IN THE MATTER OF A REFERENCE CONCERNING THE POWER OF HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, UNDER THE BRITISH NORTH AMERICA ACT, 1867, TO DISALLOW ACTS PASSED BY THE LEGISLATURES OF THE SEVERAL PROVINCES, AND THE POWER OF RESERVATION OF THE LIEUTENANT-GOVERNOR OF A PROVINCE.

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* Jan. 10.
* Mar. 4.

Constitutional law—B.N.A. Act, ss. 90, 55, 56, 57—Power of Governor General in Council to disallow provincial legislation—Power of Lieutenant-Governor to reserve for signification of pleasure of Governor General Bills passed by legislative assembly or legislative authority of a province.

The power to disallow provincial legislation, vested in the Governor General in Council by s. 90 of *The British North America Act, 1867*, is still a subsisting power. Its exercise is not subject to any

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis, Kerwin and Hudson JJ.

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limitations or restrictions, save that the power shall be exercised within the prescribed period of one year after the receipt of an authentic copy of the Act by the Governor General.

The fact that, as is the practice in some provinces, the Lieutenant-Governor assents to a Bill in the name, not of the Governor General but of His Majesty, does not impair the legal validity of his assent, nor does it affect the said power of disallowance vested in the Governor General in Council.

Per Duff C.J. and Davis J.: The circumstance that the assent of the Lieutenant-Governor acting under the authority and on behalf of the Crown has been given in a form more august than that prescribed by s. 90 of the *B.N.A. Act* cannot impair in any way the legal validity of his assent that is expressed as the assent of the Sovereign, which in truth, in point of law, it is and is intended to be; and this practice is of no relevancy touching the law governing the matters now in question, which is to be ascertained from the enactments of the *B.N.A. Act*.

As to that practice (assenting in the name of the King), Kerwin J. was of opinion that it is the correct practice. Crocket J. was inclined to the same opinion. Hudson J. was of opinion that the practice is justified. (All three were of opinion that assent in the Governor General's name would have the same effect).

The power to reserve, for the signification of the pleasure of the Governor General, Bills passed by the legislative assembly or legislative authority of a province, vested in the Lieutenant-Governor by s. 90 of *The British North America Act, 1867,* is still a subsisting power. Its exercise is not subject to any limitations or restrictions, save that the discretion of the Lieutenant-Governor shall be exercised subject to any relevant provision in his Instructions from the Governor General.

Liquidators of the Maritime Bank v. *Receiver-General of New Brunswick,* [1892] A.C. 437; *In re The Initiative and Referendum Act,* [1919] A.C. 935; *Bonanza* v. *The King,* [1916] 1 A.C. 566; *British Coal Corpn.* v. *The King,* [1935] A.C. 500; *Wilson* v. *E. & N. Ry. Co.,* [1922] 1 A.C. 202, at 209, 210; *Bank of Toronto* v. *Lambe,* 12 App. Cas. 575, at 587, and other cases, discussed or referred to. The *Statute of Westminster* (1931) 22 Geo V. (Imp.), c. 4, discussed.

REFERENCE, by Orders of the Governor General in Council, of the following questions of law to the Supreme Court of Canada for hearing and consideration, pursuant to s. 55 of the *Supreme Court Act,* R.S.C., 1927, c. 35:—

1. Is the power of disallowance of provincial legislation, vested in the Governor General in Council by section 90 of the *British North America Act, 1867,* still a subsisting power?
2. If the answer to question 1 be in the affirmative, is the exercise of the said power of disallowance by the Governor General in Council subject to any limitations or restrictions and, if so, what are the nature and effect of such limitations or restrictions?

3. Is the power of reservation for the signification of the pleasure of the Governor General of Bills passed by the legislative assembly or legislative authority of a province vested in the Lieutenant-Governor by section 90 of the *British North America Act, 1867*, still a subsisting power?
4. If the answer to question 3 be in the affirmative, is the exercise of the said power of reservation by the Lieutenant-Governor subject to any limitations or restrictions, and if so, what are the nature and effect of such limitations or restrictions?

The (unanimous) answers of the Court to the said questions, as certified to His Excellency the Governor General in Council, were as follows:—

1. The first question referred is answered in the affirmative;
2. The second question referred is answered in the negative, save that the power of disallowance shall be exercised within the prescribed period of one year after the receipt of an authentic copy of the Act by the Governor General;
3. The third question referred is answered in the affirmative;
4. The fourth question referred is answered in the negative, save that the discretion of the Lieutenant-Governor shall be exercised subject to any relevant provision in his Instructions from the Governor General.

Certain Acts of the Legislature of the Province of Alberta (assented to on August 6, 1937, and intituled respectively: "An Act to Provide for the Regulation of the Credit of the Province of Alberta"; "An Act to Provide for the Restriction of the Civil Rights of Certain Persons"; and "An Act to Amend the Judicature Act") were, by Order of the Governor General in Council, dated August 17, 1937 (P.C. 1985), disallowed, which disallowance was duly signified. The Government of the Province of Alberta challenged the constitutional right and competency of the Governor General in Council to disallow the legislation, on the ground that the power of disallowance, which the Governor General in Council had professed to exercise, no longer exists. Therefore the above ques-

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tions 1 and 2 were (by Order in Council, P.C. 2715) referred as aforesaid. The above questions 3 and 4 were added (by Order in Council, P.C. 2802) at the request of the Government of the Province of Alberta.

