"THE VETO POWER." *

In settling the form of government for the various colonies, the Crown from the beginning reserved to itself the right to disallow Colonial legislation; and in the first Imperial Act which framed a Colonial Government (The Quebec Act, 1774), and in all similar Acts since, the right is reserved.

In Canada the right is statutory, and is provided for in section 56 of The British North America Act. Authentic copies of all bills assented to by the Governor-General must be sent "at the first convenient opportunity" to one of her Majesty's Secretaries of State, and the Queen-in-Council may disallow within two years from the receipt thereof. At common law no time limit existed for the exercise of the prerogative of disallowance, but the unlimited common law prerogative has been changed to a limited statutory power.

Under the provisions of section 90 of The British North America Act, an authentic copy of every Provincial Act must be sent to the Governor-General-in-Council, and such Act may be disallowed within one year from the receipt thereof, but it cannot be vetoed after the expiration of that period.

The power of disallowance vested in the Governor-General-in-Council is, therefore, analogous to the power of disallowance vested in the King-in-Council over Dominion legislation. The supervision exercised by the law officers of the Crown in England is directed to seeing that any Colonial Act submitted for consideration is not repugnant to any Imperial legislation; the law officers do not pretend to examine Dominion Acts in order to determine whether or not they fall within the range of subjects confided to Parliament by section 91 of The British North America Act; and as between Canada and the individual Provinces, the veto power in the hands of the Federal authorities has no logical relation whatever to the question of legislative competence, although, in practice, for many years past the question of whether or not a Provincial enactment is within the powers of the Province has been in reality the one determining factor in dealing with the matter of disallowance.

The position is stated very concisely by the Privy Council in *Bank of Toronto* v. *Lambe*,[1]

* Notes of an Address delivered at Annual Dinner of Saskatchewan Bar Association, held at Regina, 25th June, 1924.

[1] 12 A. C. 575; 56 L. J. P. C. 87.

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

The late Mr. Cardwell, as Secretary of State for the Colonies, in acknowledging receipt of the Quebec Resolutions, on December 3rd, 1864, wrote, with respect to the Federal veto power, as follows:

"The importance of this principle cannot be overrated. Its maintenance is essential to the practical efficiency of the system and its harmonious operation, both in the general Government and in the Government of the several Provinces." Its object may, therefore, be said to provide a balance wheel for the harmonious operation of the Constitution.

There is no such power in the Federal authority of the United States. Each State may make laws for itself, uncontrolled by the Federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction; and here it may be said that the Supreme Court of the United States has performed a service in settling constitutional questions there similar to that performed by the Privy Council in determining questions of jurisdiction between Canada and the various Provinces.

The exercise of the power has not been frequent in Canada; but in the earlier days of Confederation it was applied in a wider sense than it is to-day. For some years, following 1867, there was a tendency to apply it to any abuse of Provincial powers, such as interference with vested rights or with decisions of the Courts, or the passing of retroactive legislation; but in more recent years "the abuse of power" has not been considered good ground for the exercise of the veto, and its use has rather been confined to cases where the Act of the Legislature in question is *ultra vires* or unconstitutional.

The early view of the power of disallowance is well illustrated by a statement made by the late Chief Justice Draper, in delivering judgment in the Goodhue Will case in 1873, which is reported in 19 Grant, p. 366. The Ontario Legislature had undertaken to make a will for a very wealthy gentleman named Goodhue, then deceased. The measure came under consideration in the Ontario Courts, where it was argued that, while it dealt with "property and civil rights," still such powers as are given to the Legislatures of the Provinces must be subject to "natural rights and justice." Chief Justice

Draper pointed out that legislation of the character under consideration was within the scope of the powers of the Legislature as conferred by The British North America Act, and then stated that the proper course was to apply to the Federal authorities for disallowance, using the following language:

"If from oversight or any other cause, provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or even possible interests, by retroactive legislation, such bills are still subject to the consideration of the Governor-General, who, as the representative of the Sovereign, is entrusted with authority—to which a corresponding duty attaches—to disallow any Act contrary to reason or natural justice or equity."

