland, severally possess a nominated upper house, and yet difficulties similar to those which have so long agitated Victoria are not unknown in these colonies.

Colonial upper chambers.

In the Assembly of New South Wales, resolutions have been passed at the instance of the premier, within the present year (1879), condemning the action of the upper house in repeatedly rejecting an important government measure, and to remedy this grievance it is proposed to make that chamber elective.[r]

In Canada, the Senate, or Upper House, have repeatedly exhibited an independent spirit, and the expediency of curbing their powers in respect to financial questions has been mooted, at any rate, by the party now in opposition.

The colony of New Zealand also possesses a nominated Legislative Council, and hitherto no collision has occurred between the two chambers, since the introduction of representative institutions, which has led to any serious results. Nor is there any other special reason for altering the constitution of the upper chamber. Nevertheless, on Sept. 18, 1878, a series of resolutions were submitted to the House of Representa-

[r] "The Colonies" newspaper, Aug. 16, Sept. 13 and 20, 1879.

tives avowedly for the purpose of making the Upper House a more independent body, by changing its constitution from a nominated to an elective chamber. It was proposed to effect this alteration gradually, as vacancies should occur in the Council; such vacancies to be filled up by the election of members by ballot by the House of Representatives, but so that the number of the Legislative Council should not exceed one-half of the number of the lower house. It was further proposed that when bills have been rejected in two successive sessions by either house, both houses should sit together and decide by a two-thirds vote of the united body, upon the question whether such bills should pass and be presented for the sanction of the Crown. Ministers, however, disapproved of this scheme. The Attorney-General said, "he was opposed to an elected upper house, and believed that it would become the greatest curse to our constitution." He had always thought "that by having a nominated Legislative Council, and by having the number of its members unlimited, there was always an available power under the constitution act, which would prevent a dead-lock. Without such a power, collisions will always occur," as we see in other colonies. After a debate, the previous question was put on these resolutions and negatived.[s]

On the other hand, stringent measures of reform, designed to restrain the freedom of elective legislative councils, are in contemplation, not only in Victoria, but in two other colonies where an elective upper chamber exists; namely, in Tasmania,[t] and in South Australia.[u]

We may, therefore, safely conclude that the true remedy for legislative disputes is to be found not in any change of tenure, or in a formal redistribution of

[s] New Zealand Parl. Deb. vol. xxix. p. 246.
[t] See *post*, p. 555. "The Colonies," of Aug. 16, 1879.
[u] *Ibid.* Aug. 30, Sept. 20, and Dec. 6, 1879.

powers on the part of either house, but in the general acceptance by both houses of counsels of moderation, and in the avoidance by each of the assertion of extreme rights. It is to such a temperate and forbearing policy in the two houses of the Imperial Parliament towards each other, that their good understanding and cordial co-operation, for so long a period, is mainly attributable.

Victoria constitution reform bill.

When the parliament of Victoria reassembled, in July, 1879, Mr. Graham Berry introduced into the Legislative Assembly a bill, as a government measure, to reform the constitution of the colony. This bill proposed to confer upon the Legislative Assembly absolute control over taxation and expenditure. And to provide that all public money shall be available for appropriation immediately after it has been voted by the Assembly.[v] It also provided for the gradual substitution of a nominee Legislative Council in place of the present elective body; and that bills passed by the Assembly and twice rejected by the upper house shall be referred by the governor to a *plébiscite*, at which the decision of a majority of the people shall be final, subject, however, to the assent of the governor. But the third reading of this bill having been voted in the Assembly by one less than the absolute majority required by the constitution act, it was withdrawn. Ministers then advised a dissolution, to which the Governor consented. The elections will take place early in the new year.[w]

The result of the renewed attempt to dispose of this much controverted question within the colony itself, without recourse to imperial authority to change the constitution, is not yet known. But there are indications that the people of Victoria are not willing to destroy a political system which, if wisely and temperately administered, would secure to them the blessings of beneficent rule and good government, and that some reasonable ground of compromise may yet be found which shall reconcile contending parties, without introducing novel and objectionable features into the constitution of Vic-

[v] But on the second reading of the reform bill, on August 26, Mr. Berry intimated that he was prepared to abandon this clause. "The Colonies," Oct. 18, 1879.

[w] "The Colonies," Aug. 2, Sept. 20, Dec. 13 and 20, 1879.

toria, which find no parallel in any other colony under the British Crown.

In concluding this section, it is unnecessary to comment any further upon the position of a constitutional governor upon the occurrence of differences between the legislative chambers. This point has been made sufficiently clear in our review of the preceding case. It has been therein shown that, so long as the two houses keep within the limits of the law, it is not the duty of the governor to interfere in discussions or disputes in regard to their relative powers and privileges, save only by advice or suggestions in the capacity of a mediator. Should these disputes become irreconcilable, a governor may then authoritatively interpose, and, with the consent of his ministers, dissolve the parliament, and thereby bring public opinion directly to bear upon the question at issue and upon the parties to the contestation. Position of a governor.

We will now proceed to consider the powers which appertain to a governor in the administration of this prerogative.

A. K. GHOSE.

c. *Discretion of the sovereign or her representative in granting or refusing to ministers a dissolution of Parliament.*

The prerogative of the Crown to dissolve an existing Parliament, and to summon for advice and assistance another Parliament, which shall consist, so far as the popular chamber is concerned, of an assembly newly chosen by the constituent body, is one of immense utility in bringing into harmonious co-operation the several portions of the body-politic. Prerogative of dissolution.

This prerogative may be exercised by the sovereign at any time, subject only to the constitutional rule which, under parliamentary government, necessitates that it shall be advised and approved by a minister of state, directly responsible to the House of Commons.

The prerogative power of dissolving Parliament has been aptly termed "the most popular of all the prerogatives of the Crown, which can never be exercised except for the benefit of the people, because it makes them arbiter of the dispute,"[x] — appealing to them, in the last resort, to determine the policy which shall prevail in the government of the nation, and the minister by whom that policy shall be carried out.

When and how to be exercised.

From the serious consequences which may follow the administration of this prerogative, it is manifest that it should be resorted to with great caution and forbearance. Frequent, unnecessary, or abrupt dissolutions of Parliament inevitably tend to "blunt the edge of a great instrument, given to the Crown for its protection;" and, whenever they have occurred, they have been fraught with danger to the commonwealth.

The personal sanction of the sovereign — after deliberate inquiry, and in the exercise of an unfettered judgment — must be given to the advice or recommendation of a minister, whenever it is proposed to have recourse to the prerogative of dissolution. "Upon such an occasion, the sovereign ought by no means to be a passive instrument in the hands of his ministers: it is not merely his right, but his duty, to exercise his judgment in the advice they may tender to him. And though, by refusing to act upon that advice, he incurs a serious responsibility, if they should in the end prove to be supported by public opinion, there is, perhaps, no case in which this responsibility may be more safely and more usefully incurred than when ministers have asked to be allowed to appeal to the people from a decision pronounced against them by the House of Commons. For they might prefer this

[x] Sir C. Gavan Duffy's minute, to Governor Canterbury, Commons Papers, 1873, vol. l. p. 315.

request when there was no probability of the vote of the house being reversed by the nation, and when the measure would be injurious to the public interests. In such a case, the sovereign ought clearly to refuse to allow a dissolution." [y]

Discretion of the Crown.

The sovereign has an undoubted constitutional right to withhold his consent to the application of a minister that he should dissolve Parliament. But, on the other hand, the Crown can only grant a dissolution upon the advice of a responsible minister.[z] If the minister to whom a dissolution has been refused is not willing to accept the decision of the sovereign, it is his duty to resign. He must then be replaced by another minister, who is prepared to accept full responsibility for the act of the sovereign, and for its consequences, in the judgment of Parliament.[a]

Must be sustained by a minister.

It is evident, therefore, that the sovereign — when, in the exercise of this prerogative, a dissolution is either granted or refused — must be sustained and justified by the agreement of a responsible minister. If this be constitutionally necessary, as respects the sovereign, it is doubly so in the case of a governor. For the sovereign is not personally responsible to any earthly authority; but a governor is directly responsible to the Crown for every act of his administration.[b]

Whenever the popular chamber refuses its confidence to ministers, the question whether, in doing so, it has correctly expressed the opinion of the country may properly be submitted to the test of a dissolution of Parliament.[c] Nevertheless, in the words of Charles James Fox, quoted by Sir Robert Peel in

[y] Todd, Parl. Govt. vol. ii. p. 408.

[z] E. A. Freeman, in North American Review, vol. cxxix. p. 156.

[a] Todd, Parl. Govt. vol. i. pp. 155, 209.

[b] Governor Normanby, in New Zealand Parl. Papers, 1877, A. 7, p. 3.

[c] Todd, Parl. Govt. vol. ii. p. 406.

1841, it is dangerous to admit of any other recognized organ of public opinion than the House of Commons. So long as Parliament may be reasonably presumed to represent the wishes of the people, it is not necessary to go beyond Parliament to ascertain them. But, when this point is doubtful, the Constitution permits of a dissolution, for the purpose of solving the doubt.[d]

It rests with the sovereign, however, — or, in a colony, with the representative of the sovereign, — to determine the question whether, in a particular instance, a dissolution of Parliament shall or shall not be allowed. An examination of the following precedents will enable us to arrive at certain additional principles, applicable to the exercise of this prerogative by a constitutional governor.

Precedents.

New Brunswick liquor law.

We have already noted, in a former section, a remarkable case which occurred in New Brunswick in 1855, wherein the governor, being impressed with the conviction that certain legislation in a previous session, intended to enforce prohibition of the sale of liquor, had proved injurious to the country, and was altogether in advance of the public sentiment, suggested to his ministers the expediency of an immediate dissolution of parliament in order to elicit a decided expression of public opinion upon the question. Ministers demurred to this position; but the governor called upon them either to accept responsibility for the dissolution, or to retire from office. They chose to resign; whereupon a new administration was formed, and the parliament dissolved. The result of the appeal to the country was to vindicate the wisdom of the governor's action; for the new parliament, in accordance with the opinion of the electorate, promptly repealed the objectionable legislation.[e]

In the province of Canada, in 1858, upon the defeat of Mr. (afterwards Sir) John A. Macdonald's ministry, by an adverse vote of the Legislative Assembly upon the question of the most suitable place for the future seat of government, the governor-general (Sir Edmund Head) commissioned Mr.

[d] Todd, Parl. Govt. vol. ii. p. 407.
[e] See *ante*, p. 453.

George Brown, in conjunction with Mr. (now Sir) A. A. Dorion, to form a new administration. The attempt proved unsuccessful, for reasons which will appear on the perusal of the following correspondence between Mr. Brown and the governor-general, which is taken from the newspapers of the period: — Canadian Brown-Dorion administration.

On Thursday, the following note was received by Mr. Brown: —

"TORONTO, Thursday, July 29, 1858.

"The members of the Executive Council have tendered their resignation to his Excellency the governor-general, and they now retain their several offices only till their successors shall be appointed.

"Under these circumstances, his Excellency feels it right to have recourse to you as the most prominent member of the opposition, and he hereby offers you a seat in the Council as the leader of a new administration. In the event of your accepting this offer, his Excellency requests you to signify such acceptance to him in writing, in order that he may be at once in a position to confer with you as one of his responsible advisers.

"His Excellency's first object will be to consult you as to the names of your future colleagues, and as to the assignment of the offices about to be vacated, to the men most capable of filling them.

(Signed) EDMUND HEAD.

"GEORGE BROWN, ESQ., M.P.P."

Immediately on the receipt of this document Mr. Brown waited on the governor-general, and asked time to consult his friends.

On Friday morning, Mr. Brown waited on the governor-general by appointment, and stated that he was engaged consulting his friends, but would next morning give his Excellency a final answer.

On Saturday morning, Mr. Brown waited on his Excellency with the following acceptance of the trust proposed to him: —

"Mr. Brown has the honour to inform his Excellency the governor-general that he accepts the duty proposed to him in his Excellency's communication of 29th inst., and undertakes the formation of a new administration.

"CHURCH STREET, July 31, 1858."

Governor Head will give no pledge to dissolve.

On Sunday night, at ten o'clock, Mr. Brown was waited on by the governor-general's secretary, and presented with the following memorandum: —

"His Excellency the governor-general forwards the enclosed memorandum to Mr. Brown to-night, because it may be convenient for him to have it in his hand in good time to-morrow morning.

"The part which relates to a dissolution is in substance a repetition of what his Excellency said yesterday at his interview with Mr. Brown.

"The portion having reference to the prorogation or adjournment of Parliament is important in determining the propriety of the course to be pursued.

"His Excellency therefore requests Mr. Brown to communicate the memorandum to his future colleagues, in order to avoid all misapprehension hereafter.

"GOVERNMENT HOUSE, TORONTO, Aug. 1, 1858."

Memorandum.

"His Excellency the governor-general wishes Mr. Brown to consider this memorandum, and to communicate it to the gentlemen whose names he proposes to submit to his Excellency as members of the new government.

"The governor-general gives *no pledge or promise, express or implied, with reference to dissolving parliament.* When advice is tendered to his Excellency on this subject, he will make up his mind according to the circumstances then existing, and the reasons then laid before him.

"The governor-general has no objection to prorogue the parliament without the members of the new administration taking their seats in the present session. But, if he does so, it ought, his Excellency thinks, to be on an express understanding that parliament shall meet again as soon as possible, say in November or December. Until the new ministers meet parliament, his Excellency has no assurance that they possess the confidence of the majority of the house.

"The business transacted in the interval ought, in his opinion, to be confined to matters necessary for the ordinary administration of the government of the province.

"If parliament is prorogued, his Excellency would think it

very desirable that the bill for the registration of voters, and that containing the prohibition of fraudulent assignments and gifts by traders, should be proceeded with and become law, subject, of course, to such modifications as the wisdom of either house may suggest. Besides this, any item of supply absolutely necessary should be provided for by a vote of credit, and the money for repairs of the canals, which cannot be postponed, should be voted.

"His Excellency can hardly prorogue until these necessary steps are taken. If parliament merely adjourns until after the re-election of the members of the government, the case is different, and the responsibility is on the house itself. A prorogation is the act of his Excellency; and, in this particular case, such act would be performed without the advice of ministers who had already received the confidence of parliament. His Excellency's own opinion would be in favour of proroguing, if the conditions above specified can be fulfilled, and if Mr. Brown and his colleagues see no objection.

(Signed) EDMUND HEAD."

"GOVERNMENT HOUSE, TORONTO, July 31, 1858."