Due notice of the hearing of the Reference (in accordance with an order of this Court) was given to the Attorneys-General of the several Provinces of Canada.

A. Geoffrion K.C., *J. Boyd McBride K.C.*, and *C. P. Plaxton K.C.* for the Attorney-General for Canada.

O. M. Biggar K.C. and *J. J. Frawley K.C.* for the Attorney-General for Alberta.

(*H. A. MacLean* attended on behalf of the Attorney-General for British Columbia, but did not take part in the argument).

The judgment of the Chief Justice and Davis J. was delivered by

THE CHIEF JUSTICE.—The answers to the questions referred to us depend in substance upon the construction of sections 55, 56, 57 and 90 of the *British North America Act*. We think there is nothing to be gained by a verbal analysis of those sections. The plain effect of section 90 is that

> what has been laid down as to the Dominion Parliament in regard to . . . the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, is to extend and apply to the Legislatures of the several Provinces as if these provisions were re-enacted and made applicable in terms to the respective Provinces and their Legislatures, with the substitution of the Lieutenant-Governor of the Province for the Governor General, of the Governor General for the Sovereign and for a Secretary of State (*In re The Initiative and Referendum Act* (1)).

The alternative construction, in support of which everything that could be said for it with any degree of plausibility was lucidly put before us by Mr. Biggar, involves the conclusion that the Governor General has never possessed authority to disallow provincial legislation; and that the authority of a Lieutenant-Governor to reserve bills presented to him for assent is a power to reserve such bills for the signification of the pleasure of the Sovereign himself and not that of the Governor General.

This is a novel view put forward now for the first time since the *British North America Act* came into force. Many provincial statutes have been disallowed in the period

(1) [1919] A.C. 935, at 942.

which has elapsed since July 1st, 1867, and bills have been reserved to be dealt with by the Governor General which have been dealt with accordingly; and the regularity of these proceedings has never before been challenged. The power of disallowance by the Governor General has been recognized in at least two judgments of the Privy Council (*Bank of Toronto* v. *Lambe* (1), and *Wilson* v. *E. & N. Railway Co.* (2).)

One argument advanced is that the literal construction of section 90 is inconsistent with the reasons for judgment given on behalf of the Judicial Committee by Lord Watson in *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (3) and by Lord Haldane in *In re The Initiative and Referendum Act* (4). The question before the Board in the first of those appeals was whether the debt of a bank, in respect of public moneys of a province deposited in the name of the Receiver-General of a province, was entitled to payment in full, over other depositors who were simple contract creditors of the bank, as a Crown debt to which priority attaches by virtue of the prerogative. It was pointed out that previous decisions of the Board had already settled that the territorial rights assigned by section 109 to the provinces became, after the enactment of the *B.N.A. Act,* vested in Her Majesty as the Sovereign head of the province for the benefit of the province and subject to the control of its legislature. As those decisions rested upon the general recognition of "Her Majesty's continued sovereignty under the Act of 1867," it appeared to their Lordships that the revenues of Her Majesty other than territorial revenues, assigned to the provinces by section 126, were vested in the Crown in the same sense. That was the precise point decided, but the judgment of Lord Watson contains an exposition of the relation between the Sovereign and the Provinces which is relied upon by Alberta on this reference. The argument, which appears to have been addressed on behalf of the appellants to their Lordships in that appeal, that the Lieutenant-Governor, neither in legislative nor in execu-

(1) (1887) 12 App. Cas. 575, at 587.
(2) [1922] 1 A.C. 202, at 209, 210.
(3) [1892] A.C. 437.
(4) [1919] A.C. 935.

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tive acts, represented the Crown was rejected on grounds which are summed up in this paragraph (p. 442):

> It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share.

In *In re The Initiative and Referendum Act* (1), the Board had to consider whether legislation which, as it was held, would compel the Lieutenant-Governor to submit a proposed law to a body of voters distinct from the Legislature, and would render him powerless to prevent it becoming an actual law if approved by those voters, was invalid. In the course of the judgment delivered by Lord Haldane on behalf of the Judicial Committee, the judgment and the reasons in *The Liquidators of the Maritime Bank* case (2) were recognized by the Board as laying down the governing principles in respect of the relation of the Crown to the provinces. In substance, these judgments declare that, in the appointment of a provincial Governor, the Governor General in Council under section 58 is acting as the Executive Government of the Dominion which, by section 9 of the statute, is declared to be vested in the Queen; in other words,

> the act of the Governor General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown.

Lord Watson proceeds:

> a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion government (*Liquidators of the Maritime Bank* v. *The Receiver-General of New Brunswick* (3)).

The act of a Lieutenant-Governor in assenting to a bill or in reserving a bill is the act of the Crown by the Crown's representative just as the act of the Governor General in assenting to a bill or reserving a bill is the act of the Crown.