In 1881, Sir John A. Macdonald, in recommending disallowance of The Rivers and Streams Bill passed by the Ontario Legislature, said:

"I think the power of the local Legislatures to take away the rights of one man and vest them in another, as is done by the Act, is extremely doubtful; but assuming that such right does in strictness exist, I think it devolves upon the Government to see that such power is not exercised in flagrant violation of private rights and natural justice, especially when, as in this case, in addition to interfering with private rights in the way alluded to, the Act overrides the decision of a Court of competent jurisdiction by declaring retrospectively that the law always was and is different from that laid down by the Court."

In 1882, an appellate Judge of the Province of Quebec stated:

"The true check for the abuse of Provincial powers, as distinguished from an unlawful exercise of them, is the power of the central Government, to disallow laws open to the former reproach." And in 1893 the Hon. J. A. Ouimet, then Acting Minister of Justice, in referring to an Ontario statute for which application for disallowance had been made, said:

"The case would appear to be that of a statute which interferes with vested rights of property and the obligation of contract without providing for compensation, and would, therefore, in the opinion of the undersigned, furnish sufficient reason for the exercise of the power of disallowance."

These instances are sufficient to indicate that in the early years of Confederation abuse of Provincial powers—the passing of laws contrary to natural justice and equity—constituted good reason for the exercise of the Federal veto power; but, as pointed out above, a change has come about in more recent years, and we find that, in 1901, the Honourable David Mills, then Minister of Justice, took the position

that rights of property were subject only to the control of the Provincial Legislatures; and in reporting upon a Provincial Act dealing with rights of property, he said:

"The undersigned conceives that your Excellency's Government is not concerned with the policy of this measure; it is no doubt *intra vires* of the Legislature, and if it be unfair or unjust to the principles that ought to govern in dealing with private rights, the constitutional recourse is to the Legislature and the Acts of the Legislature may ultimately be judged by the people." Again, in 1901, the Honourable David Mills, in dealing with certain legislation of the Province of British Columbia for which disallowance was asked, said:

"The undersigned bases his refusal to recommend disallowance upon the fact that the application proceeds upon grounds affecting the substance of the Act with regard to matters undoubtedly within the legislative authority of the Province and not affecting any matter of Dominion policy. It is alleged that the Statute affects pending litigation and rights existing under previous legislation and grants from the Province. The undersigned considers that such legislation is objectionable in principle and not justifiable except under very exceptional circumstances; but your Excellency's Government is not in any wise responsible for the principles of the legislation . . . and the proper remedy in such cases lies with the Legislature or its constitutional judges."

In 1902, Sir Charles Fitzpatrick, reporting upon legislation of the Province of British Columbia which had the effect of interfering with the status of parties engaged in litigation, said:

"It appears that litigation was pending between the Government and the petitioners at the time of the passing of the Act, with regard to the petitioners' liability to pay these royalties; and no doubt a very strong case is made out by the petitioners in support of the view that the Legislature should have allowed the existing law to operate and should not have undertaken to legislate so as to diminish or offset existing rights. The undersigned cannot help but express disapprobation of measures of this character."

But he refused to disallow, stating:

. . . "for it would place the Government of Canada in place of the Legislature in regard to matters over which the Legislature has exclusive legislative authority."

In 1909 a very interesting case arose in the Province of Ontario. The Florence Mining Company claimed to have staked mining claims and to have made valuable discoveries in Cobalt Lake. The Ontario

Government claimed that Cobalt Lake had been withdrawn from exploration, and later sold the property in question to the Cobalt Mining Company. The Florence Mining Company commenced action to recover their claim, whereupon the Legislature stepped in and declared the property to be vested in the purchaser, the Cobalt Mining Company, "as and from the date of the said sales absolutely freed from all claims and demands of any nature whatever in respect of or arising from any discovery, location or staking." This Act of the Ontario Legislature was criticised in very strong language, but, as was pointed out by someone at the time, the eighth commandment, "Thou shalt not steal," does not apply to a Legislature; the local Legislature has the power to take away the property of anyone, and to deprive any person of his right to go to the Courts; there is nothing within the realm of its jurisdiction which it cannot do. Disallowance of the Act was sought, but was refused; Sir Alan Aylesworth, the Minister of Justice, stating:

"The large question of principle, which was presented for consideration, was simply whether or not the Provincial Legislature had the power, without control, to take one man's property and give it to another, and to take away from the person injured any right of redress in the Courts . . . If this identical question had arisen prior to 1896 this legislation would have been disallowed . . . A Provincial Legislature having, as is given to it by the terms of the B. N. A. Act, full and absolute control over property and civil rights within the Province, might, if it saw fit to do so, repeal Magna Charta itself . . . rights of property are subject only to the control of Provincial Legislatures in Canada . . . my one inquiry ought to be whether or not there was anything in the legislation itself which went beyond the power of the Provincial Legislature to pass a law referring alone to property and civil rights within the Province."