Early on Monday morning, Mr. Brown, on his own personal responsibility, and without consulting his proposed colleagues, sent the following note to the governor-general: —

"Mr. Brown has the honour to acknowledge receipt of his Excellency the governor-general's note of last night, with accompanying memorandum.

"Before receiving his Excellency's note, Mr. Brown had successfully fulfilled the duty entrusted to him by the governor-general, and will be prepared, at the appointed hour this morning, to submit for his Excellency's approval the names of the gentlemen whom he proposes to be associated with himself in the new government.

"Mr. Brown respectfully submits that, until they have assumed the functions of constitutional advisers of the Crown, he and his proposed colleagues will not be in a position to discuss the important measures and questions of public policy referred to in his Excellency's memorandum.

"CHURCH STREET, Aug. 2."

On Monday morning, at half-past ten, Mr. Brown waited on his Excellency, and submitted for his approval the names

New ministry request a dissolution.

of the proposed government. At noon, on the same day, the members of the government took the oaths of office. On Monday night, adverse votes were given against the administration in both houses. On Tuesday, Mr. Brown waited on his Excellency, and informed him that the cabinet advised a prorogation of parliament, with a view to a dissolution. The governor-general requested the grounds of this advice to be put in writing. In compliance with his Excellency's request, the following memorandum was communicated to the governor-general: —

"His Excellency's present advisers having accepted office on his Excellency's invitation, after the late administration had, by their resignation, admitted their inability successfully to conduct the affairs of the country in a parliament summoned under their own advice, and being unanimously of opinion that the constitutional recourse of an appeal to the people affords the best, if not the only solution of existing difficulties, respectfully advise his Excellency to prorogue parliament immediately with a view to a dissolution.

"When his Excellency's present advisers accepted office, they did not conceal from themselves the probability that they would be unable to carry on the government with the present House of Assembly. That house, they believe, does not possess the confidence of the country; and the public dissatisfaction has been greatly increased by the numerous and glaring acts of corruption and fraud by which many seats were obtained at the last general election, and for which acts the house, though earnestly petitioned so to do, has failed to afford a remedy.

"For some years past, strong sectional feelings have arisen in the country, which, especially during the present session, have seriously impeded the carrying on of the administrative and legislative functions of the government. The late administration made no attempt to meet these difficulties or to suggest a remedy for them, and thereby the evil has been greatly aggravated. His Excellency's present advisers have entered the government with the fixed determination to propose constitutional measures for the establishment of that harmony between Upper and Lower Canada which is essential to the prosperity of the province. They respectfully submit that they have a right to claim all the support which his

Excellency can constitutionally extend to them in the prosecution of this all-important object.

"The unprecedented and unparliamentary course pursued by the House of Assembly, which immediately after having, by their vote, compelled the late ministry to retire, proceeded to pass a vote of want of confidence in the present administration, without notice, within a few hours of their appointment, in their absence from the house, and before their policy had been announced, affords the most convincing proof that the affairs of the country cannot be efficiently conducted under the control of the house as now constituted."

At two o'clock this day, the following memorandum was received from the governor-general:—

Governor Head's reasons for refusing.

"His Excellency the governor-general has received the advice of the Executive Council to the effect that a dissolution of parliament should take place.

"His Excellency is no doubt bound to deal fairly with all political parties; but he has also a duty to perform to the queen and the people of Canada paramount to that which he owes to any one party, or to all parties whatsoever.

"The question for his Excellency to decide is not,—'what is advantageous or fair for a particular party?' but what upon the whole is the most advantageous and fair for the people of the province.

"The resignation of the late government was tendered in consequence of a vote of the house, which did not assert directly any want of confidence in them.

"The vote of Monday night was a direct vote of want of confidence on the part of both houses. It was carried in the Assembly by a majority of forty in a house of a hundred and two, out of one hundred and thirty members, consequently by a majority of the whole house, even if every seat had been full at the time of the vote.

"In addition to this, a similar vote was carried in the upper house by sixteen against eight, and an address founded on the same was adopted.

"It is clear that under such circumstances a dissolution, to be of any avail, must be immediate. His Excellency the governor-general cannot do any act other than that of dissolving parliament by the advice of a ministry who possess the confidence of neither branch of the legislature.

"Is it then the duty of his Excellency to dissolve parliament?

"It is not the duty of the governor-general to decide whether the action of the two houses on Monday night was, or was not in accordance with the usual courtesy of parliament towards an incoming administration. The two houses are the judges of the propriety of their own proceedings. His Excellency has to do with the conclusions at which they arrive, provided only that the forms observed are such as to give legal and constitutional force to their votes.

"There are many points which require careful consideration with reference to a dissolution at the present time. Amongst these are the following: —

"I. It has been alleged that the present house may be assumed not to represent the people; if such were the case, there was no sufficient reason why, on being in a minority in that house, the late government should have given place to the present. His Excellency cannot constitutionally adopt this view.

"II. An election took place only last winter. This fact is not conclusive against a second election now, but the cost and inconvenience of such a proceeding are so great that they ought not to be incurred a second time without very strong grounds.

"III. The business before parliament is not yet finished. It is perhaps true that very little which is absolutely essential for the country remains to be done. A portion, however, of the estimates and two bills, at least, of great importance are still before the Legislative Assembly, irrespective of the private business.

"In addition to this, the resolutions respecting the Hudson's Bay Territory have not been considered, and no answer on that subject can be given to the British Government.

"IV. The time of year and the state of affairs would make a general election at this moment peculiarly inconvenient and burthensome, inasmuch as the harvest is now going on in a large portion of the country, and the pressure of the late money crisis has not passed away.

"V. The following considerations are strongly pressed by his Excellency's present advisers as reasons why he should authorize an appeal to the people, and thereby retain their services in the Council: —

"1. The corruption and bribery alleged to have been practised at the last election, and the taint which on that account is said to attach to the present Legislative Assembly.

"2. The existence of a bitter sectional feeling between Upper and Lower Canada, and the ultimate danger to the Union, as at present constituted, which is likely to arise from such feeling.

"If the first of these points be assumed as true, it must be asked what assurance can his Excellency have that a new election, under precisely the same laws, held within six or eight months of the last, will differ in its character from that which then took place?

"If the facts are as they are stated to be, they might be urged as a reason why a general election should be avoided as long as possible; at any rate, until the laws are made more stringent, and the precautions against such evils shall have been increased by the wisdom of parliament. Until this is done, the speedy recurrence of the opportunity of practising such abuses would be likely to aggravate their character and confirm the habit of resorting to them.

"The second consideration, as to the feeling between Upper and Lower Canada, and the ultimate danger of such feelings to the Union, is one of a very grave kind. It would furnish to his Excellency the strongest possible motive for a dissolution of parliament, and for the retention of the present government at all hazards, if two points were only conclusively established; that is to say, if it could be shown that the measures likely to be adopted by Mr. Brown and his colleagues were a specific, and the only specific, for these evils, and that the members of the present Council were the only men in the country likely to calm the passions, and allay the jealousies, so unhappily existing. It may be that both these propositions are true, but, unless they are established to his Excellency's complete satisfaction, the mere existence of the mischief is not in itself decisive as to the propriety of resorting to a general election at the present moment. The certainty, or, at any rate, the great probability, of the cure by the course proposed, and by that alone, would require to be also proved. Without this, a great present evil would be voluntarily incurred for the chance of a remote good.

"VI. It would seem to be the duty of his Excellency to

exhaust every possible alternative before subjecting the province for the second time in the same year to the cost, the inconvenience, and the demoralization of such a proceeding.

"The governor-general is by no means satisfied that every alternative has been thus exhausted, or that it would be impossible for him to secure a ministry who would close the business of this session, and carry on the administration of the government during the recess with the confidence of a majority of the Legislative Assembly.

"After full and mature deliberation on the arguments submitted to him by word of mouth, and in writing, and with every respect for the opinion of the Council, his Excellency declines to dissolve parliament at the present time.

(Signed) "EDMUND HEAD.

"GOVERNMENT HOUSE, TORONTO, C. W., Aug. 4, 1858."

New ministry resign.

Immediately on the receipt of this document, Mr. Brown proceeded to the government house and placed in the hands of his Excellency the resignations of himself and colleagues.

"Mr. Brown has the honour to inform his Excellency the governor-general that, in consequence of his Excellency's memorandum of this afternoon, declining the advice of the Council to prorogue parliament with a view to a dissolution, he has now on behalf of himself and colleagues to tender their resignations.

"EXECUTIVE COUNCIL CHAMBER, TORONTO, Aug. 4, 1858."

Previous ministry reinstated.

The previous administration was accordingly recalled. In order to avoid the necessity for their formal re-election — when in fact they plausibly assumed that they had been actually reinstated in office owing to the failure of negotiations with their political opponents — the new ministers availed themselves of certain statutory provisions by which they were enabled to resume their places without vacating their seats. The nominal premier was changed, and certain minor alterations in the *personnel* of the administration took place; but substantially it was a return to power of the Macdonald ministry, and they succeeded in maintaining the policy in regard to the seat of government which had led to their temporary loss of office. Attempts were made to question their proceedings in resuming their places without going for re-elec-

tion; but ministers were sustained, not only by the Legislative Assembly, but also by judgments upon the case in the courts of law.[f]

Governor Mulgrave, in Nova Scotia, refuses a dissolution.

In 1860, the lieutenant-governor of Nova Scotia (Lord Mulgrave) was placed in a position somewhat resembling that of Sir Edmund Head in the preceding case. After a dissolution of parliament in the previous year, his ministers, who had heretofore a good working majority, found themselves considerably weakened, the opposition being almost able to turn the scale against them. Ministers declared, however, that several of their opponents were disqualified and that their seats should be vacated. They endeavoured to persuade the House to unseat these gentlemen without a resort to the legal method of trying controverted elections. But the attempt was unsuccessful. Instead, the House resolved that they had no confidence in the administration.

Whereupon ministers strongly urged upon the governor the necessity for another dissolution of parliament, not only on their own behalf, but also on public grounds. His Excellency carefully reviewed their arguments, dissented from their conclusions, and declined to accede to their request. He promised that, whenever he should be of opinion "that a constitutional necessity for a dissolution exists," he would not hesitate to appeal to the country; but he added, "so long as I remain her Majesty's representative in Nova Scotia, I shall claim to be the judge of when that time has arrived." As it was, he deemed it to be neither expedient nor for the public convenience that a dissolution should take place so soon after a general election. Accordingly the ministry resigned.

Ministry resign.

In defending his conduct upon this occasion to the secretary of state for the colonies, the governor said: — "I quite admit that when a Council is backed by a majority of the House, a governor is bound in ordinary cases to follow their advice, and that it is chiefly by his influence and persuasion that he must endeavour to direct their conduct, but Mr. Johnston (the premier) would place a governor in the same position as the queen, and the Council in the position of the cabinet at home, forgetting entirely that the governor is him-

[f] Leg. Assem. Journals, **1858**, pp. 973–976, 1001; Upper Canada Q. B. Reports, vol. xvii. p. 310; Upper Canada C. P. Reports, vol. viii. p. 479.

self responsible to the home government, and that it is no excuse for him to say in answer to any charge against his administration of affairs, I did so by the advice of my Council." Ministers having advised a dissolution after a vote of want of confidence had passed, "their advice had ceased to carry that weight which under other circumstances would attach to it;" and, "in the event of the people deciding against them," the governor would "have been left to answer for having refused to acknowledge the vote of the majority in a house which had only just been elected by the people, an act which I consider would have been most unconstitutional."

New ministry appointed.

In charging the leader of the opposition with the task of forming a new ministry, the governor required of him a written pledge that he would facilitate a legal inquiry into the right to the contested seats, and that parliament should not be prorogued until that question was decided. This pledge was given, and faithfully kept. The result of the inquiry into the legality of disputed elections proved somewhat surprising. The alleged disqualification, which had been so vehemently asserted by the ex-ministers, was not substantiated; and the members declared by their opponents to be disqualified were pronounced by the proper tribunal to have been duly elected. Nevertheless, the ex-ministers persevered in attempts to obtain a dissolution of parliament; but the governor would not yield. The house sustained the new ministry on a test vote, by a majority of four. And the colonial secretary, upon receiving the report of the governor's proceedings, expressed entire approval of his Excellency's conduct.[g]

Governor Fergusson of South Australia grants a dissolution, under parliamentary protest.

In 1871, the governor of South Australia (Sir James Fergusson) agreed to allow a dissolution to his ministers, — after their defeat, on Nov. 16, — on a vote of want of confidence, which was carried against them in the Assembly, by the casting vote of the speaker. Whereupon, both houses of parliament passed addresses, praying the governor to dismiss his ministers at once, and not to grant them a dissolution. In reply to these addresses, the governor informed the Legislative Council that he regretted his inability to comply with their request; and he informed the Assembly that, under

[g] Nova Scotia Assem. Journals, **1860**, appx. pp. 11-46; *ibid.* **1861**, appx. no. 2.

existing circumstances, he did not feel justified in refusing to his advisers the appeal which they desired to make to the constituencies from the vote of the house. On the same day, the governor proceeded to prorogue parliament, with a view to its immediate dissolution.[h]

Governor Canterbury, of Victoria, refuses a dissolution.

In May, 1872, the Legislative Assembly of Victoria having agreed to a vote expressing a want of confidence in the administration of Mr. (afterwards Sir) C. Gavan Duffy, the cabinet presented to the governor (Lord Canterbury) a minute, expressing their conviction that they were bound to give effect to this vote, either by an immediate resignation of office or by recommending a speedy dissolution of parliament.

They believed that a dissolution of parliament, as an alternative to resignation of office, was justifiable under any one of the following circumstances: —

"1. When a vote of 'no confidence' is carried against a government which has not already appealed to the country.

"2. When there are reasonable grounds to believe that an adverse vote against the government does not represent the opinions and wishes of the country, and would be reversed by a new parliament.

"3. When the existing parliament was elected under the auspices of the opponents of the government.

"4. When the majority against a government is so small as to make it improbable that a strong government can be formed from the opposition."

All these conditions they believed to be united in their own case. The present ministry was appointed a year ago, after a general election; and the constituencies had had no opportunity of pronouncing upon their public policy.