(1) [1919] A.C. 935. (2) [1892] A.C. 437.
(3) [1892] A.C. 437, at 443.

There is nothing, however, in all this in the least degree incompatible with a Lieutenant-Governor reserving a bill for the signification of the pleasure of the Governor General who is the representative of the Crown or in the disallowance of an Act of the Legislature by the Governor General acting on the advice of his Council who, as representing the Sovereign, constitutes the executive government for Canada.

It seems proper in this connection to call attention to the functions of the Dominion Government respecting the appointment and the removal of a Lieuteant-Governor. By section 58 of the *B.N.A. Act,* the Lieutenant-Governor is appointed by the Governor General in Council by instrument under the Great Seal of Canada. His commission runs in the name of the Sovereign, just as the commissions of other great officers of state (appointed by the same authority under such instruments) run in the name of the Sovereign. But his Instructions emanate from the Governor General and it is the Governor General in Council who determines their character; and in assenting to bills, withholding assent, and reserving bills for the signification of the Governor General's pleasure, he exercises his discretion subject to the Instructions of the Governor General. He holds office during the pleasure of the Governor General (sec. 59). His salary is fixed and provided by the Parliament of Canada.

It is true it appears to have been the practice in Alberta and in some of the other provinces, although the practice is not uniform, for the Lieutenant-Governor to assent to bills in the name, not of the Governor General, but of His Majesty. The circumstance, however, that the assent of the Lieutenant-Governor acting under the authority and on behalf of the Crown has been given in a form more august than that prescribed by the statute could not, of course, impair in any way the legal validity of his assent that is expressed as the assent of the Sovereign, which in truth, in point of law, it is and is intended to be; and this practice is of no relevancy touching the law governing these matters which is to be ascertained from the enactments of the *B.N.A. Act.*

That the Lords of the Privy Council did not consider the principles enunciated in the two judgments just discussed implied as a consequence any qualification of the *ex facie*

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meaning of section 90 seems to follow from the tenor of the passage quoted in the first paragraph of this judgment from that of Lord Haldane in the later of the two appeals.

We come now to the precise questions submitted which are, as to both disallowance and reservation: Is the power still a subsisting power and, if so, is it subject to any limitations or restrictions?

We are not concerned with constitutional usage. We are concerned with questions of law which, we repeat, must be determined by reference to the enactments of the *British North America Acts* of 1867 to 1930, the *Statute of Westminster,* and, it might be, to relevant statutes of the Parliament of Canada if there were any.

Section 90 which, with the changes therein specified, re-enacts sections 55, 56 and 57 of the *B.N.A. Act,* is still subsisting. It has not been repealed or amended by the Imperial Parliament and it is quite clear that, by force of subsection 1 of section 7 of the *Statute of Westminster,* the Dominion Parliament did not acquire by that statute, any authority to repeal, amend or alter the *British North America Acts.* Whether or not, by force of section 91 (29) and section 92 (1) of the *B.N.A. Act,* the Dominion Parliament has authority to legislate in respect of reservation, it is not necessary to consider because no such legislation has been passed.

The powers are, therefore, subsisting. Are they subject to any limitation or restriction?

Once more, we are not concerned with constitutional usage or constitutional practice. Nor is it necessary to consider whether the Parliament of Canada, though not competent to repeal or amend section 90 of the *British North America Act,* possesses authority by legislation to dictate the form or the substance of the Instructions to the Lieutenant-Governors as touching the reservation of bills or the rules and principles by which the Governor General is to be guided in exercising the power of disallowance. Here again, there is no pertinent legislation.

As to disallowance, it was said in the judgment of the Judicial Committee in *Wilson* v. *E. & N. Railway Co.* (1), "It is indisputable that in point of law the authority is unrestricted."

(1) [1922] 1 A.C. 202, at 210.

As to reservation, the statute in express terms (section 55, as re-enacted by section 90) imposes on the Lieutenant-Governor the duty to declare either that he assents to a bill presented to him, or that he withholds assent, or that he reserves the bill for the signification of the Governor General's pleasure. He is to act, the statute says, " according to his discretion, but subject to the provisions of this Act and to . . . . Instructions " of the Governor General.

There is nothing in the *British North America Act* controlling this discretion; nor is there any other statute having any relevancy to the matter.

The power of reservation is subject to no limitation or restriction, except in so far as his discretion in exercising it may be controlled or regulated by the Instructions of the Governor General and it is not suggested that the Instructions contain anything of that character.

The conclusion, therefore, is that the power of disallowance and the power of reservation are both subsisting powers, and that the former is subject to no limitations or restrictions and the latter only to the restriction that the discretion of the Lieutenant-Governor shall be exercised subject to the Governor General's Instructions.

CANNON J.—The following questions were referred by His Excellency the Governor General in Council to this Court for hearing and consideration, pursuant to section 55 of the *Supreme Court Act:*—

1. Is the power of disallowance of provincial legislation, vested in the Governor General in Council by section 90 of the British North America Act, 1867, still a subsisting power?

2. If the answer to Question 1 be in the affirmative, is the exercise of the said power of disallowance by the Governor General in Council subject to any limitations or restrictions and, if so, what are the nature and effect of such limitations or restrictions?