One of the most notable attempts in recent years to secure disallowance of a Provincial Act on the ground of interference with vested rights, was that in connection with the Ontario Power Commission Amendment Act (ch. 19 of the Statutes of 1909). This Statute was passed in aid of the policy of the Ontario Government, which had established the Hydro-Electric Power Commission in that Province, with statutory powers to supply electric energy to the municipalities. The Act made alterations in contracts theretofore existing between certain municipalities and the Commission, and declared that the contracts so altered "shall be conclusively deemed to be contracts executed by the corporations," and further declared that any

action which had been brought or was pending calling in question the validity of the said contracts or any bylaws authorizing the contracts of the municipalities "shall be for ever stayed." Disallowance of the Act was sought on the grounds that: (1) vested rights were unjustly interfered with; (2) the credit of Ontario and of Canada would be injured in the money markets of Europe, as the Government was entering the field of supplying electric power in competition with a number of companies supported largely by English capital, and which had been allowed to spend large sums for the development of electric power. Disallowance was refused, the Minister of Justice, Sir Alan Aylesworth, stating:

"A suggestion of the abuse of power, even so as to amount to partial confiscation of property, or that the exercise of power has been unwise or indiscreet, should appeal to your Excellency's Government with no more effect than it does to the ordinary tribunal, and the remedy, in such cases, is, in the words of Lord Herschell, an appeal to those by whom the Legislature is elected."

There was considerable controversy in Ontario on the question of this Act. The Ontario Government took very strong grounds on the right of the Province to pass the legislation, and on December 7th, 1909, the Attorney-General of Ontario wrote the Minister of Justice, setting out what he considered to be the true constitutional position, and what, indeed, has been the position taken on the subject by the various Provinces whenever the necessity arose. The letter of the Attorney-General sets forth the position so forcibly that I quote a portion of it, as follows:

"For upwards of two hundred years the Lords and the Commons of Great Britain have legislated without fear of the Royal Veto, although its existence has been undoubted; and therefore, in full accord with the spirit and genius of British institutions, the people of the Province, being entitled to all the rights of British subjects elsewhere, are as free to legislate within their jurisdiction, as the Lords and Commons of Great Britain are free to legislate, and cannot submit to any check upon the right of the Legislature to legislate with respect to subjects within its well-defined jurisdiction, although a technical right to disallow may exist. Any other view would mean that there are different grades of British subjects within the Empire —that the people of the several Provinces of the Dominion have not and are not entitled to the full and free enjoyment of those civil rights and liberties which are enjoyed by British subjects in the Mother Country, a condition of things which would be intolerable."

A very important application for disallowance was made with respect to an Act of the Alberta Legislature of 1910, whereby the Legislature confiscated to the general revenue fund of the Province certain money then on deposit with certain banks, the proceeds of the sale of the bonds of the Alberta and Great Waterways Railway Co., the said money having been paid and deposited in the banks by the purchasers of the bonds under an arrangement with the Alberta Government and the Railway Company, confirmed by Alberta Statute and Order-in-Council, that they were only to be paid out to the Railway Company in monthly payments as the construction of the line proceeded. The Act, however, guaranteed the bonds, and provided for the indemnification of the Railway Company. It was contended on the application for disallowance that (1) the Act was *ultra vires,* as designed to raise Provincial revenue in a manner not authorized by the B. N. A. Act; (2) the Act was *ultra vires,* because it interfered with the exclusive power of Canada with regard to banking; (3) that it unjustly diverted the proceeds of the bonds from the construction of the railway for which the money was raised and deposited, and injuriously affected the general credit and reputation of the Dominion. Mr. Doherty, the Minister of Justice, in a report dated June 20th, 1912, stated that, while constitutionally the power of veto on the grounds of injustice or interference with private rights existed, still the subject was one of Provincial policy, and within the jurisdiction of the Province, and refused to interfere.