This memorandum, otherwise very able, contained one grave error. It alleged that, "in England, it may be said to have become a maxim of constitutional law that the alternative of resignation or dissolution is left absolutely to the discretion and responsibility of ministers." And it inferred, from this erroneous assumption, that a similar rule should be

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[h] South Australia Leg. Coun. Journals, **1871**, p. 65; House of Assem. Journals, **1871**, pp. 235, 237.

recognized, equally without qualification, as applicable to the colonies.[1]

In reply, the governor pointed out that, inasmuch as of late years, it had not been customary for the sovereign to refuse a dissolution asked for by her ministers, as an alternative to a resignation of office, — a circumstance from which, however, a very questionable inference was drawn in respect to the constitutional law of the mother country, — it was not therefore to be assumed that a governor had no discretion in such matters. Colonial governors, though not constitutionally responsible to colonial legislatures, are personally responsible to the Crown. This responsibility involves practically, though indirectly, serious local responsibilities, — especially in regard to dissolutions, — of which no governor can divest himself.

Adverting to the "four conditions" above specified, — in any one of which, Mr. Duffy believed, recourse might properly be had to a dissolution, — the governor declined to admit that any or all of these considerations "would, under all conceivable circumstances, and without any reference whatever to any other fact or facts, however important, justify a dissolution."

Admitting the propriety of the recommendation to dissolve as coming from his advisers, the governor himself, in the exercise of his constitutional discretion, thought it premature at the time to act upon that advice.

The vote of censure which had led to the present crisis was principally directed against acts of administration and not of legislation. The governor was not satisfied that the majority in the Assembly would not have approved of the proposed legislative measures of ministers. If not, with parties so evenly balanced in the Assembly, a new administration might probably be formed which would obtain sufficient support from the existing chamber to enable them to carry on the public business.

The adoption of a non-confidence vote by the Assembly had undoubtedly rendered it impossible for the present ministry to remain in office unless the Assembly should be dissolved,

[1] Commons Papers, **1873**, no. 346, p. 7 (vol. l. p. 315). See also Victoria Assembly Votes and Proceed. **1872**, no. 45.

but the governor deemed it to be his duty, under existing circumstances, to put himself into communication with the party by which this vote had been carried, and endeavour to form a ministry without being obliged to resort to that which he considered would be essentially, if not exclusively, a penal dissolution.

Whereupon the Duffy administration resigned. They did not feel warranted in debating any of the grounds upon which his Excellency had arrived at his decision, but protested against being understood as implying their acquiescence in those reasons.

The governor then sent for Mr. Francis, who succeeded in forming a new administration to which the confidence of parliament was given, without the necessity for having recourse to a dissolution.[j]

Reasons for approving of Lord Canterbury's decision.

In reviewing this difficult case, it is evident in the first place, that Lord Canterbury was right when he vindicated for himself a "constitutional discretion" to decide as to the expediency or otherwise, upon grounds of public policy, whether or not to grant an appeal to the country to this defeated administration.

No doubt the governor's refusal of this appeal was a great hardship to the Duffy ministry, for they had good reason to anticipate a favourable response had they been allowed a dissolution.

It has been often urged that a ministry is entitled to claim from the Crown the dissolution of a parliament which had been elected under the auspices of their political opponents, and that this claim may be preferred whenever the popular branch thinks fit to withhold its confidence from an administration. But neither constitutional usage nor a just appreciation of the monarchial office, will warrant any such limitation of the discretion of the Crown in the exercise of this prerogative. For it is not a legitimate use of the prerogative

j Victoria Assembly, Votes and Proceed. **1872**, no. 45. And see Victoria Year Book, p. 1.

of dissolution to resort to it when there is no important political question upon which contending parties are directly at issue, and merely in order to maintain in power the particular ministers who are in office at the time.[k]

It has been alleged that eminent constitutional authorities in England expressed their opinion that Lord Canterbury acted on this occasion too arbitrarily in refusing to grant a dissolution to the Duffy administration.[l] But, on the other hand, it would appear that the governor's decision was justified by the result, inasmuch as the ministry which succeeded to office had no difficulty in securing the confidence of the existing Assembly. And upon the retirement of Lord Canterbury from the government of Victoria in the following year, when his term of service expired, he received cordial addresses of respect and consideration for his public conduct from both houses of the colonial parliament.

New Zealand ministry ask for a dissolution.

In New Zealand, on Oct. 5, 1872, the Stafford administration was defeated in the House of Representatives upon a motion by Mr. (now Sir) Julius Vogel of want of confidence, which was passed by a majority of two. This ministry had been in existence but four weeks, their predecessors having resigned upon a similar defeat by an adverse majority of three. These facts seemed to show "that no party in the present house was strong enough to command a reliable working majority."

Mr. Stafford accordingly advised the governor (Sir George Bowen) to grant a dissolution of parliament, the existing house having been elected during the time of the preceding administration, which at first had a large majority, but which had gradually dwindled away. From the best information at his command, Mr. Stafford was satisfied that the result of a dissolution would be the return of a decisive majority in favour of his policy.

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[k] See Todd, Parl. Govt. vol. ii. p. 406.
[l] Private Letter from Victoria.

Before replying to this request, the governor inquired whether the existing parliament would be ready to grant the necessary supplies to carry on the public service until a new parliament could be convened. Mr. Stafford answered that he had no doubt that, in accordance with constitutional usage, the requisite supplies for the public service, limited to the shortest period which would enable a new parliament to meet, would be voted.

Governor Bowen refuses.

On Oct. 7, Governor Bowen made known his decision. After carefully reviewing the case in all its bearings, he said he was unable to acquiesce in an immediate dissolution. He believed frequent dissolutions to be objectionable on principle. "They have an obvious tendency to cause members to be regarded as mere delegates of the constituencies and not as representatives of the country at large." The existing parliament, elected for five years, is barely eighteen months old. No measure of urgent importance on which public opinion is divided is before the country. The governor was not, therefore, satisfied that a dissolution would materially alter the present evenly balanced state of parties. He would prefer to try and form a new ministry on a wider basis, which might be strong enough to carry on the government without delay or interruption.

New ministry.

Accordingly, the Stafford administration resigned office, and on Oct. 11, the Waterhouse ministry was appointed. This cabinet at once commanded a strong working majority in the legislature, a circumstance which, coupled with other subsequent events, proved unmistakably that the general sentiment of parliament and of the country was in favour of the course pursued by Governor Bowen on this occasion.[m]

Two months afterwards, however, the premier (Mr. Waterhouse) unexpectedly brought about another ministerial crisis by placing his resignation in the governor's hands. There had been no difference whatever between ministers and the governor, nor any serious dissensions in the cabinet. But Mr. Waterhouse was dissatisfied with the relations between

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[m] New Zealand House of Representatives Journals, **1872**, appx. A. no. 10; Leg. Coun. Journals, **1873**, appx. no. 4, p. 5. The imperial secretary of state, as usual under such circumstances, acknowledged the receipt of the governor's despatches, in explanation of his conduct, without commenting thereon. *Ibid.* p. 19.

himself and Mr. Vogel, a brother minister, whose influence in the cabinet was seemingly predominant. He therefore determined to retire. The governor begged him to reconsider his resolve, in view especially of the fact that the resignation of the prime minister must, by constitutional usage, dissolve the ministry, and this too at a very inconvenient period. But, as Mr. Waterhouse adhered to his determination, the governor requested Mr. Fox to assume the premiership and reconstruct the ministry. Mr. Fox undertook this duty, but in a month afterwards he also resigned. Mr. Vogel was then appointed premier, making five successive administrations in seven months! The secretary of state for the colonies was duly notified of these transactions, but he contented himself with acknowledging the receipt of the despatches communicating the information.[n]

Five ministries in seven months.

In the same colony, in November, 1877, the premier, Sir George Grey, requested the governor, the Marquis of Normanby, to dissolve the House of Representatives, on account of the evenly balanced state of parties therein. The Grey administration had taken office on Oct. 13, previous, on the defeat of their predecessors upon a vote of want of confidence. On Oct. 24, before the new ministers had announced their intended policy, a vote of want of confidence was submitted against them. This was negatived, on Nov. 6, by the casting vote of the speaker. Shortly after, a similar motion was proposed, during the debate upon which ministers asked for a dissolution of parliament.

Sir G. Grey asks for a dissolution,

They based their claim to a dissolution upon the fact that at the last general election the ex-ministry were in power, and upon their conviction that the new elections would give them a large majority of supporters.

which Governor Normanby declines.

In reply, the governor expressed his opinion that a dissolution was, at present, undesirable; principally, because (1) he believed that the existing difficulties might be disposed of without recourse to such an act; (2) because the parliament was now only in its second session, and legislation was contemplated upon the question of representation, which would probably necessitate a dissolution; (3) because no great ques-

[n] New Zealand Parl. Papers, **1873**, A. 1, a. pp. 7–20. New Zealand Statistics, **1876**, pp. 6, 7.

tion was at issue upon which to appeal to the constituencies; (4) because he had no assurance that a dissolution would produce a working majority in favour of ministers; and (5) because no supply had yet been granted; and unless the house should first vote supplies, for at least three months, the governor could not undertake to consider the question of a dissolution.

Furthermore, it did not appear that from the outset this administration had been able to command a majority of the house. The speaker's vote, which alone had saved them from defeat, is, according to parliamentary usage, always given with a view not to preclude the house from reconsidering a question so decided upon. A speaker's casting-vote, given to negative a vote of want of confidence, "can hardly be taken as an expression of confidence on the part of the house."

Sir George Grey's answer to the governor's memorandum was, for the most part, a vindication of his right to a dissolution, whether or not supply should be previously granted, as to which, he believed, "the governor had nothing to do, because the decision ought to rest with the ministers, the parliament, and the people."

Sir G. Grey denies governor's right to refuse.

In a subsequent memorandum, ministers strongly urged the necessity, on financial grounds, for a speedy dissolution. They denied the right of the governor to base his exercise of the power to dissolve parliament upon the prerogative of the Crown. They contended that it was a power derived from the constitution act, and was, therefore, "one of those questions on which, according to constitutional law, the governor should act on the advice of his ministers." They, therefore, reasserted their right to a dissolution, "unfettered by any condition of supplies being granted;" and declined to enter into any compromise in the matter.

The governor, in his reply, pointed out that, under the constitution act, his right, at his own discretion, to prorogue or dissolve the Assembly, was clear; and that, by the royal instructions, his authority to exercise that right, notwithstanding the opposition of his ministers, was established. Accordingly, he "could not admit that ministers have an unqualified right to a dissolution when the governor may consider it undesirable or unnecessary."

Ministers still endeavoured to controvert the governor's arguments; but he refused to discuss with them his constitutional position, responsibilities, or duties; though he admitted their undoubted right to appeal to her Majesty, through the secretary of state, in respect to his conduct, whenever he might deem it his duty to decline to comply with their advice. Should such a complaint be preferred, the governor would forward it to the secretary of state with such explanations as might be required.

The governor is firm.

Reiterated attempts were made by the ministry to induce the governor to give way and grant them a dissolution of parliament, in conformity with the rights which they contended appertained to the Queen's ministers in England. But his Excellency adhered to his resolve, not under present circumstances to yield to their request, until at any rate all other expedients had failed to beget a good understanding between ministers and the house. He did not think it expedient to impose an unconstitutional pressure on parliament by promising a dissolution at some future period, when it might suit ministers to go to the country; nor did he see any immediate need for such an act. He would not deny that ministers in a colony have equal rights with ministers in England, in matters that do not affect imperial interests; but he did not believe that, in similar circumstances, a minister in England would ask for a dissolution "when there was no great political question directly at issue between the contending parties, and simply in order to maintain in power" an existing administration.

The upshot of the matter was that parliament was prorogued, without reference to any contemplated dissolution, the usual supplies, meanwhile, having been voted for the service of the current year.[o]

He declines a second request to dissolve.

A month after the prorogation, Sir George Grey renewed his application to the governor for a dissolution of parliament. But at this time, Lord Normanby was of opinion that there was a fair prospect of the ministry being able to secure, in the next session, the support of the popular chamber. And as there was no definite question at issue upon which an appeal to the country could be made, the governor again declined to

[o] New Zealand Parl. Papers, **1877**, A. 7; *ibid.* **1878**, A. 1, p. 3.

accede to this request. Upon which Sir George Grey repeated his assertion that the governor was not warranted in exercising any discretion in the matter, and claimed that he ought to grant a dissolution whenever a ministry thought fit to demand it.

Whereupon, his Excellency submitted the entire correspondence on this question to the secretary of state for the colonies. Sir M. Hicks-Beach, in a despatch dated Feb. 15, 1878, expressed his dissent from Sir George Grey's opinion, in respect to the powers of the governor, as being an undue limitation of the prerogative of the Crown. He said that "the responsibility, which is a grave one, of deciding whether, in any particular case, it is right and expedient, having regard to the claims of the respective parties in parliament, and to the general interests of the colony, that a dissolution should be granted, must, under the constitution, rest with the governor. In discharging this responsibility, he will, of course, pay the greatest attention to any representations that may be made to him by those who, at the time, are his constitutional advisers; but, if he should feel himself bound to take the responsibility of not following his ministers' recommendation, there can, I apprehend, be no doubt that both law and practice empower him to do so."[p]

Secretary of state sustains the Governor.

The Grey administration continued in office for about two years. But, on July 29, 1879, they were defeated by a majority of fourteen, in the House of Representatives, upon an amendment to the address in answer to the speech from the throne, at the opening of the session. This amendment expressed a want of confidence in the ministry.

Defeat of Grey ministry.

Sir George Grey then applied to the governor (Sir Hercules Robinson) to grant him a dissolution of parliament. His Excellency responded to the request in the following memorandum, which was laid on the table of the house by the premier:[q] —

"I have carefully considered the position in which ministers are placed by the defeat which they have just sustained in the House of Representatives, upon a no-confidence motion; and

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[p] *Ibid.*, **1878** appx. A. 2, p. 14; New Zealand Gazette, **1878**, pp. 911–914.

[q] New Zealand Parl. Papers, **1879**, A. 1.

Governor Robinson permits an appeal to the people, conditionally.

I am clearly of opinion that they have a fair constitutional claim to a dissolution.

"No doubt, a general election at the present moment would be inconvenient, having regard to the condition of public business (the prevailing financial depression) and the circumstances of the colony generally, — especially the native difficulties upon the west coast. But I presume that ministers have carefully considered the consequences of such a step, before tendering to me advice to dissolve; and I am, therefore, prepared to adopt their recommendation, — leaving with them the entire responsibility of such a proceeding.

"At the same time, I think it right to stipulate that the well-recognized constitutional principles which govern cases like the present shall be strictly adhered to. Ministers have lost the confidence of the representatives of the people, and are about to appeal from them to the country. A majority of the House of Representatives has declared that ministers have so neglected and mismanaged the administrative business of the country that they no longer possess the confidence of parliament. It is indispensable, in such circumstances, if ministers do not at once resign, that parliament shall be dissolved with the least possible delay; and that, meanwhile, no measure shall be proposed that may not be imperatively required, nor any contested motion whatever brought forward. It is necessary also, and in accordance with established constitutional precedent, that the new parliament shall be called together at the earliest moment at which the writs are returnable.