3. Is the power of reservation for the signification of the pleasure of the Governor General of bills passed by the legislative assembly or legislative authority of a province vested in the Lieutenant-Governor by section 90 of the British North America Act, 1867, still a subsisting power?

4. If the answer to Question 3 be in the affirmative, is the exercise of the said power of reservation by the Lieutenant-Governor subject to any limitations or restrictions, and if so what are the nature and effect of such limitations or restrictions?

It appears that these references were deemed advisable as a result of difficulties between the Dominion and the province of Alberta, following the disallowance by the Governor General of three acts passed on August 6th, 1937,

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by the legislature of Alberta. The other Provinces, although duly notified, did not take part in the argument.

After hearing counsel for the Dominion and the province, I have without hesitation reached the conclusion that the four questions should be answered respectively as follows:—

Question 1. Yes. The power of disallowance is and remains in full vigour.

Question 2. The power of disallowance by the Governor General in Council is subject to no limitation or restriction whatsoever, save that it has to be exercised within the period of one year after receipt of the Act by the Governor General.

Question 3. Yes. The power of reservation is and remains in full vigour.

Question 4. The exercise of the power of reservation by the Lieutenant-Governor is subject to no limitation or restriction whatsoever, save that the Lieutenant-Governor is, under the terms of sec. 90 of the *British North America Act*, required to exercise the power "according to his discretion but subject to the provisions of the said Act and to the Governor General's instructions."

And I now proceed to give my reasons for reaching the above conclusions:—

1. The Province of Alberta having raised the controversy, it may be relevant to note that the *Alberta Act*, 4-5 Ed. VII (Canada) c. 3, sec. 3, provides as follows:—

3. The provisions of *The British North America Acts*, 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

2. The provisions of the *British North America Act* to be considered read as follows:—

55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, 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.

56. Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to one of Her Majesty's Principal Secretaries of State,

and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

57. A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

90. The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—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.

3. Blending the three sections with the directions of sec. 90, we find:—

(*a*) Where a Bill passed by the House or Houses of the Legislature is presented to the Lieutenant-Governor of the Province for the Governor General's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to the Governor General's Instructions, either that he assents thereto in the Governor General's Name, or that he withholds the Governor General's Assent, or that he reserves the Bill for the Signification of the Governor General's pleasure.

(*b*) Where the Lieutenant-Governor of the Province assents to a Bill in the Governor General's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to the Governor General, and if the Governor General in Council within One Year after Receipt thereof by the Governor General thinks fit to disallow the Act, such Disallowance (with a Certificate of the Governor General of the Day on which the Act was received by him) being signified by the Lieutenant-Governor, by Speech or Message to the House, or, if more than one, to each of the Houses of the Legislature, or by Proclamation, shall annul the Act from and after the Day of such Signification.

(*c*) A Bill reserved for the Signification of the Governor General's Pleasure shall not have any Force unless and until within One Year from the Day on which it was presented to the Lieutenant-Governor for the Governor General's Assent, the Lieutenant-Governor signifies by Speech or Message to the House, or, if more than one, to each of the Houses of the Legislature or by Proclamation, that it has received the Assent of the Governor General in Council.

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An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of the House, or of each House, if more than one, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of the Province.

4. It was accepted as common ground, at the hearing, that the statutory provisions are clear and that they are unrepealed. Counsel for Alberta agreed entirely with counsel for the Dominion that, when the directions given by section 90 are carried out in connection with sections 55 to 57, we get a perfectly clear statutory direction. One must reach the conclusion that these provisions must be given full force and effect, unless they have been amended by the Imperial Parliament. Far from doing so, the *Statute of Westminster* (1931), 22 Geo. V, Imp. ch. 4, sec. 7, enacts:

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

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

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

In my opinion these enactments would give new force, if necessary, to the existing provisions of the *British North America Act* and preserve them. The Imperial Conferences mentioned in the Alberta factum could not and did not purport to change the law. Moreover, the resolutions of these conferences do not apply to the right of the federal government to disallow or to the right of the Lieutenant-Governor to reserve, but to the right of the Governor General to reserve and to the right of the Imperial Government to disallow.

5. Both powers have been often exercised in practice and the Lieutenant-Governors instructed accordingly. All the jurisprudence that has been quoted is to the same effect.

The Judicial Committee, in *Wilson* v. *Esquimalt and Nanaimo Ry. Co.* (1), said, as regards the federal power of disallowance: "It is indisputable that in point of law the authority is unrestricted." How and when the power is to be exercised is a matter to be determined by the Governor General in Council.

(1) [1922] 1 A.C. 202, at 210.

6. It may be added, although it is not by itself a decisive consideration, that chapter 2 of the Revised Statutes of Alberta (1922) provides that in case of reservation by the Lieutenant-Governor of a bill for the assent of the Governor General, the clerk of the legislative assembly shall endorse thereon the date when the Lieutenant-Governor has signified that the same was laid before the Governor General and that the Governor General was pleased to assent to the same. In the case of an Act of the province which has been reserved and afterwards assented to, provisions are made for the coming into force of the legislation.