Certain Statutes of the Province of Saskatchewan of 1909, incorporating loan, investment and trust companies, and purporting to invest them with power to transact business beyond the limits of the Province, were disallowed pursuant to a report of the Minister of Justice of January 9th, 1911. The report stated:

"It is the duty of your Excellency's Government, when persuaded by authority or upon due consideration that a Provincial enactment is *ultra vires* of the Legislature, to see that the public interest does not suffer by an attempt to sanction locally laws which can derive their authority only from Parliament . . . Great confusion and hardship may result from a statutory corporation carrying on a trust or investment business in excess of its corporate powers."

An Act of the Legislature of the Province of Quebec of 1910, amending the charter of a company called "The General Trust," was disallowed, because it authorized the company to carry on a business which the Minister of Justice considered "impinged upon the subject of banking, and also because it apparently authorized the company to carry on a general business throughout Canada."

Provincial Acts which discriminate against foreign immigrants or resident aliens have, on several occasions, been treated by the Federal authorities as a special class and have been disallowed. In 1899, a British Columbia statute, the effect of which was that no person other than a British subject might have any right or interest in any of the mining properties to which the British Columbia Mining Act applied, was disallowed. In 1901 the Minister of Justice recommended the disallowance of a number of British Columbia Acts incorporating railway companies, which contained a provision that no aliens should be employed during the construction unless it was demonstrated to the satisfaction of the Lieutenant-Governor-in-Council that the work could not be proceeded with without the employment of such aliens. In this case actual disallowance became unnecessary, because the Provincial authorities agreed to make the necessary amendments. Again, in 1901, British Columbia statutes prohibiting immigration into the Province of any immigrants who failed to satisfy an educational test of knowledge of a European language, and that no workmen should be employed on works to be constructed under Provincial franchise who failed to pass a similar test, were disallowed at the urgent request of the Japanese Consul. Mr. Joseph Chamberlain pointed out, in a despatch to the Governor-General on January 22nd, 1901, that such legislation affects directly the relations of the Empire with foreign States.

It should also be pointed out that the Governor-General-in-Council may always be relied upon to veto Provincial Acts contrary to Imperial treaties, which are placed under the special care of the Dominion by sec. 132 of the British North America Act, as follows:

"The Parliament and the Government of Canada shall have all the powers necessary or proper for performing the obligations of Canada or any Province therein as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries."

There have been two very recent instances where disallowance has been asked to which some reference should be made in conclusion. These are the Act of the Manitoba Legislature with respect to the taxation of grain sold for future delivery (Ch. 17 of the Statutes of Manitoba, 1923), and an Act to impose a tax upon minerals (Ch. 32 of the Statutes of Alberta, 1923).

The Grain Futures Taxation Act of Manitoba provided that upon every contract of sale of grain for future delivery made at any exchange or similar institution or place of business in Manitoba, there

shall be paid to his Majesty for the use of the Province, a tax of 12 cents on every thousand bushels of flax seed, six cents on every thousand bushels of wheat, and three cents on every thousand bushels of oats, barley or rye. Disallowance of the Act was sought by both Saskatchewan and Alberta, on the ground that it did not constitute "direct taxation within the Province" within the meaning of sec. 92, clause 2 of the British North America Act. In the request for disallowance reference was made to several leading cases where the meaning of this provision had been considered: *Atty-General for Quebec* v. *Queen Ins Co.*,[2] *Atty-General for Quebec* v. *Reed*,[3] *Bank of Toronto* v. *Lambe*,[4] *Brewers and Maltsters' Assn. of Ontario* v. *Atty.-General for Ontario*,[5] *Cotton* v. *The King*.[6]

The Governor-General-in-Council referred the matter to the Supreme Court of Canada for decision, and very recently judgment was given, holding that the Statute was *ultra vires*; Mr. Justice Mignault pointed out that the tax in question came within the definition of an indirect tax by John Stuart Mill, which the Judicial Committee in *Cotton* v. *The King, supra*, adopted as authoritative, namely, a tax which is demanded "from one person in the expectation and intention that he shall indemnify himself at the expense of another."

The Mineral Taxation Act (Ch. 32, Statutes of Alberta, 1923). The Act defines "mineral owner" as a person

"with the right to search for, work, win or get, any mineral who derives such right by lease, grant, license or otherwise from the Dominion of Canada or the Province, and also every person who possessed the same by virtue of a reservation or exception thereof, or as an incident or part of his ownership of land." "'Non-taxable person' shall mean the Crown and any person who is not liable to taxation by the Province."