"If ministers accept a dissolution upon this understanding, I beg that, in any explanation which the premier may think proper to make to parliament, the answer which I have given to his tendered advice may be stated in my own words.

"HERCULES ROBINSON.

"July 30, 1879."

By a "contested motion," the governor subsequently explained to Sir George Grey that he did not mean a bill of supply or a loan bill. Ministers, thereupon, entered into communication with the opposition, for the purpose of arriving at a good understanding in respect to the measures which should be allowed to proceed without objection, as being of imperative importance, and not involving any dis-

puted principle.[r] On Aug. 11, parliament was prorogued by commission, and the dissolution ensued shortly afterwards.

Both houses ask for an immediate meeting of new parliament.

Meanwhile, however, a curious, if not an unprecedented, circumstance occurred. The majority in both branches of the legislature were not disposed to accept the assurances of the premier that a new parliament should be convened at the earliest possible moment. They, therefore, passed formal resolutions and addresses to the governor on the subject, requesting his Excellency to take such steps as might afford an adequate security that the meeting of the new parliament should not be delayed any longer than might be indispensably necessary. Whereupon, the following correspondence took place between the governor and the premier, which, by desire of the governor, was presented to both houses of the General Assembly:[s] —

"*Memorandum for the Premier.*

"The governor has received, from the speaker of the Legislative Council and from the speaker of the House of Representatives, addresses which have been adopted by each house of the legislature, in effect urging the governor to insist upon the faithful fulfilment of the stipulation which he attached to the promise of a dissolution; namely, that the new parliament shall be called together at the earliest moment at which the writs can be made returnable.

"In view of these circumstances, and of the fact that ministers have been condemned in both houses of parliament, — having regard also to the critical state of native affairs, — the governor considers that it is his bounden duty to take every possible precaution that he shall be in a position to recur to the advice of a new parliament at the earliest date allowed by law.

"The governor desires, therefore, to inform the premier that, before proroguing parliament with a view to dissolution, he must receive from the premier a written assurance, which shall appear to the governor satisfactory, as to the date on which the premier will advise the issue of the new writs, and the date upon which he will advise that they be made returnable.

"HERCULES ROBINSON.

"Aug. 7, 1879."

[r] New Zealand Parl. Deb. vol. xxxi. p. 327.
[s] New Zealand Parl. Papers, 1879, A. 2.

"*Memorandum for his Excellency.*"

Ministerial pledge thereon.

"Sir George Grey presents his respectful compliments to Sir Hercules Robinson.

"In obedience to the terms of the directions contained in the governor's memorandum of the 7th inst., Sir George Grey gives a written assurance that he will advise that the writs summoning the new parliament shall be issued within two days after the dissolution, and that they shall be made returnable within thirty days after their issue; and Sir George Grey trusts that this assurance will be satisfactory to the governor.

"G. GREY.

"WELLINGTON, Aug. 8, 1879."

"*Memorandum for the Premier.*

"The governor thanks the premier for his memorandum of this date, and in reply has much pleasure in informing him that the assurance which it contains is quite satisfactory.

"If the premier sees no objection, the governor would be glad if he would communicate to the Legislative Council and to the House of Representatives the governor's memorandum of yesterday, with the subsequent memoranda on the subject, as showing to both houses the action taken by the governor upon their addresses.

"HERCULES ROBINSON.

"Aug. 8, 1879."

Grey ministry defeated.

The elections virtually turned on the question whether Sir G. Grey should continue to rule the colony. They resulted unfavourably to his administration; so that, on the assembling of the new parliament, on Sept. 24, a vote of want of confidence was proposed, which, after a protracted debate, was carried against ministers, but only by a majority of two. On Oct. 3, the ministry resigned. Mr. John Hall was then entrusted by the governor with the formation of a new administration, — a task which he successfully accomplished. Sir George Grey accepted his defeat, and declared his intention of not again being a candidate for office.[t]

New ministry formed.

Mr. Hall announced the intended policy of his ministry in the House of Representatives, on Oct. 14. But the new ad-

[t] "The Colonies," newspaper, Oct. 11, and Nov. 29, 1879.

ministration were met by vehement opposition in that chamber, before they had time to prove their fitness for office. A vote of want of confidence was proposed against them at the outset. They succeeded, however, in winning over certain of their opponents; this motion was withdrawn, and the new ministry proceeded successfully with public business.[u]

Sir George Grey, however, undertook to assail the new premier upon extraordinary grounds, and in a very unprecedented and discreditable manner. Sir G. Grey tries to keep new premier out of the House.

It appears that Mr. Hall was a member of the Legislative Council; but, previously to the general election, he determined to resign his seat therein, with a view to election to the House of Representatives, and for the purpose of leading his party in that house. He accordingly applied to the governor for permission to relinquish his seat as a life-member in the Council, which had been repeatedly done before, under similar circumstances. Sir G. Grey (then in office as premier) endeavoured to thwart Mr. Hall in this project, and declined to consent to the formal acts necessary to complete the transaction.

The governor remonstrated with the premier for such ungenerous conduct. He pointed out that it was a perfectly justifiable as well as a not unusual proceeding, and declined "to lend himself to any device for placing one of the premier's political opponents under a disability not imposed by law," declaring that he would not be "a party to such an unprecedented and strained exercise of a mere formal act of prerogative for party purposes." Sir G. Grey, however, persisted in his opposition, and warned Sir Hercules Robinson that "every act of the governor must be done under advice and ministerial responsibility." The governor replied that this doctrine was undoubtedly correct, but that a governor "could always reject ministerial advice, if he were prepared to face the constitutional consequences; and that, in this case, if such advice were tendered, he should unquestionably refuse it, which would leave the premier with the constitutional alternative of resignation or acquiescence in the refusal." The premier then took his departure, saying he should con-

[u] "The Colonies" newspaper, Dec. 6, and 27, 1879, New Zealand Parl. Deb. vol. xxxii. p. 579.

But is frustrated by the governor.

sult his colleagues. The result was, that the necessary papers to complete Mr. Hall's resignation were quietly sent to the governor for his signature.

Afterwards, in debate in the House of Representatives, Sir George Grey, without permission of the governor, disclosed these particulars, disavowed any responsibility for the transaction by which Mr. Hall was enabled to vacate his seat in one house so as to become a candidate for the other, and threw upon the governor the *onus* and responsibility of it.

Sir G. Grey declines responsibility.

This placed the governor in a dilemma. He was anxious not to obtrude his name and authority before either house of parliament in an irregular way; and yet he could not allow such unwarrantable conduct on the part of Sir George Grey to pass without notice or explanation. His Excellency therefore put in writing the history of this occurrence, and gave the memorandum to Mr. Hall to make what use of it he pleased. Mr. Hall read this paper to the house. It plainly showed that, while Sir G. Grey had publicly stated that he had opposed the act in question, but that the governor had insisted upon it, and therefore it had been done by him, "without advice;" that this statement was, in fact, "only half the truth." Sir G. Grey's subsequent conduct, in causing the papers necessary to perfect Mr. Hall's resignation to be forwarded to the governor "without any adverse advice," was tantamount to his formal acquiescence in the act, and rendered himself, as premier, and not the governor, solely responsible for the same to the House of Representatives.[v] It need not be said that this is sound doctrine, for no ministry can relieve themselves from the responsibility of having advised an act done by the Crown during their continuance in office.[w]

Tasmania ministry ask for a dissolution.

In Tasmania, in May, 1877, the Fysh ministry having been defeated in the House of Assembly on a vote of want of confidence, the premier requested the governor to grant them a dissolution, inasmuch as they had lately acceded to office upon the voluntary resignation of their predecessors, and because, for years past, there had been a want of co-operation between the Two Houses of Parliament.

The governor (Mr. F. A. Weld) in a memorandum dated May 11, 1877, reviewed the position of ministers. He admit-

[v] New Zealand Parl. Deb. vol. xxxii. pp. 283–289, 387, 397.
[w] See *ante*, pp. 19, 39, 94.

ted the reasonableness of their request, and consented to the dissolution. But in a subseqent despatch to the colonial secretary, he took occasion to declare "that in all cases the representative of the Crown should be more careful in granting a dissolution than the Crown might be in England; as he must sometimes be advised by ministers not sufficiently determined to waive small party advantages, somewhat accustomed occasionally to the sledge-hammer style of political warfare, and not uniformly imbued with that constitutional knowledge and spirit which often seems hereditary and is generally inherent in British statesmen." Governor Weld accedes,

His Excellency did not refer, in his memorandum, to the question of supplies, because he thought that "the Crown ought not beforehand to express its decision upon a theoretical question not immediately before it," and because "he had no right to suppose that parliament would depart from the most usual and most constitutional course of voting necessary supplies for the period that must elapse before the meeting of the new parliament." But he did not hesitate to say "that nothing but the most extreme and clear public necessity would justify the Crown in dissolving after supplies had been refused." And he privately notified the prime minister that, in the event of previous supply being now refused, he should require the administration to resign. The premier replied: "I would not ask you, Sir, to do any thing that you consider to be contrary to your duty." The supplies were accordingly voted. provided supply is first voted.

The governor's memorandum was laid on the table of the Assembly by ministers, and the house proceeded to criticise the contents of that document. They recorded their opinion that his Excellency's statements, upon which he had agreed to allow the ministers a dissolution of parliament, were inaccurate, and that consequently the deductions therefrom were erroneous. This was unmistakably to impugn the governor's decision; and was a proof of the irregularity of the course taken by ministers in making public a document which should have been held as confidential, thereby exposing the governor to attack from their political opponents. His Excellency, however, refrained from any attempt at self-justification, and would not allow himself to be drawn into controversy with the House of Assembly. He dissolved parliament, and then Governor charged with error by Assembly.

wrote a despatch to the secretary of state for the colonies in explanation of his conduct. In reply, he received a despatch expressing approval by her Majesty's government of his action in this matter. Pursuant to an address from the Legislative Council, this correspondence was communicated to the local parliament.[x]

Another Tasmania ministry asks for a dissolution,

In 1879, the Crowther administration (which replaced that of Mr. Giblin in December, 1878; Mr. Giblin having succeeded Mr. Fysh as premier, without any further change in the ministry in March, 1878), finding themselves too weak to carry on the government in the existing House of Assembly, applied to the governor to grant them a dissolution of parliament. The ministry, moreover, had been further weakened by the following resolution, which was carried in the Legislative Council on Oct. 14, 1879: —

"That the conduct of the Hon. W. L. Crowther, the premier of the colony, in promoting an appeal to the public of Tasmania (on behalf of Gertrude Kenny, late matron of the New Norfolk Asylum), [who had been dismissed from her office by order of the asylum commissioners], in which grave reflections are made on the commissioners of the hospital for the insane, is unwarranted, highly unbecoming, and deserves the censure of this Council."

The ministerial memorandum for the governor was as follows: —

"Ministers considered it their duty to ask for a dissolution for the following reasons: —

"1. Parties being so equally divided in the present house, the difficulty, if not impossibility, of carrying on the government in a satisfactory manner appeared to them to warrant an appeal to the several constituencies.

"2. That ministers having submitted a distinct policy, including direct taxation on property and income and the reform of the constitutional act, the country should be called upon to express an opinion favourable or otherwise of that policy.

"3. That ministers were bound, in justice to their supporters and themselves, to evidence their willingness to submit both the policy and *personnel* of the administration to the

[x] Tasmania Leg. Coun. Journals, **1877**, sess. 2, no. 45; *ibid.* sess. 4, no. 19.

verdict of the electors, as the present house had, by a majority of one, expressed its want of confidence in ministers.

"The premier and the colonial secretary waited upon the governor, and asked for a dissolution on the grounds above stated, and expressed their belief that they were justified in making the application, and desirous at the same time that whatever decision his Excellency might arrive at such application should be duly recorded."

The governor in the following memorandum, addressed to the premier, declined to grant a dissolution: — which Governor Weld declines to grant.

"1. A vote of want of confidence in ministers having been carried in the House of Assembly, they have asked for a dissolution.

"2. The present House of Assembly was elected a little over two years ago.

"3. It was elected under the auspices, and the dissolution had been given at the request, of the party now in office.

"4. I have no assurance or ground for belief that a general election would now materially alter the strength of parties.

"5. No distinct division of parties in the house upon any question to be put to the country has been shown to my satisfaction. The question of direct taxation was to some extent brought before the country at the last election, but appeared little to influence the result. An income-tax bill passed the House of Assembly last session, and the principle of direct taxation has since been virtually reaffirmed by that house. Now I am asked to dissolve the Assembly, and to appeal to the country on a financial policy which has never been rejected by that house, nor even by the Legislative Council this session.

"6. The question of the relations between the two houses has indeed been raised, but it has not taken a substantial form, or become a line of party demarcation.

"7. The Legislative Council has this session expressed no opinion upon either of these two questions of policy.

"8. In my opinion, the time has not yet arrived, even though it possibly may arrive, when these questions can be properly considered ripe for reference to the country as a test between one party and the other. Were a dissolution now

granted, the real issue at a general election would be the personal question of confidence in certain members of the ministry as decided in the house, or of the opposition, and not questions of policy.

"9. Considering all the circumstances of the case I do not think that such an issue, though in some cases a sufficient ground for an appeal to the country, now warrants the dissolution of a comparatively young House of Assembly, at a time when the financial position of the colony is admittedly suffering by the delay of urgently necessary measures, until it has been proved that the present parliament cannot furnish a ministry able to carry on the public business, more especially as new combinations are understood to have been under consideration by members of both parties, and divergences of opinion on political questions between opposite sides of the house do not seem rigidly defined or clearly irreconcilable.

"10. It will moreover be in the recollection of the premier and of the colonial secretary that, before their assumption of office, I warned them that I was not prepared to grant a dissolution under existing circumstances without special and strong reasons being adduced; that I had taken the same course with Mr. Giblin, their predecessor, who, concurring with my view, did not ask for a dissolution.

"Ministers will also observe on reference to my memorandum of May 11, 1877, that most of the conditions which then led me to give their party a dissolution are now wanting, and consequently I am unable to accept their advice.

"F. A. WELD.

"GOVERNMENT HOUSE, Oct. 18, 1879."