7. An additional reason for the preservation of this power of disallowance of provincial statutes is its necessity, more than ever evident, in order to safeguard the unity of the nation. It may become essential, for the proper working of the constitution, to use in practice the principle of an absolute central control which seems to have been considered an essential part of the scheme of Confederation; this control is found in the Lieutenant-Governor's power of reservation and the Governor General in Council's power of disallowance.

CROCKET, J.—I take it that questions 1 and 2 submitted on this reference concern only the power of the Governor General in Council to disallow provincial legislation, that is to say, Acts passed by the Legislatures of the several Provinces of Canada, which have been assented to by their respective Lieutenant-Governors. The form of question 1 apparently assumes that s. 90 of the *British North America Act* vested this power of disallowance in the Governor General in Council and merely asks if that power is still a subsisting power.

I am of opinion, not only that the clear and indisputable effect of s. 90, as the question assumes, was to vest the power of disallowance of provincial legislation in the Governor General in Council, but am of opinion also that that power still subsists, precisely as it has subsisted since the coming into force of the *British North America Act* in 1867, unimpaired by the *Statute of Westminster, 1931,*

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or any other enactment of the Imperial Parliament. The *Statute of Westminster* itself expressly declares by s. 7:—

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

None of the British North America Acts passed by the Imperial Parliament after the enactment of the principal Act of 1867, viz: the Act of 1871, c. 28, respecting the establishment of new Provinces in Canada; the Act of 1886, c. 35, as to the representation in the Parliament of Canada of territories not then forming part of any Province but forming part of the Dominion; the Act of 1915, c. 45, increasing the number of senators; the Act of 1916, c. 19, extending the duration of the then existing Parliament of Canada; and the Act of 1930, c. 26, confirming certain agreements between the Government of Canada and the western Provinces, purport to alter in any manner, either the respective legislative powers of the Dominion or of the Provinces, or the administrative prerogative of the Governor General in Council in relation to the disallowance of provincial legislation, as provided for in the principal Act of 1867.

While s. 90 of the *British North America Act* of 1867 vests the power of disallowance in the Governor in Council by the very inconvenient method of extending and applying to the Legislatures of the several Provinces the provisions of the Act relating to the assent to bills by the Governor General, the disallowance of Acts by the Queen in Council and the signification of pleasure on bills reserved by the Governor General, "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," and does not re-produce these provisions as thus altered, the meaning and effect is perfectly clear, as I have said, so far as the power of disallowance is concerned, once those provisions are examined and re-produced with the required substitutions. The only provisions which the Act contains relating to the disallowance of federal Acts are those which are found in s. 56.

There may be a question as to whether the intention of s. 90 was to substitute "the Governor General's name" for "the Queen's name", concerning the assent to bills in the Legislatures of the Provinces. I am inclined to agree with the conclusion expressed by Dr. Todd in his "Parliamentary Government in the British Colonies" (1894) for the reasons stated at p. 440 by that experienced and eminent authority on that subject, as well as for the reason that it has been definitely decided by the Judicial Committee of the Privy Council that the Lieutenant-Governor is as much the representative of the Sovereign for all purposes of the Provincial Government as is the Governor General for all purposes of the Dominion Government (see *Maritime Bank* v. *Receiver-General of New Brunswick* (1), and *Bonanza* v. *The King* (2); and *In re The Initiative and Referendum Act* (3), that the correct constitutional practice is for the Lieutenant-Governor to assent to or to withhold his assent in the Sovereign's name. This, however, is a mere matter of form. Whether a Bill is assented to by the Lieutenant-Governor of a Province in the King's name or in the Governor General's name, it must be taken to have been assented to in behalf of the Sovereign and to have become an Act which is subject to the exercise of the power of disallowance by the appropriate authority.

Reproducing, then, s. 56 with the substitutions mentioned in s. 90, we have the following provision, which is by the latter section, unmistakably made applicable in terms to the respective Provinces and the Legislatures thereof:

> Where the Lieutenant-Governor of the Province assents to a Bill in the Queen's name (or in the Governor General's name), he shall by the first convenient opportunity send an authentic copy of the Act to the Governor General, and if the Governor General in Council within one year after receipt thereof by the Governor General thinks fit to disallow the Act, such disallowance (with a certificate of the Governor General of the day on which the Act was received by him) being signified by the Lieutenant Governor of the Province by speech or message to the Legislature or by proclamation, shall annul the Act from and after the day of such signification.

This provision having been thus written into our constitutional Act as one of the terms of the compact under which the original Provinces agreed to federate, and having been preserved inviolate by the Imperial Parliament to

(1) [1892] A.C. 437. (2) [1916] 1 A.C. 566.
(3) [1919] A.C. 935.

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the present day together with all other provisions of the Act in relation to the distribution of legislative power between the Dominion and the Provinces as well as in relation to the executive power of the Dominion and Provincial Governments, as is so significantly emphasized by the express terms of the *Statute of Westminster,* I think the answer to question 1 must be in the affirmative.