The Act provides that every mineral owner who is a taxable person, in respect of any parcel of land, in, on or beneath the surface of which he is entitled to search for, work, win or get any material shall pay a tax of three cents per acre on the surface of the land; the tax shall fall due on August first in each year; that the owner must forward a statement to the Minister of Municipal Affairs before September first in each year, showing the parcels for which he is taxable and therewith pay his taxes; if the taxes are not paid by October first, the Minister must send the mineral owner a registered letter, and if the

[2] (1878) 3 A. C. 1090.
[3] 10 A. C. 141.
[4] 12 A. C. 575.
[5] (1897) A. C. 231.
[6] (1914) A. C. 176.

taxes are not paid within three months from the despatch of the letter, the Minister shall, in case the minerals beneath the land affected are registered in the name of a taxable person, direct the registrar of the proper land registration district to make a memorandum upon the proper certificate of title as follows: "That all mines and minerals in, on or beneath the surface of the said parcel of land are the property of the Province," and thereupon the property in all minerals shall pass to the Crown in the right of the Province, together with full liberty to the Province and to persons authorized by it to enter upon such lands, develop the minerals and carry them away at pleasure; provision is also made that in cases where the land under which the minerals lie belongs to a non-taxable person, the Minister may proceed to enforce the payment of the tax by suit or by distraint levied in the same way as if the Minister were a landlord who had demised the surface of the parcel of land.

Applications for disallowance of the Act were made by the Canadian Pacific Railway Co., the Hudson's Bay Co., the Western Land Co., Ltd., The Calgary & Edmonton Land Co., Ltd., and others. The grounds for the applications were briefly that the legislation was oppressive, confiscatory and unjust. The petitions for disallowance were submitted by the Federal authorities to the Government of Alberta, and the Attorney-General of the Province wrote affirming the right of the Province to enact the law, using the following language:

"The power of the Province to impose taxation, like any other legislative power, is a plenary power of a sovereign legislature, and properties within the Province may be taken to answer Provincial needs, in such shape, in whole or in part, as the sovereign Legislature of the Province in its wisdom deems proper, the Government in the exercise of such power being answerable only to the electors of the Province."

The Minister of Justice, in his statement disallowing the Act, reaffirms the power of veto, and states that it may be used with regard to any Provincial Statute, if, in the words of secs. 56 and 90 of the B. N. A. Act, "the Governor-General-in-Council within one year after the receipt thereof by the Governor-General thinks fit to disallow the Act," and continues:

"While the discretion thus belonging to your Excellency in Council ought, of course, to be wisely exercised upon sound principles of public policy, and having due regard to local powers of self-government, there are cases in which disallowance affords a constitutional remedy, and it is implicit that the exercise of the power ought not to

be withheld when the public interest requires that it should become effective."

The Minister of Justice, however, found it unnecessary to pursue the question of the position or interests of mineral owners, for he states:

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

The report then points out that in the Constitution of the Western Provinces the public lands were reserved for administration by the Federal Government; that the administration of the lands is intimately connected with immigration and the development of the country; that it has been a part of the policy of the Dominion for many years to reserve the minerals; and in the disposition of the minerals it has been usual to grant leases for the working and winning of those which may be specified in the demise; that the grantee or lessee from the Dominion is taxable under the Act in question; that where such lessee fails to pay the tax, the minerals become the property of the Province; and that in this way the legislation may operate directly to divert Dominion right; also that where the surface remains in the Dominion and the minerals are leased, power is given to enforce the payment of the tax by suit or distraint levied in the same way as if the Minister were landlord, thus giving the Minister the right of entry and distress on Dominion lands.

It is then pointed out that section 91 (1) of the B. N. A. Act assigns to the Parliament of Canada exclusively "the public debt and property," and that this is entirely removed from Provincial legislative authority; and the conclusion is reached that those provisions of the Mineral Taxation Act which affect or purport to affect the public property of Canada are *ultra vires* of the Province.

To sum up: Provincial legislation will not, under the present practice, be disallowed merely because it constitutes an abuse of Provincial power; it will be disallowed when *ultra vires:* when it discriminates against foreign immigration; when it interferes with Imperial treaties, or when it interferes with Dominion property or policy.

Regina. W. M. MARTIN.