Upon receipt of this memorandum the premier placed the resignation of ministers in his Excellency's hands. Mr. Giblin was then sent for, and he succeeded in forming a new ministry.[y]

Adverting to the observations contained in Governor Weld's despatch to the secretary of state of May 20, 1877, in reference to the necessity for a grant of supply by a colonial Assembly in anticipation of a dissolution of

[y] Tasmania Leg. Coun. Papers, 1879, no. 66; "The Colonies," Dec. 6, 1879.

parliament in consequence of a ministerial defeat, it may be stated that in England, Parliament has never hesitated to vote whatever supplies may be required for the public service. But upon a change of ministry, or other ministerial crisis, which may necessitate a speedy dissolution of Parliament, it is obviously improper to ask the House of Commons to vote either the whole amount, or to approve of all the details of the proposed estimates, and so commit Parliament to the financial policy of a ministry whose fate is about to be determined by a general election. Under such circumstances, it is customary to limit the grant of supply to the amount absolutely required for ordinary expenditure until the reassembling of Parliament. This affords, moreover, a guarantee that there will be no unnecessary delay in convening the new Parliament.[z]

Supply always granted in England before dissolution.

But, in the colonies, this most important principle has not been uniformly observed, as will appear from various cases recorded in this section.[a] It is, however, gratifying to note that English usage in this particular is being gradually introduced into colonial practice.

Not always in colonies.

This question will be further elucidated on reference to the following case:—

In 1877, the governor of New South Wales (Sir Hercules Robinson) submitted to the secretary of state for the colonies a question in regard to the exercise of the prerogative right of dissolving parliament, upon which the views of her Majesty's government as to the administration of this prerogative were specially desired, for the guidance of colonial governors.

Governor Robinson in New South Wales.

It appears that it had become customary in New South Wales to delay the grant of the annual supplies until after the commencement of the year to which they were applicable. Sometimes this delay was protracted until eight or nine months of the new fiscal year had expired. Meanwhile, the

[z] Todd, Parl. Govt. vol. i. p. 486.

[a] And see Governor Normanby's despatch to the Earl of Carnarvon, dated Nov. 16, 1877: New Zealand Parl. Papers, **1878, A. 1, p. 4.**

Asks imperial advice as to conditional promise of a dissolution.

services were carried on by temporary monthly supply bills, based on the estimates of the previous year. Frequently, a ministerial crisis has arisen under such circumstances, and the request of the Crown for supply in furtherance of an intended dissolution, has been met by obstruction or refusal. When thus obstructed by the Assembly, ministers had obtained leave of the governor to dissolve parliament without any grant of supply. Once the services were paid by an arrangement with the government bank and without parliamentary authority.

The objections to such irregular practices are manifest. They operate injuriously upon public morality and upon the efficient administration of public affairs. They expose ministers and members of parliament alike to corrupt influences. They offer a strong inducement to the house to withhold supply in the endeavour to avert an expected dissolution, thereby threatening the very existence of parliamentary government.

Anxious to secure for the colony the benefit of English constitutional practice in such cases, Governor Robinson determined to withhold his consent to any application by ministers for authority to dissolve parliament until adequate provision had been made to defray the indispensable requirements of the public service in the interval which must elapse before the new parliament could meet; or, at any rate, until every effort to obtain supply had been first exhausted.

Accordingly on two occasions of the occurrence of ministerial crises, in the months of March and August, in 1877, his Excellency approved of the advice of his ministers to dissolve parliament, but reserved to himself the right of reconsidering his decision in the event of their appeal to the house for the grant of supply preliminary to a dissolution being refused.[b]

Pending the recurrence of a similar emergency, Governor Robinson was desirous of obtaining advice from competent constitutional authority in the mother country. He therefore wrote to the secretary of state for the colonies, on August 20, 1877, requesting to be informed whether the giving of a qualified or conditional acceptance to the advice of his ministers to dissolve parliament, was an exercise of the royal

[b] See New South Wales Leg. Assem. Journals, **1876–77**, vol. i. pp. 179, 184–193.

prerogative in unison with sound constitutional principles and with the permanent interests of the country; or whether, on the contrary, a governor was bound to give either an absolute acceptance or an absolute rejection to such advice.

In his reply, dated Dec. 15, 1877, the secretary of state for the colonies (Earl Carnarvon) expressed his approval of Governor Robinson's endeavour to check the irregular practices of "delaying to obtain supply, and of carrying on the government either without supply or upon temporary supply bills," and his hope that the colony would become alive "to the danger of practices which are inconsistent with the true spirit of representative government."

Considering the constitutional question which had been raised by the governor as one of much interest and importance, Lord Carnarvon thought it desirable to consult Sir T. Erskine May and the Speaker of the House of Commons. The replies of these eminent and experienced gentlemen, together with the letter wherein the question was submitted to them for their consideration, were as follows: —

Opinions Sir Erskine May and of Speaker Brand sought.

Mr. Herbert to Sir T. Erskine May, K.C.B.

(Confidential.)

DOWNING-STREET, Dec. 3, 1877.

SIR, — I am directed by the Earl of Carnarvon to acquaint you that the governor of New South Wales has asked for his Lordship's opinion upon a constitutional question which has arisen in the colony under his government.

2. It appears that it is not unusual for a ministry in New South Wales to be without supply, and that ministers are content to accept this position, provided they can find any expedient or excuse for holding office under it.

3. Sir H. Robinson desires to be informed whether, if whilst in this condition a political crisis arises and ministers advise a dissolution, the governor is bound either to accept or to reject this advice absolutely, or whether he would be justified in consenting to dissolve conditionally upon temporary supply being first obtained, if in his opinion the public interests should appear to render such a middle course desirable.

4. Lord Carnarvon desires me to enclose a copy of the despatch in which Sir H. Robinson has submitted this question for consideration, accompanied by a paper which he has drawn

up containing a full statement of the circumstances attending the late ministerial crises in New South Wales, and of the action which he has taken on these occasions.

5. It will be seen that on the last two occasions Sir H. Robinson has accepted the advice of his ministers to dissolve, but has reserved to himself the right of reconsidering his decision if supply were refused.

6. Lord Carnarvon apprehends that from one point of view Sir H. Robinson may be considered to have been substantially right in the course he adopted. It would be the duty of the governor in a colony having parliamentary government on the English system to discountenance any course which would have even a tendency to render the executive government independent of supply, but his Lordship also thinks that it may not unreasonably be contended, as a matter of argument, that in point of form it would have been better if in his answer to his ministers the governor had confined himself to the state of facts which had then arisen, and had not anticipated the future by giving a hypothetical decision; since, if he had informed his ministers that inasmuch as they had not got supply, he was unable to grant them a dissolution, he would not have laid himself open to the criticism that he was attaching a qualification or proviso to their advice, which it may be urged it was his duty to accept or reject without amendment.

7. His Lordship would, however, be greatly obliged if you would favour him with your opinion upon the whole subject.

I am, &c.,

ROBT. G. W. HERBERT.

P.S. — Since the above was written, Lord Carnarvon has received two further despatches, copies of which are enclosed, which seem to render it somewhat doubtful whether Sir H. Robinson can fairly be said to have attached a condition to his acceptance of the advice of his ministers on the question of dissolution.

Sir Erskine May's reply.

Sir T. Erskine May, K.C.B., to Mr. Herbert.

HOUSE OF COMMONS, Dec. 6, 1877.

SIR, — I beg to acknowledge the receipt of your letter of the 3d instant, together with the correspondence and papers transmitted to me by direction of Lord Carnarvon, and I will

briefly state my views upon the subjects referred to, as desired by his Lordship.

1. The first question raised by these papers is, whether the governor of New South Wales, in giving a qualified assent to the advice of his ministers to dissolve parliament, adopted a constitutional course. It seems to me that as the power of dissolution rests absolutely with the governor, as representative of the Crown, he is entitled to insist upon such conditions as he may deem necessary for the public interests before he proceeds to exercise that power. He was therefore warranted in giving a qualified or conditional assent according to his own discretion.

2. At the same time, the form in which his conditional assent was given appears open to some objections. His resolution being communicated by his ministers to the parliament, it practically gave to that body a *veto* upon its own dissolution, and even encouraged it to withhold the supplies. And, further, the governor took upon himself the responsibility of granting or refusing a dissolution, instead of laying that responsibility upon his constitutional advisers.

3. I think that the course more recently taken by the governor, in regard to Sir John Robertson's administration, was entirely free from these objections, and was in every respect judicious and constitutional, according to the usage of the mother country.

4. To dissolve parliament before provision has been made for the public service is so serious an evil that the governor is entitled to the highest credit for his endeavours to discourage such a practice, and I have no doubt he will continue to discountenance it by every means in his power. But I should venture to suggest that in future the governor, after discussing with his ministers all the circumstances under which they advise a dissolution, including the financial situation and the probability of obtaining supplies, should either accept or decline their advice without conditions, or should defer his decision until every effort had been made to secure the supplies or to avert a dissolution.

5. It is to be hoped that the difficulties which have arisen, and the great public inconvenience caused by the present methods of providing for the public service in New South Wales, will lead to improved financial arrangements, and to

the separation of questions relating to the supplies from the conflicts of political parties.

I am, &c.,

T. ERSKINE MAY.

From the Speaker of the House of Commons to the Earl of Carnarvon.

GLYNDE, LEWES, Dec. 10, 1877.

Reply of Speaker of House of Commons.

DEAR LORD CARNARVON, — I have received your letter of the 3d inst. transmitting papers with reference to the recent political crisis in New South Wales.

I have also heard from Sir Erskine May that the same papers have been referred to him by your direction, and that he reported his opinion at length in a letter of the 6th inst., a copy of which he has sent me.

I have carefully gone through the papers, and I concur generally in the substance of Sir Erskine May's report upon them.

I apprehend that there can be no doubt of the right of the governor, acting in the public interest, to qualify his acceptance of ministerial advice, although by so doing he incurs serious responsibility.

The course taken by Sir Hercules Robinson upon the recent occasion of a political crisis seems to have been thoroughly constitutional. He declined to accept, unconditionally, the advice of his ministers, until he had endeavoured through other political arrangements to carry on the government, and when his several attempts had proved abortive, he then acquiesced in the advice originally tendered by his ministers.

It appears to me that the governor and his ministers and the Legislative Assembly can never be placed in proper relationship so long as the present system prevails of deferring supply; for the governor ceases to be independent, the ministers are hampered by the constant need of temporary supply bills, and the house has a strong inducement to stop supply, in order to prolong its own existence.

It is to be hoped that the complications arising out of the several crises occurring recently in New South Wales will open the eyes of the colony to the propriety of voting supplies more in accordance with the practice of the mother country.

Believe me, &c.,

H. BRAND.

Subject to the reservations upon the point of form referred to in Sir Erskine May's letter, Governor Robinson's course upon this occasion must be approved. He is, undoubtedly, entitled to the highest credit for his judicious efforts to discourage the injurious practices hitherto prevalent in New South Wales, in the matter of supply, and to substitute for the same the constitutional usage of the Imperial Parliament. Governor Robinson sustained.

In February, 1878, the foregoing correspondence was laid upon the table of the Legislative Assembly.[c]

A further question, in relation to the grant of supply previous to a dissolution of parliament, arose in New South Wales in 1878. On Dec. 3, the administration of which Mr. Farnell was premier were defeated in the Legislative Assembly upon their principal measure, the crown-lands bill, the motion for the second reading of which was negatived by a large majority. Further question as to supply before dissolution.

The premier then requested Governor Robinson to permit him to appeal to the country by a dissolution. His Excellency declined to grant this request; upon which the ministry resigned. The governor sent for Sir John Robertson, the nominal leader of the opposition, and commissioned him to form a new administration. He did so, and submitted a list of the proposed ministry for his Excellency's approval.

At this juncture, Sir J. Robertson requested the outgoing premier to ask the Assembly to vote certain necessary supplies, "as it had been the practice for outgoing governments to do for incoming governments." These supplies were meant to defray certain services to be incurred during the current financial year; including a sum of £50,000 on behalf of an international exhibition about to be held in Sydney, the capital of the colony. Mr. Farnell complied with this request, and on receipt of a message from the governor, recommending these appropriations, the Assembly proceeded to consider the matter in committee of supply. This committee reported a resolution granting £86,500 for certain specified services, but nothing for the international exhibition. Whereupon, Sir John Robertson and his colleagues at once relinquished their attempt to form an administration.

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[c] New South Wales Leg. Assem. Votes and Proceed. **1877–78**, vol. i. p. 451.

The governor notified Mr. Farnell of this circumstance, and begged him to withdraw his resignation, and proceed with the business before parliament. On December 17, Mr. Farnell informed the Assembly that he and his colleagues had deemed it their duty, in the public interest, at this critical period, to comply with his Excellency's request, and to resume their places.

The Assembly, however, objected to this arrangement. On the following day they addressed the governor, intimating their unwillingness to proceed with the public business, so long as the Farnell ministry remained in office. Upon which the ministry immediately retired, and the governor sent for Sir Henry Parkes, who for the previous year had taken no active part in the business of parliament, and entrusted him (for the third time) with the formation of a government. Sir John Robertson gave his support to Sir Henry, which enabled him to form a strong administration.

Agreeably to former precedent, Mr. Farnell again invited the house to vote the supplies which the new ministry considered would be required before they could meet parliament. The standing orders were suspended for that purpose, and upon the receipt of the customary message from the governor, recommending a vote of credit to the necessary amount, the sum of £120,000 was granted in committee of supply; and no further obstacle was interposed by the Assembly to the progress of public business.[d]

Dissolution refused by a Canadian lieutenant-governor.

The last precedent to be cited in illustration of the powers of a governor, in the exercise of the prerogative of dissolution, is one that occurred in the province of Quebec, upon the defeat, in the Legislative Assembly, of the Joly administration. It is peculiarly instructive as affording an example of the discharge — by a lieutenant-governor appointed by the dominion government of Canada — towards a provincial legislature of which he formed a component part, of the same constitutional powers, under responsible government, as

[d] New South Wales Votes and Proceed. Dec. 3, to Dec. 20, 1878. And private information from the colony.

those which pertain, under similar conditions, to the governor of a colony appointed directly by the Crown.

Asked for by M. Joly in Quebec.

The Joly administration of whose history some account has been given in a former chapter[e] were never able to command a majority in the Legislative Council. Recently that body had evinced their hostility to the ministry by stopping the supplies. A dead-lock ensued. At length the small majority by which ministers were sustained in the Assembly after the general election was transformed into a majority against them by the secession of certain of their former supporters, when an adverse vote against the ministry was carried by a majority of six.