With regard to question 2 as to whether the exercise of the power of disallowance of provincial legislation by the Governor in Council is subject to any limitations or restrictions, I am of opinion that, in point of law the authority is unrestricted as was distinctly held by the Judicial Committee of the Privy Council, speaking by my Lord the Chief Justice of Canada, in *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (1); and that its exercise by the Governor in Council is subject to no limitation except that which is found in the enactment itself as above reproduced as to the time within which the authority must be exercised and the manner in which the disallowance must be signified, if the latter can properly be said to be a limitation upon the exercise of the power. The enactment plainly applies to any and every bill which becomes an Act of any Provincial Legislature by reason of the Lieutenant-Governor's assent in behalf of the Sovereign, and the words "and if the Governor General in Council within one year after receipt thereof (i.e. after receipt of an authentic copy of the Act by the Governor General to whom the Lieutenant-Governor is required to send such copy) *thinks fit to disallow the Act*" distinctly denote an entirely unfettered discretion on the part of the Governor General in Council so far as the exercise of the power of disallowing the Act is concerned, whether the Act be one which may be found to be *intra* or *ultra vires* of the Legislature, provided such power is exercised within a year after the receipt of the authentic copy by the Governor General. The last words of the enactment concern only the manner in which the disallowance of the Act is to be signified by the Lieutenant-Governor and made effective by the annulment of the Act from the day of such signification, whether

(1) [1922] 1 A.C. 202.

it be by speech or message to the Legislature or by proclamation. We are, of course, concerned here only with legal limitations and restrictions—not with any question of the expediency or inexpediency of the exercise of the power of disallowance in any particular case. That is the responsibility of the Governor in Council entirely.

Questions 3 and 4 with regard to the power of reservation for the signification of the pleasure of the Governor General of bills passed by the Legislative Assembly or Legislative Authority of a Province, which latter expression I assume comprises both the Legislative Assembly and the Legislative Council in any Province, whose constitution still comprises these two separate branches of its Legislature, take substantially the same form as questions 1 and 2 regarding the power of disallowance. They assume that such power of reservation was vested in the Lieutenant-Governors of the Provinces by the same section 90 of the *British North America Act,* and simply ask if it is still a subsisting power. As I have said with regard to the power of disallowance of provincial statutes, I am of opinion not only that the indisputable and clear effect of s. 90, as questions 3 and 4 assume, was to vest the power of reservation of bills for the signification of the pleasure of the Governor General in the Lieutenant-Governor, but am of opinion also that that power still subsists in the Lieutenant-Governors of the Provinces for the same reasons I have indicated in discussing the power of disallowance, s. 90 extending and applying the provisions of s. 55, regarding the presentation to the Governor General of a bill passed by the two Houses of Parliament for the Queen's assent, to the Legislatures of the Provinces in the same way as it extends and applies the provisions of s. 56 and with the same substitutions of the Lieutenant-Governor of the Province for the Governor General and of the Governor General for the Queen. S. 55 with these substitutions would accordingly read, as applied to the Provincial Legislatures, as follows:—

> Where a bill passed by the Legislature is presented to the Lieutenant-Governor of the Province for the Queen's (or the Governor General's) assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to the Governor General's instructions,

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either that he assents thereto in the Queen's (or the Governor General's) name, or that he withholds the Queen's (or the Governor General's) assent, or that he reserves the bill for the signification of the Governor General's pleasure.

The relevant part of s. 57 with the required substitutions stated in s. 90 would read as follows:

A Bill reserved for the Signification of the Governor General's Pleasure shall not have any Force unless and until within One Year from the Day on which it was presented to the Lieutenant-Governor for the Queen's (or the Governor General's) Assent, the Lieutenant-Governor signifies, by Speech or Message to the Legislature or by Proclamation, that it has received the Assent of the Governor General in Council.

The intention and effect of s. 90, which embodies within it sections 55 and 57 with the above indicated substitutions, to confer upon the Lieutenant-Governor of the Province the power of reservation of bills for the signification of the pleasure of the Governor General is, in my opinion, clear and unmistakable. S. 13 should perhaps also be referred to in this connection. It reads:—

The provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the advice of the Queen's Privy Council for Canada.

I shall, therefore, answer question 3 in the affirmative also.

As to question 4, whether the exercise of the said power of reservation by the Lieutenant-Governor is subject to any limitations or restrictions, I am of opinion that there are no limitations or restrictions to the exercise of the said power other than those indicated by the words " but subject to the provisions of this Act and to the Governor-General's instructions " contained in the enactment itself.

KERWIN J.—Pursuant to the provisions of section 55 of the *Supreme Court Act,* His Excellency the Governor General in Council referred to this Court, for hearing and consideration, the following questions:—

1. Is the power of disallowance of provincial legislation, vested in the Governor General in Council by section 90 of the British North America Act, 1867, still a subsisting power?
2. If the answer to Question 1 be in the affirmative, is the exercise of the said power of disallowance by the Governor General in Council subject to any limitations or restrictions and, if so, what are the nature and effect of such limitations or restrictions?

3. Is the power of reservation for the signification of the pleasure of the Governor General of bills passed by the legislative assembly or legislative authority of a province vested in the Lieutenant Governor by section 90 of the British North America Act, 1867, still a subsisting power?

4. If the answer to question 3 be in the affirmative, is the exercise of the said power of reservation by the Lieutenant Governor subject to any limitations or restrictions, and if so, what are the nature and effect of such limitations or restrictions?

Section 90 of the *British North America Act, 1867*, is as follows:—

90. The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—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.

Sections 55, 56 and 57 are the only provisions in the Act relating to "The Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved," and with the substitutions directed to be made by section 90 would read:—

55. Where a Bill passed by the House or Houses of the Legislature of a Province is presented to the Lieutenant Governor of the Province for the Governor General's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to the Governor General's Instructions, either that he assents thereto in the Governor General's Name, or that he withholds the Governor General's Assent, or that he reserves the Bill for the Signification of the Governor General's Pleasure.

56. When the Lieutenant Governor of the Province assents to a Bill in the Governor General's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to the Governor General, and if the Governor General in Council within One Year after Receipt thereof by the Governor General thinks fit to disallow the Act, such Disallowance (with a Certificate of the Governor General of the Day on which the Act was received by him) being signified by the Lieutenant Governor of the Province, by Speech or Message to the House, or, if more than one, to each of the Houses of the Legislature, or by Proclamation, shall annul the Act from and after the Day of such Signification.

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57. A Bill reserved for the Signification of the Governor General's Pleasure shall not have any Force unless and until within One Year from the Day on which it was presented to the Lieutenant Governor for the Governor General's Assent, the Lieutenant Governor signifies, by Speech or Message to the House, or, if more than one, to each of the Houses of the Legislature, or by Proclamation, that it has received the Assent of the Governor General in Council.

An Entry of every such Speech, Message, or proclamation shall be made in the Journal of the House or of each House, if more than one, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of the Province.

The questions submitted refer in general terms to the power of disallowance of provincial legislation and the power of reservation with reference to Bills passed by the Legislative Assembly or legislative authority of a province. At the date the Act of 1867 came into force, the only provinces to which the substituted provisions could apply were Ontario, Quebec, Nova Scotia, and New Brunswick, but under the powers reserved by section 146 and in pursuance of the relevant Orders of Her Majesty in Council and of the relevant statutes, Imperial and Dominion, that ensued thereunder, these sections became applicable to the other provinces now forming part of the Dominion. No question was raised, and indeed it would appear that none could be suggested, but that the answers to the questions would apply to all the provinces and it is therefore unnecessary to set forth the various orders in council and statutes by which this conclusion is reached.

These sections of the Act (55, 56 and 57 as altered above) are clear and unambiguous and, if this be so, it follows, as stated by Earl Loreburn in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1):

> In the interpretation of a completely self-governing constitution founded upon a written organic instrument, such as the *British North America Act,* if the text is explicit the text is conclusive, alike in what it directs and what it forbids.

In my opinion, the power to reserve and the power to disallow were explicitly conferred by the terms of the provisions referred to, and on the point as to the original existence of these powers, perhaps nothing more requires to be said except to deal with a suggestion of counsel for the Attorney General of Alberta, referred to later. However, it is a matter of at least historical interest that a survey of

(1) [1912] A.C. 571, at 583.

the relevant well-known Quebec Resolutions of 1864 and resolutions adopted at the London Conference of 1866 and of the preliminary drafts of the Act, indicates that these provisions carry out the intention of the Fathers of Confederation. From time to time these resolutions and drafts have been referred to in that sense by the Judicial Committee and this Court in construing various sections of the Act.

There are set forth at pages 48 and 49 of Pope's Confederation Documents, Articles 50 and 51 of the Quebec Resolutions. Identical resolutions were adopted at the London Conference as numbers 49 and 50 respectively and are reproduced herewith as they appear at pages 107 and 108 of the same publication:—

49. Any Bill of the General Parliament may be reserved in the usual manner for Her Majesty's assent, and any bill of the Local Legislatures may, in like manner, be reserved for the consideration of the Governor General.

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

In order to give effect to these Articles, there was inserted in the rough draft of the Bill to provide for the Union, prepared by the London Conference, section 34, reading as follows:—

34. The Governor General may disallow any Bill passed by the Local Legislature within one year after the passing thereof, and upon the proclamation thereof by the Governor it shall become null and void; and no Bill which shall be reserved by the Governor for the consideration of the Governor General shall have any force or authority until the Governor General shall signify his assent thereto and proclamation thereof made within the Province by the Governor of the Province for which such Bill has been passed.

This provision was expanded in the fourth draft as sections 118, 119 and 120:—

118. Where a Bill passed is presented to the Lieutenant-Governor for his assent, he shall declare according to his discretion, but subject to the provisions of this Act, either that he assents thereto or that he withholds his consent, or that he reserves the Bill for the signification of the pleasure of the Governor-General.

119. Where the Lieutenant-Governor assents to a Bill he shall by the first convenient opportunity send an authentic copy of the Act to the Governor-General, and if the Governor-General in Council within one year after the passing thereof, thinks fit to disallow the Act, such disallowance being signified by the Governor-General to the Lieutenant-

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Governor, or by proclamation, shall annul the Act from and after the day of such signification or proclamation.