Under these circumstances, M. Joly wrote to the lieutenant-governor, requesting permission to appeal to the constituencies by a dissolution of the legislature. The result of his application was afterwards communicated to the Legislative Assembly, as follows: —

Hon. Mr. Joly announced that he had the authorization of the lieutenant-governor to state that, when he had acquainted him with the result of the vote in the house, he had at the same time advised him to dissolve the house in view of immediate general elections. He had received this afternoon a reply from his Honour, the lieutenant-governor, acknowledging receipt of his request, but, for certain reasons contained in his letter, refusing to grant it. He had therefore considered it to be his duty to proceed immediately to Government House and to tender to the lieutenant-governor his resignation and that of his colleagues, thanking his Honour at the same time for the courtesy he had shown him. The resignation had been accepted, and he had been authorized by the lieutenant-governor to communicate the correspondence in question to the house. He then proceeded to read as follows: —

QUEBEC, Oct. 30, 1879.

TO HIS HONOUR

THE LIEUTENANT-GOVERNOR OF THE PROVINCE OF QUEBEC.

SIR, — I have the honour to inform you that the cabinet has been defeated by a majority of six votes upon a question which my colleagues and myself consider as a vote of non-confidence.

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[e] See *ante*, p. 406.

This vote is the result of the unconstitutional action of the Legislative Council, and I do not consider it as expressing the opinion of the majority of the people of the province of Quebec.

It is my duty to apply to your Honour for a dissolution in view of an immediate appeal to the people.

I firmly believe that the result of an appeal to the people which I now ask for would be to give to this government a much larger majority than it has hitherto possessed.

Allow me to add that in my opinion the present circumstances make it very advisable that an immediate occasion should be afforded to the electorate of the province to pronounce on the constitutional question arising out of the action of the Legislative Council in connection with the supplies.

I have the honour to remain,

Your very obedient servant,

(Signed) H. G. JOLY.

GOVERNMENT HOUSE, QUEBEC, Oct. 30, 1879.

TO THE HONOURABLE
H. G. JOLY, PREMIER OF THE PROVINCE OF QUEBEC.

Refused by Lieutenant-Governor Robitaille.

The lieutenant-governor has the honour to acknowledge the receipt of the request made to him by the executive council, of which you are the head, to dissolve the present parliament. The lieutenant-governor does not overlook the embarrassment of the present situation, and he understands how important it is for him to be doubly prudent and impartial in the midst of violent contentions which have divided public opinion for some time past.

The lieutenant-governor desires at once to call the attention of his ministers to the difference which exists between their position and his on a question such as that which is now at stake.

It must not be forgotten that the privilege of dissolving parliament is one of the most valued prerogatives of the sovereign, and that it is the right and the duty of the representative of the Crown to control its exercise. Now the lieutenant-governor and the cabinet cannot look at the subject of this prerogative from the same point of view.

The first care of a government, under the political system which governs us, is to administer the affairs of the country for the best undoubtedly, but in all cases by means of a party; while with the representative of the Crown parties count for nothing.

Although the lieutenant-governor is always disposed to lend the sanction of his authority to legislative or administrative acts which are evidently above all blame and which every good administration might consider useful or necessary, he is strictly bound to inquire whether the extraordinary exercise of the royal prerogatives with which he is invested is demanded by the greater good of the province, as he is responsible towards the Crown for all political troubles and for all financial damage from which he might save the province and from which he does not save it.

When the lieutenant-governor received your request, what first struck him was the fact that since your assuming power you had already asked the Crown for a dissolution and obtained it. Two dissolutions for the same cabinet! The extraordinary exercise of the most valued of the royal prerogatives granted twice to the same administration within an interval of a few months! such was the first idea which presented itself to the mind of the lieutenant-governor. Immediately after your entry into office, you asked the Crown to dissolve parliament, and you had a general election. You issued from the electoral struggle with a majority, according to you; with a minority, according to your opponents. But in point of fact you were enabled to govern at first with the vote of the speaker only, and subsequently with a majority varying from four to two votes; and, in fine, you have announced to-day to the representative of the Crown that you find yourself in the house, resulting from the elections asked for by yourself, in a minority of six votes, and you claim a new dissolution.

Is it in the public interest that the province should be subjected so frequently to general elections? Is it in accord with the spirit of the constitution that parliament should be dissolved so often? Is the renewal at such brief intervals of the popular representation of a nature to ensure the stability and the good working of our political institutions? To all these questions the lieutenant-governor deems it his duty to answer, — No. The wise authority awarded to us by the constitution which we enjoy has decided that general elections for this province should take place every four years, and this period is not so long that it should be still further shortened without reasons of extraordinary gravity. The

Lieutenant-governor Robitaille's letter to M. Joly.

prime minister understands the deep and prolonged agitation into which a general election plunges society at large, as well as the divisions and the demoralization which follow it. Apart from these political and social considerations, there are the financial considerations. A general election, and the session which a dissolution at this moment would render inevitable, would cost the country a hundred thousand dollars; and, in the financial situation in which we are placed, this is an expenditure which deserves to be earnestly considered.

However, if there were reasons sufficiently grave and serious to transcend all other considerations, the lieutenant-governor admits that a dissolution might be had recourse to. But do similar reasons exist in the present case? A dissolution can have but one object, and that is to maintain in power certain men or certain parties. There would not be in this a sufficient compensation for the sacrifices which the country would be called upon to make. The lieutenant-governor is quite prepared to admit that the views of his ministers are of the highest character, and that the struggles which they have led have been inspired by the best motives; but, when it becomes necessary to divide duties and responsibilities, each one must look upon the matter from his stand-point and perform the task which his position allots him. Under the present circumstances, one of the reasons which might be brought forward in support of an appeal to the people would be the necessity of restoring harmony between the two branches of the legislature. But this harmony is very nearly restored; and, if there exists any other method than dissolution to complete the reconciliation of the Council with the Assembly, the lieutenant-governor considers that it is his duty to make use of it. The question for the lieutenant-governor to decide is not whether the government is to become the victim of what his advisers call an irresponsible body. So long as his ministers possessed the confidence of the popular branch of the legislature, he considered them as the representatives of the will of the people and maintained them in their position contrary to the wish expressed by the Legislative Council. But now the majority which the government had in the Legislative Assembly has become a minority. The two branches of the legislature agree upon one of the most important points; viz., a change of govern-

ment, and it cannot be alleged that recourse must be had to extraordinary means to terminate a conflict which is in a fair way to be terminated by ordinary means. The necessity of restoring harmony in parliament could not, therefore, justify a dissolution after the recent vote of the Legislative Assembly, a vote which you consider as one of want of confidence. But you say you do not think this vote expresses the opinion of the people of this province. It is, however, the vote of the house of your choice, of the house elected under your auspices, under exceptionally favourable circumstances, after a dissolution asked for by you. And you would solicit the people to renew an assembly which you yourself caused to be elected eighteen months ago. The lieutenant-governor, taking into account these particular circumstances, cannot understand upon what basis rests the conviction which you manifest with respect to the result of new general elections. In fine you declare that, in your opinion, the late events require that an immediate opportunity should be afforded to the people to pronounce upon the constitutional question raised by the action of the Council in regard to the supplies. The lieutenant-governor sees no necessity of appealing to the people on this point. The absolute right of the Council — at least such is the impression of the lieutenant-governor — is contested by no one, so that there only remains to be discussed the question of opportuneness. Now the representatives of the people, elected scarcely eighteen months ago, expressed their opinion upon this question before the adjournment of the house; and the fact that since that adjournment they have voted want of confidence in the administration does not reverse their previous verdict on the question at issue, and is not sufficient of itself to warrant a dissolution. It appears to the lieutenant-governor that there could be no more impolitic act than to revive by an altogether extraordinary proceeding a difficulty settled; and an appeal to the people just now could bear no other meaning.

For all these reasons, deeply penetrated with the feelings of his responsibility towards the Crown which he represents and towards the people of this province, the lieutenant-governor does not deem it his duty to make the use you ask him of the royal prerogative, having for its object a dissolution of the parliament.

THEODORE ROBITAILLE.

Joly ministry resign.

Upon receipt of this excellent memorandum, the Joly administration resigned. The lieutenant-governor then sent for Mr. J. A. Chapleau, the leader of the opposition in the Legislative Assembly, and commissioned him to form a new ministry. He succeeded in this undertaking. The Legislative Council at once passed the supply bill, and the provincial legislature was immediately prorogued. In his speech upon this occasion, the lieutenant-governor was able to express his congratulations upon the restoration of harmony between the Legislative Council and the Legislative Assembly, and his hope that a good understanding between the two branches of the legislature would continue to prevail.

From the foregoing precedents, we may deduce certain general principles in regard to the exercise by a colonial governor of the prerogative of dissolving a colonial parliament or provincial legislature. These deductions, however, should be taken in connection with the principles already formulated at the beginning of this section, and which are primarily applicable to the sovereign in a parliamentary government.

Discretion of a governor in granting or refusing a dissolution.

As the representative of the Crown in the dominion, colony, or province, over which he is commissioned to preside, the power of dissolution rests absolutely and exclusively with the governor or lieutenant-governor for the time being. He is personally responsible to the Crown for the lawful exercise of this prerogative, but he is likewise bound to take into account the welfare of the people, being unable to divest himself of a grave moral responsibility towards the colony he is commissioned to govern.

Whilst this prerogative, as all others in our constitutional system, can only be administered upon the advice of counsellors prepared to assume full responsibility for the governor's decision, the governor must be himself the judge of the necessity for a dissolution. The "constitutional discretion" of the governor should be

invoked in respect to every case wherein a dissolution may be advised or requested by his ministers; and his *judgment ought not to be fettered, or his discretion* disputed, by inferences drawn from previous precedent, when he decides that a proposed dissolution is unnecessary or undesirable.

It is the duty of a governor to consider the question of a dissolution of the parliament or legislature solely in reference to the general interests of the people and not from a party standpoint. He is under no obligation to sustain the party in power if he believes that the accession to office of their opponents would be more beneficial to the public at large. He is therefore justified in withholding a dissolution requested by his ministers, when he is of opinion that it was asked for merely to strengthen a particular party, and not with a view to ascertain the public sentiment upon disputed questions of public policy. These considerations would always warrant a governor in withholding his consent to a dissolution applied for, under such circumstances, by a ministry that had been condemned by a vote of the popular chamber. If he believes that a strong and efficient administration could be formed that would command the confidence of an existing Assembly, he is free to make trial thereof, instead of complying with the request of his ministers to grant them a dissolution as an alternative to their enforced resignation of office.

On the other hand, he may at his discretion grant a dissolution to a ministry defeated in parliament and desirous of appealing to the constituencies, notwithstanding that one or both branches of the legislature should remonstrate against the proposed appeal, if only he is persuaded that it would be for the public advantage that the appeal should be allowed.

It is not expedient that the Crown should be required to decide beforehand upon any theoretical or hypotheti-

Prerogative of dissolution.

cal question not requiring to be immediately determined.[f] Nevertheless, a governor is entitled to stipulate upon whatever conditions he may deem essential for the promotion of the public interests before he proceeds to exercise the power of dissolution. He may, therefore, defer his final decision upon an application for a dissolution of parliament until he has ascertained whether certain proposed conditions have been complied with, or whether it may be necessary that he should agree to modify the same.

When ministers advise a dissolution on the ground of disputes between the two houses of parliament, it behooves a governor to be cautious in acceding to such a request. It is not the duty of a governor to take sides with one branch of the legislature against the other, or to criticise the action of either house, in party conflicts. The two houses are presumably the best judges of the propriety of their own proceedings. It is only when disputes between them transcend the lawful bounds of parliamentary warfare, and seem to be irreconcilable by any other means, that a governor is justified in the attempt to invoke the aid of the people to restore harmony by dissolving the popular chamber.

In according to a ministry defeated in parliament — or recently appointed to office in the face of an adverse majority — the alternative of dissolution instead of resignation, a governor may, and ordinarily should, insist that ministers should meet the new parliament at the earliest possible period, for the purpose of determining the question whether or not they possess the confidence of the newly elected Assembly.[g]

[f] Governor Manners Sutton of Victoria, refused, in 1868, to pledge himself, beforehand, to grant a dissolution, under certain hypothetical conditions, to gentlemen with whom he was negotiating for the formation of a ministry: and accordingly the negotiations failed. (See *ante*, p. 117.) See also Governor Head's decision, to the same effect, in 1858. (See *ante*, p. 533.)

[g] But under particular circum-

Finally, if an existing administration be not prepared to accept the governor's decision in regard to a proposed dissolution, and to assume responsibility for the same, they are bound to resign office and give place to other ministers, who are willing to facilitate — and to become responsible to parliament and to the country for — the intended exercise of the royal prerogative.

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stances the governor may see fit to approve of delay in convening the new parliament. See an example mentioned, *ante*, p. 287.

CHAPTER V.

POSITION AND FUNCTIONS OF A COLONIAL GOVERNOR REVIEWED.

DURING the brief but brilliant career of the late Sir Edward Bulwer-Lytton, as her Majesty's secretary of state for the colonies, he was required in 1859 to make choice of a capable person to serve as the first governor of the new colony of Queensland, which in that year was set apart, as a separate government, out of New South Wales. He selected for this responsible office Sir George Bowen, the present governor of the island of Mauritius, — a gentleman with whom he had no personal acquaintance, but of whose ability and fitness for the post the reputation he had already acquired as government secretary in the Ionian islands afforded sufficient proof.

Sir B. Lytton's letter to Sir G. Bowen.

In tendering to Sir George Bowen this promotion, Sir E. Bulwer-Lytton addressed him a letter, professedly containing mere "desultory hints" for his guidance in his new appointment, but to which Sir George afterwards referred as an admirable compendium of the duties of a colonial governor, — to the study of which he attributed in no slight degree whatever measure of success had attended upon him as governor of Queensland and afterwards of New Zealand, in both of which colonies he proved himself to be a very able and popular administrator.[a]

[a] After serving eight years in Queensland, with great distinction, Sir George Bowen was promoted in 1868 to New Zealand, and in 1873

A few passages from this letter may be quoted, as they express ideas which may be profitably pondered by all colonial governors: —

Good advice to colonial governors.

Remember that the first care of a governor in a free colony is to shun the reproach of being a party man. Give all parties, and all the ministries formed, the fairest play.

Mark and study the idiosyncrasies of the community: every community has some peculiar to itself. Then, in your public addresses, appeal to those which are the noblest: the noblest are always the most universal and the most durable. They are peculiar to no party.

As soon as possible, exert all energy and persuasion to induce the colonists to see to their self-defence internally. . . . A colony that is once accustomed to depend on imperial soldiers for aid against riots, &c., never grows up into vigorous manhood.

Do your best always to keep up the pride in the mother country. . . . Sustain it by showing the store set on integrity, honour, and civilized manners; not by preferences of birth, which belong to old countries.

As you will have a free press, you will have some papers that may be abusive. Never be thin-skinned about these: laugh them off. Be pointedly courteous to all editors and writers, — acknowledging socially their craft and its importance. The more you treat people as gentlemen, the more "they will behave as such."

After all, men are governed as much by the heart as by the head. Evident sympathy in the progress of the colony; traits of kindness, generosity, devoted energy, where required for the public weal; a pure exercise of patronage; an utter absence of vindictiveness or spite; the fairness that belongs to magnanimity, — these are the qualities that make governors powerful, while men merely sharp and clever may be weak and detested.

But there is one rule which I find pretty universal in

— in a highly complimentary despatch from the Secretary of State — to the government of Victoria, a position which has been termed the "Blue Ribbon" of the colonial service. Lord Lytton's Memoir, and Speeches of Sir E. Bulwer-Lytton, vol. i. p. cxxi, n.; Heaton's Australian Dictionary of Dates, p. 22.

A. K. GHOSE.

colonies. The governor who is the least *huffy*, and who is most careful not to overgovern, is the one who has the most authority. Enforce civility upon all minor officials. Courtesy is a duty public servants owe to the humblest member of the public.

Sir E. Bulwer-Lytton adds, to these wise precepts of political morality, earnest advice to the governor upon practical matters, — such as the need of mastering thoroughly the details of public questions; of being watchful over "the paramount object of finance and the administration of revenue;" and of striving to convert local jealousies between adjacent colonies into wholesome emulation.[b]

These were the ideas of a high-minded English statesman, anxious to build up the colonial empire of Great Britain upon the stable foundations which had secured honour and renown to the parent state. He recognized therein the authority and influence appertaining to the office of governor and its appropriate functions in elevating the tone of public sentiment, and stimulating colonial statesmen to the loftiest aims in their efforts to promote the public good.

With a similar object, Mr. Herman Merivale, who was permanent under-secretary of state for the colonies during twelve eventful years in colonial annals (1847–59), in an edition of his valuable "Lectures on Colonization and Colonies," published in 1861, thus comments upon "the very critical and peculiar functions" of a colonial governor, under "responsible government:" —

Merivale on a governor's functions.

"He constitutes the only political link connecting the colony with the mother country. So far as regards the internal administration of his government, he is merely a constitutional sovereign acting through his advisers; interfering with their policy or their patro-

[b] Lord Lytton's Memoir and Speeches, vol. i. pp. cxxi–cxxiv.

nage, if at all, only as a friend and impartial councillor. But whenever any question is agitated touching the interests of the mother country — such, for instance, as the imposition of customs duties, or the public defence — his functions as an independent officer are called at once into play. He must see that the mother country receives no detriment. In this duty, he cannot count on aid from his advisers: they will consult the interests either of the colony or of their own popularity; he may often have to act in opposition to them, either by interposing his veto on enactments or by referring those enactments for the decision of the home government. But for these purposes the constitution furnishes him with no public officers to assist him in council or execution, or to share his responsibility. The home government looks to him alone." [c]

Again, "under responsible government" [a governor] "becomes the image, in little, of a constitutional king, introducing measures to the legislature, conducting the executive, distributing patronage, in name only, while all these functions are in reality performed by his councillors. And it is a common supposition that his office is consequently become one of parade and sentiment only. There cannot be a greater error. The functions of a colonial governor under responsible government are (occasionally) arduous and difficult in the extreme. Even in the domestic politics of the colony, his influence as a mediator between extreme parties and controller of extreme resolutions, as an independent and dispassionate adviser, is far from inconsiderable, however cautiously it may be exercised. But the really onerous part of his duty consists in watching that portion of colonial politics which touches on the connection with the mother country. Here he has to reconcile, as

[c] Merivale, Lectures delivered before the University of Oxford, on Colonization, etc., new ed. enlarged, 1861, p. 649.

well as he can, his double function as governor responsible to the Crown, and as a constitutional head of an executive controlled by his advisers. He has to watch and control, as best he may, those attempted infringements of the recognized principles of the connection which carelessness or ignorance, or deliberate intention, or mere love of popularity, may, from time to time, originate. And this duty, of peculiar nicety, he must perform alone. . . His responsible ministers may (and probably will) entertain views quite different from his own. And the temptation to surround himself with a *camarilla* of special advisers, distinct from these ministers, is one which a governor must carefully resist. It may, therefore, be readily inferred, that to execute the office well requires no common abilities, and I must add that the occasion has called forth these abilities." [d]

Sir W. Fox on a governor's position.

A further testimony has been lately borne to the important functions fulfilled by a modern constitutional governor, by a colonial statesman of much local experience in public affairs. Mr. (now Sir William) Fox, formerly premier in New Zealand, in an address before the Royal Colonial Institute, on May 23, 1876, expressed himself on this subject as follows: —

"The position of governors in self-governing colonies is now analogous to that of her Majesty in this country. The business of governing is done by the ministers, and it is only in extreme cases, where a governor may dismiss his ministers (subject to the control of parliament), or cases where imperial rights are involved, and perhaps in the prerogative of mercy, in cases of life and death, that the governor can act independently of his ministers. Still, the governor is not reduced to a mere dispenser of viceregal hospitalities, which I am bound to say they do dispense with a very liberal hand. If a

[d] Merivale, Lectures on Colonization, etc. p. 666.

governor is an educated man, has common sense, and is familiar with political principles and precedents, he may be of much use in advising with his ministers, though it would be highly improper for him to take a side in party politics, or engage in political intrigues. It is his duty also to set a high social example, and to interest himself not only in the general progress of the colony, but, as far as possible, in the personal welfare and prosperity of the colonists engaged in the great battle of colonial life. And they generally do exhibit much sympathy in these matters. They make periodical "progresses" through the colony over which they rule, and are hospitably entertained in the centres of population."[e]

British statesmen of various shades of political opinion have used similar language, more emphatically expressed, in reference to the position occupied by constitutional governors under the British Crown.

Lord Elgin on a governor's office.

Thus, Lord Elgin, in words already quoted, dwells pointedly upon the weight and influence attributable to this office, and upon the beneficial results which a governor can produce in the arena of colonial politics, without deviating from the strict line of his official duty.[f] Elsewhere, adverting to the altered position of a governor, as the imperial executive gradually withdraws from direct interference in colonial concerns, he says, "the office of governor tends to become — in the most emphatic sense of the term — the link which connects the mother country and the colony, and his influence the means by which harmony of action between the local and imperial authorities is to be preserved." From his independent and impartial position, the opinion of a

[e] Royal Col. Inst. Proceedings, vol. vii. p. 252.

[f] See *ante*, p. 59. See also Sir George Bowen's observations, with the Duke of Newcastle's comments thereon, *ante*, pp. 66-68; and the Duke of Argyll's remarks, in Hansard's Deb. vol. cxci. p 2001.

governor must needs have "great weight in the colonial councils; while he is free to constitute himself, in an especial manner, the patron of those larger and higher interests, — as of education, and of moral and material progress in all its branches, — which, unlike the contests of party, unite, instead of dividing, the members of the body-politic." [g]

Governor-general of Canada.

The Duke of Buckingham, when secretary of state for the colonies, in 1868, thus wrote, in a despatch concerning the office of governor-general of Canada. He "is the representative of the queen, and the highest authority in a dominion vast in extent, occupied by several millions of people, comprising within itself various provinces recently brought together which can only be knit into a mature and lasting whole by wise and conciliatory administration. Nor is the position insulated. The governor-general is continually called upon to act on questions affecting international relations with the United States. The person who discharges such exalted functions ought to possess not only sound judgment and wide experience, but also an established public reputation. He should be qualified both to exercise a moderating influence among the different provinces composing the union, and also to bear weight in his relations with the British minister at Washington and with the authorities of the great neighboring republic." [h]

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[g] These sagacious words form the closing sentence of the last official despatch written by the Earl of Elgin, on relinquishing the government of Canada. They were dated from Quebec, on Dec. 18, 1854. Walrond's Letters of Lord Elgin, pp. 126–128.

[h] This despatch was written to explain the reasons why her Majesty's government felt it to be their duty to advise the queen to refuse her assent to a bill passed by the dominion parliament to reduce the salary of the governor-general, which had been fixed by the British North America Act, 1867, sec. 105, at £10,000 sterling (Canada Sess. Papers, **1869**, no. 73). For the salaries now payable to all colonial governors, see Col. Office List, 1879, p. 17. For the Governors' Pension Acts (28 and 29 Vict. c. 113, and 35 and 36 Vict. c. 29), see *ibid.* p. 233. See also correspondence concerning the heavy expenses entailed upon

Upon the expiration of Lord Dufferin's term of service as governor-general of Canada, in 1878, a joint address was presented to his Excellency by both houses of the dominion parliament, which bore testimony to the ripe wisdom, experience, and eminent abilities displayed by that accomplished statesman in his administration of the government of Canada. Special mention was made in this address of the zeal and devotion manifested by Earl Dufferin upon all occasions wherein it had been in his power to promote Canadian interests; to his efforts and liberality in fostering literature, art, and the industrial pursuits; and to the beneficial results which had attended his visits to each of the provinces and territories of the dominion, for the purpose of familiarizing himself with their distinctive resources, and with the character of the inhabitants; and in availing himself of every opportunity to enlarge on these topics in eloquent speeches, which had attracted attention throughout the empire, and contributed largely to an increased knowledge of Canada, its present condition and future prospects. Sir M. Hicks-Beach, her Majesty's colonial secretary, in a despatch to the Earl of Dufferin, dated Oct. 15, 1878, congratulating his Lordship upon the estimation in which he was held by all classes in Canada, conveyed the queen's commands signifying the high appreciation entertained by her Majesty of the great ability and judgment with which he had discharged the duties of governor-general. The secretary of state added an expression, on the part of her Majesty's government, of their conviction that the admirable manner wherein his Lordship had fulfilled the duties of the queen's representative had done much to strengthen and deepen in the hearts of the Canadian

Lord Dufferin as a constitutional governor.

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the governor of Victoria in discharging the duties of official hospitality in that colony. Victoria Assembly Papers, 1877–78, vol. iii. no. 101.

people that spirit of loyalty and devotion to the British Crown and empire, of which there had been so many gratifying indications.[1]

Our object in referring to these pleasing reminiscences of the administration of Lord Dufferin in Canada is not merely to record the high estimation in which his Lordship was held — alike by the Crown, the parliament, and the people — as a constitutional governor, but likewise to exemplify, by such a conspicuous and distinguished example, the appropriate field of action for a representative of the sovereign in a self-governing community.

Benefits accruing from a governor's office.

For, while a constitutional governor suitably abstains from direct interference with the ordinary course of public business, he has numerous opportunities of conferring substantial benefits upon the colony over which he presides, and of strengthening the tie which connects it with the mother land.

It is his especial duty to acquaint himself, by personal observation, with the country and its capabilities, and to ascertain by individual intercourse the condition of its inhabitants, and the quality, aim, and efficiency of its various local institutions. In his official tours for this purpose a governor would naturally be called upon to make frequent response to loyal address of respect and welcome. In such utterances, in the delivery of speeches upon public occasions of a non-political character, and in his despatches to the secretary of state, a governor is at liberty, from time to time, to direct attention, with the authority and impartiality becoming his office, to numerous questions of public concern, as, for example, the peculiar advantages presented by the colony as a field for emigration or for the profitable employment of capital. He can likewise promote —

[1] Canada Commons Journals, April 11, 1878; Dominion Official Gazette, Nov. 9, 1878.

by timely words of encouragement, of warning, or of judicious counsel — the varied and complex interests of a rising, industrious, and progressive community; pointing out, in a paternal spirit, the pitfalls and temptations to be avoided, as well as the rewards to be anticipated from perseverance in well-doing, and from the cultivation of harmony and mutual forbearance in every relation of life.[j]

Bearing in mind that the governor in a British province is a connecting link between the distant portions of a wide-spread empire and the august person of its monarch, who is everywhere honoured and beloved, and that his office is a symbol of the unity which prevails between the scattered members of a vast and powerful nationality, a constitutional governor is in duty bound to foster, within his own sphere, loyalty and devotion to the sovereign and attachment to the institutions of monarchy, — which secure to the people the inestimable benefits of liberty, protection, and advancement, in a higher degree than is afforded by any other form of government upon earth.

Furthermore, the exalted position occupied by a governor under the British Crown enables him, after the pattern exhibited by the queen, — in the order and decorum of her royal court, and in the exercise of her great personal influence,[k] — to encourage public and private morality, and to enforce the para-

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[j] For unequalled specimens of public addresses by a colonial governor, upon every imaginable subject appropriate to his position, and fraught with instruction and admonition to all classes and conditions of the people, it is scarcely necessary to refer to the narratives of Lord Dufferin's administration in Canada; written both by Mr. William Leggo, and by Mr. Charles Stewart. These works each contain *verbatim* reports of his Excellency's eloquent, and instructive speeches. Admirable addresses, upon various questions of public concern, disconnected with party politics have been delivered by other colonial governors in Australia, and elsewhere, with very beneficial effect.

[k] See Todd, Parl. Govt. vol. i. p. 203.

mount obligations of religion amongst the people, so far as he justly may, in a country which possesses no established church, and where all Christian denominations are upon a footing of equality.

These considerations, however, while they cannot be overlooked or overestimated in reviewing the beneficial effects of monarchical rule, as administered by a constitutional governor under the British Crown, are foreign to the special scope of this treatise. It has been the aim of the present writer to define, with the utmost possible precision and impartiality, the actual position and functions of a governor in his political relations, so far as the same are capable of being determined by reference to authoritative documents and other unimpeachable sources of knowledge.

Political functions of a governor.

In the admirable summaries of the duties of a governor, quoted at the commencement of this chapter from the writings or speeches of men of reputation and experience in public affairs, we find but slight allusion to his essentially political functions. This subject, however, is of vital importance; and it is with a view to supply this deficiency that the present work has been undertaken.

The general conclusions arrived at in the preceding chapters, after a careful investigation of the several questions therein discussed, may be briefly epitomized as follows: —

1. The position of a governor in a colony possessing representative institutions, with "responsible government," is that of a local constitutional sovereign. Whatever other powers may be conferred upon him by the law of the particular colony, he is, by virtue of his commission and instructions from the Crown, the representative of the queen in this part of her dominions, who is herself the source of all executive authority therein. He has his responsible ministers, who

A local constitutional sovereign.

advise him upon all acts of executive government and in all legislative matters.[1] The identity of aim and the mutual co-operation in endeavour which must invariably subsist between the representative of the Crown and his constitutional advisers is a pledge and assurance to the people that they enjoy the full benefit and security which the monarchical element is capable of affording in our colonial system, combined with the advantages of ministerial control and responsibility.[m]

2. A constitutional governor should never be held accountable, within the sphere of his government, for the policy or conduct of public affairs. This responsibility devolves unreservedly upon his ministers, who share with him in the functions of sovereignty which he exercises under his commission from the Crown, on condition that they assume full responsibility for the same before the local parliament and the constituent body. The governor is personally responsible only to the supreme power from whence his authority is derived. His responsibility.

3. The position of a constitutional governor towards those over whom he is set as the representative of the sovereign, and especially in relation to his ministers, is one of strict neutrality. He must manifest no bias towards any political party, but on the contrary be ready to make himself a mediator and a moderator between the influential of all parties; and he must be uniformly actuated solely by a desire to promote the general welfare of the province or dependency of the empire committed to his charge. No partisan.

4. A constitutional governor is bound to receive as his advisers and ministers the acknowledged leaders of that party in the state which is able for the time being His political advisers.

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[1] Sir T. Erskine May, in Commons Papers, **1879**, no. 130, pp. 6, 7.

[m] See Walrond, Letters of Lord Elgin, pp. 120–124. And see *ante*, p. 16.

to command the confidence of the popular assembly; or, in the last resort, of the people, as expressed on appeal through their representatives in the local parliament. And it is his duty to cordially advise and co-operate with his ministers in all their efforts for the public good.

Whose advice should ordinarily prevail.

5. In furtherance of the principle of local self-government and of the administration of the executive authority in harmony with the legislative bodies, it is ordinarily the duty of a constitutional governor to accept the advice of his ministers for the time being in regard to the general policy and conduct of public affairs; in the selection of persons to fill subordinate offices in the public service; and in the determination of all questions that do not require to be disposed of in conformity with special instructions from the imperial government.

His intelligent consent always necessary.

6. In order to enable a constitutional governor to fulfil intelligently and efficiently the charge intrusted to him by the Crown, he is bound to direct — as, by his commission and instructions, he is authorized to require — that the fullest information shall be afforded to him by his ministers upon every matter which at any time shall be submitted for his approval; and that no policy shall be carried out or acts of executive authority performed by his ministers in the name of the Crown, unless the same shall have previously received his sanction.

His reserved right of disapproval.

7. While, as a general rule, a constitutional governor would naturally defer to the advice of his ministers, so long as they continue to possess the confidence of the popular chamber, and are able to administer public affairs in accordance with the well-understood wishes of the people, as expressed through their representatives, if at any time he should see fit to doubt the wisdom or the legality of advice tendered to him, or

should question the motives which have actuated his advisers on any particular occasion, — so as to lead him to the conviction that their advice had been prompted by corrupt, partisan, or other unworthy motives, and not by a regard to the honour of the Crown or the welfare and advancement of the community at large, — the governor is entitled to have recourse to the power reserved to him in the royal instructions, and to withhold his assent from such advice. Under these circumstances, he would suitably endeavour, in the first instance, by suggestion or remonstrance, to induce his ministers to modify or abandon a policy or proceeding which he was unable to approve. But, if his remonstrances should prove unavailing, the governor is competent to require the resignation of his ministers or to dismiss them from office, and to call to his councils a new administration.

Or remonstrance.

8. The circumstances under which a governor would deem it discreet and advisable to have recourse to his reserved right of dismissing a ministry must be determined by himself with due regard to the gravity of the proceeding, and to the responsibility it would entail upon him to the Crown. But this prerogative right can only be constitutionally exercised on grounds of public policy, and for reasons which are capable of being explained and justified by an incoming administration to the local Assembly, as well as by the governor himself to the imperial authorities.

And of changing his ministers.

9. Upon a change of ministry, it is essential that the gentlemen who may be invited by the governor to form a new administration shall be unreservedly informed by him of the circumstances which led to the resignation or dismissal of their predecessors in office; and that they shall be willing to accept entire responsibility to the local parliament for any acts of the governor which have been instrumental in occasioning the resig-

New ministry responsible for his act.

nation or effecting the dismissal of the outgoing ministry. For it is an undoubted principle of English law, that no prerogative of the Crown can be constitutionally exercised unless some minister of state is ready to assume responsibility for the same. Hence, the authority itself remains inviolate, however the propriety of its exercise may be questioned, or its use condemned The authority of the Crown, in the hands of the queen's representative, must invariably be respected; and no one subordinate to the governor should attribute to him personally any act of misgovernment, his ministers being always answerable for his acts to the local parliament and to the constituent body.

Prerogative of dissolution.

10. A constitutional governor is personally responsible to the Crown for his exercise of the prerogative right of dissolving parliament; and he is bound to have regard to the general condition and welfare of the country, and not merely to the advice of his ministers, in granting or refusing a dissolution. And, should he deem it advisable to insist upon the dissolution of an existing parliament contrary to the advice of his ministers, he is not debarred from taking steps to give effect to his decision, because his ministers for the time being are sustained by a majority of the local assembly; although such an act, on the part of the governor, would necessarily involve their resignation of office. But no governor has a constitutional right to proceed to dissolve parliament under such circumstances, unless he can first obtain the services of other advisers, who are willing to become responsible for the act; and unless he has reasonable grounds for believing that an appeal to the constituent body would result in an approval by the new Assembly of the policy which, in his judgment, rendered it necessary that a dissolution of parliament should take place.

11. In the ultimate determination of all questions

wherein a constitutional governor may see fit to differ from his ministers, the declared intention of the queen that "her Majesty has no desire to maintain any system of policy among her North American subjects which opinion condemns,"[n] — a principle which is equally applicable to every self-governing colony, and which has been freely conceded to them all, — requires that the final verdict of the people in parliament must be accepted as conclusive; and that the governor must be prepared to accept an administration who will give effect to this verdict, or else himself surrender to the sovereign the charge with which he has been entrusted.

Verdict of the people must prevail.

12. It is inexpedient and objectionable in principle that a constitutional governor should take any part in controversies between the legislative chambers in the colony upon questions of privilege, or concerning the relative powers of the two houses under the constitution, so long as the rights of the Crown are not involved in such disputes. If he should ultimately see fit to dissolve parliament with a view to the determination of protracted legislative disputes, it must be clearly seen that he intervenes for the purpose of mediation, and as an appeal to the arbitration of the people, and not as helping one house against the other.

Non-interference between two houses.

13. In questions of an imperial nature, wherein the reputation of the British Crown is concerned, or the general policy of the empire is involved, — as, for example, in the administration, by a governor, of the prerogatives of mercy or of honour; or the reservation, under the royal instructions, of certain bills which had passed both houses of the local parliament, for the signification of the queen's pleasure thereon, — it is the duty of a governor to exercise the power vested in him, in his capacity as an imperial officer, without limitation

Imperial questions.

[n] Lord John Russell's despatch to Governor Thomson, of Oct. 14, 1879; Canada Assem. Journ. **1841**, appx. B. B.

or restraint. Nevertheless, upon such occasions, a constitutional governor should afford to his ministers full knowledge of his intentions, and an opportunity of tendering to him whatever advice in the premises they may desire to offer; albeit the governor is bound, by his instructions and by his obligations as an imperial officer, to act upon his own judgment and responsibility, whatever may be the nature of the advice proffered to him by his ministers. In all such cases, the responsibility of the local ministers to the local parliament would naturally be limited. They would be responsible for the advice they gave, but could not strictly be held accountable for their advice not having prevailed. For, "if it be the right and duty of the governor to act in any case contrary to the advice of his ministers, they cannot be held responsible for his action, and should not feel themselves justified on account of it in retiring from the administration of public affairs." [o]

Responsibility of local ministers thereon.

But, according to constitutional analogy, no such right should be claimed by the governor, except in cases wherein, under the royal instructions, he is bound as an imperial officer, to act independently of his ministers. And if his discharge of this duty should be felt, at any time, as a grievance, either by his own advisers or by the local parliament, it would be a reasonable ground for remonstrance or negotiation with the imperial government; but it could not, meanwhile, absolve the governor from his obligations to the queen, under the royal instructions. It is, nevertheless, supposable, in an extreme case, that the local parliament might assume the right of censuring a ministry for advice given upon an imperial question, or because

[o] Lord Carnarvon's view of the position of a responsible ministry in a colony, under the circumstances stated in the text; cited in Canada Sess. Papers, **1876**, no. 116, p. 82. And see *ante*, pp. 255–262.

they did not resign upon a particular occasion when their advice was not followed.[p]

Responsibility to Imperial Parliament.

14. While it is objectionable in principle, and of rare occurrence in practice, that appeals should be made to the Imperial Parliament, in cases of difference between a governor and the colonial executive or legislature, over which he presides, or has presided, — so as to lead to the renewal in the British Parliament of local political contests, — yet the authority of the Imperial Parliament to discuss all questions affecting the interests of any portion of the empire, the honour of the Crown, or the welfare of her Majesty's subjects in any part of the globe, and to advise the Crown upon the same, is unquestionable; and a governor or ex-governor of a British province must never lose sight of his responsibility, not merely to the Crown in council, but likewise to both houses of the Imperial Parliament, by whom he is liable to be censured or impeached for misconduct in office.[q]

British practice.

15. In the absence of definite instructions, or positive law, it is the duty of a constitutional governor to be guided upon all questions that may arise, or matters that may be submitted to him in his official capacity, by the usage of the Crown in the mother country; which he should endeavour to ascertain and to imitate, so far as may be consistent with his position and responsibility as a colonial governor.

16. Finally, inasmuch as all local parliaments or provincial legislatures in the empire are, within their assigned jurisdiction, absolute and supreme, save only as

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[p] See a precedent of this kind, but which did not lead to the resignation of ministers, *ante*, p. 266.

[q] See *ante*, pp. 33, 34; Earl Grey, Hans. Deb. vol. ciii. p. 1280; Mr. Gladstone, *ibid.* vol. civ. p. 356; Case of the Governor of British Guiana, *ibid.* vol. cvii. p. 930. Debates in Parliament upon the conduct of Governor Eyre, of Jamaica, in 1866 and 1867; of Governor Darling, of Victoria, in 1868; of Governor Hennessey, of Barbadoes, in 1876; and of Governor Bartle Frere, of the Cape of Good Hope, in 1879.

Constitutional functions of a governor.

respects the constitutional control of the Crown, it follows that the governor in every colony or province is, within the limits of his commission and delegation, entitled to be accredited with similar rights, privileges, and responsibilities to those which appertain to the sovereign in the parent state. Moreover, the necessary and lawful functions of a governor, who is the representative and personal embodiment of the monarchical principle in a British colony under parliamentary government, and who administers the authority of the Crown within the same, are neither diminished nor restrained by reason of the gradual emancipation of the colony from imperial control in the regulation of its internal affairs.

Rights of the Crown in a limited monarchy.

The authority herein claimed, on behalf of a constitutional governor, is that which indefeasibly belongs to the English Crown in the political system of the mother country: not, be it observed, the authority exercised of old times by the personal government of sovereigns ruling despotically, with no one directly accountable to parliament for their actions; but that tempered form of royal supremacy, limited and defined by law, and by those maxims of the constitution which owe their origin to the (so-called) revolution of 1688. For that revolution was no uprising of a democracy bent on destroying existing institutions: it was, on the contrary, a legal settlement by Parliament of the relative powers in the state; a settlement which guaranteed to the nation the inestimable advantages of a constitutional monarchy, combined with the freedom, elasticity, and responsibility which appertain to a ministerial executive ruling under parliamentary government.

And under parliamentary government.

In conferring "responsible government" upon her colonies, it was the design of Great Britain to convey to them as far as possible a counterpart of her own institutions. By this system, it was intended that the

vital elements of stability, impartiality, and an enlightened supervision over all public affairs should be secured as in the mother country, by the well-ordered supremacy of a constitutional governor, responsible only to the Crown; whilst the freedom and intelligence of the people should be duly represented in the powers entrusted to an administration co-operating with the Crown in all acts of government, but likewise responsible to parliament for the exercise of their authority.

Responsibility of the cabinet.

The administration or cabinet, as has been justly remarked by Mr. Gladstone, "stands between the sovereign and the parliament, and is bound to be loyal to both."[r] It may not separate itself from the Crown lest it should degenerate into a ministerial oligarchy, swallowing up those rights of the monarchy in the body-politic which are the eminent safeguards of political liberty and of national honour. But it should be equally mindful of the loyalty and deference due to the Crown as of the responsibility owing to parliament. It is in the just recognition of both responsibilities that ministerial authority under parliamentary government is freed from the encroachment and contamination of corrupt influences, and made conducive to the prosperity and progress of the commonwealth.

Forbearance and moderation always essential.

In conclusion, let me recall the seasonable words of caution contained in Lord John Russell's despatch to the governor-general of Canada, of Oct. 14, 1839, — a despatch which has been termed "the charter of responsible government," as it was the first official communication to introduce that system into a British colony. "Every political constitution in which different bodies share the supreme power is only enabled to exist by the forbearance of those among whom this power is distributed. In this respect, the example of

[r] Gleanings in Past Years, vol. i., England, its People and Polity, vol. ii. p. 113. quoted with comments in Escott's

England may well be imitated. The sovereign using the prerogative of the Crown to the utmost extent, and the House of Commons exerting its power of the purse to carry all its resolutions into immediate effect, would produce confusion in the country in less than a twelvemonth. So in a colony, the governor thwarting every legitimate proposition of the Assembly, and the Assembly continually recurring to its power of refusing supplies, can but disturb all political relations, embarrass trade, and retard the prosperity of the people. Each must exercise a wise moderation. The governor must only oppose the wishes of the Assembly where the honour of the Crown or the interests of the Empire are deeply concerned; and the Assembly must be ready to modify some of its measures for the sake of harmony and from a reverent attachment to the authority of Great Britain." [8]

These counsels of moderation, though immediately addressed to a popular assembly about to assume enlarged powers under a new constitution, are equally applicable to all parties and public men who are invited to assist in the working of a machine so delicate, so complex, and so carefully balanced, as parliamentary government in the colonies.

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[8] Canada Assem. Journ. **1841**, appx. B. B. And see Merivale on Colonization, ed. 1861, p. 658. Gladstone's Gleanings, vol. i. p. 245.

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THE END.

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