120. A Bill reserved for the signification of the Governor-General's pleasure shall not have any force unless and until within one year from the day on which it was reserved, the Governor-General signifies to the Lieutenant-Governor, or by proclamation that it has received the assent of the Governor-General in Council; an entry of every such signification or proclamation when transmitted by message from the Lieutenant-Governor, shall be made in the Journals of each House, as the case may be.

In the final draft these sections were omitted and in lieu thereof it was provided by section 93:—

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

Sections 54 to 58, inclusive, comprised Part V, and sections 56, 57 and 58 contained the provisions applicable to the Dominion relating to Assent to Bills, Reservation of Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved. Section 93 of the final draft was the precursor of section 90 as it appears in the Act.

We were told that according to the present general practice the Lieutenant Governors of the provinces assent to Bills in the name of the Sovereign and not in the name of the Governor General; and it was suggested by counsel for the Attorney General for Alberta that, to follow the terms of the substituted provisions of section 56, the assent should be in the name of the Governor General. We were also told that this had not always been the practice in each province, and that this is so is indicated in Todd's Parliamentary Government in the British Colonies, 2nd edition, at page 440. It was the opinion of the author of that book, as indicated on pages 440 and 442, that a Lieutenant Governor should assent to or withhold his assent from Bills passed by the Provincial Legislature in the Sovereign's name while, if he saw fit to reserve a Bill, it should be declared that the reservation was "for the signification of the pleasure of His Excellency the Governor General."

With that view I agree. Dealing with the executive power in the Dominion, section 9 of the Act provides:—

The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

As to the legislative power, section 17 provides:—

There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

The Governor General is the representative of the Sovereign for all purposes of the Dominion Government, so that when a Lieutenant-Governor assents to a Bill in the name of the Governor General, he really assents thereto in the name of the Sovereign. To do so directly in the name of the Sovereign is, therefore, strictly in conformity with the terms of its provisions.

This view is also consistent with the scheme of Union as exemplified throughout the Act and with the expressions of opinion found in three decisions of the Privy Council which were referred to by counsel for Alberta as well as by counsel for the Attorney General of the Dominion. The first of these is *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick* (1), where the position of a Lieutenant-Governor of a province was clearly defined. The second is *Bonanza Creek Gold Mining Co. Ltd.* v. *The King* (2), where it was pointed out, at page 580, that the earlier decision had dispelled "whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor General." In the third decision, *In re The Initiative and Referendum Act* (3), it is stated, at page 941, that the *Maritime Bank* case (1) determined:—

> The Lieutenant-Governor is as much the representative of His Majesty for all purposes of the Provincial Government as is the Governor General for all purposes of the Dominion Government.

At page 943 of this third case the judgment continues:—

> When the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the Sovereign that so gives or withholds assent.

While in none of these cases were the questions referred to this Court before their Lordships, the opinion I have just expressed appears to be in conformity with the above extracts from their judgments.

In any event it could hardly be argued, and in fact was not, that even if the practice in this respect were incorrect, it would render Bills which had been assented to, ineffective as statutes.

It was suggested rather than argued that the recommendations of the Imperial Conferences, and particularly the Conference of 1929, with respect to the constitutional

(1) [1892] A.C. 437. (2) [1916] 1 A.C. 566.
(3) [1919] A.C. 935.

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practice as to the reservation by the Governor General of Bills passed by the Parliament of Canada, could in some way be relied on to show that the rights of reservation and disallowance with reference to provincial Bills or Acts no longer existed. Whatever the effect of the recommendations adopted at any of the Imperial Conferences (and with that problem we are not concerned), it cannot apply to alter the position as between the Dominion and the Provinces under the terms of the *British North America Act*.

This clearly appears from the *Statute of Westminster, 1931*, or to give the full title, "An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930". The third recital therein reads:—

> And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

Section 2 is as follows:—

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

In delivering the judgment of the Privy Council in *British Coal Corporation* v. *The King* (1), Lord Sankey, at page 520, remarks:—

> It is true that before the Statute (*Statute of Westminster*), the Dominion Legislature was subject to the limitations imposed by the *Colonial Laws Validity Act* and by s. 129 of the Act (*The British North America Act, 1867*), and also by the principle or rule that its powers were limited by the doctrine forbidding extra-territorial legislation, though that is a doctrine of somewhat obscure extent. But these limitations have now been abrogated by the Statute. There now remain only such limitations as flow from the Act itself, the operation of which as affecting the competence of Dominion legislation was saved by s. 7 of the Statute, a section which excludes from the competence of the Dominion and Provincial Parliaments any power of "repeal, amendment or alteration" of the Act. But it is well known that s. 7 was inserted at the request of Canada and for reasons which are familiar.

(1) [1935] A.C. 500.

The "familiar" reasons mentioned by the Lord Chancellor are that a section proposed by the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, to be inserted in the proposed Statute of Westminster in order to make it clear that section 2 and other sections would effect no change in the existing position as between the Dominion and the provinces, was not satisfactory to the latter; and at a Dominion-Provincial Conference held in Ottawa in April, 1931, the terms of what is now section 7 were agreed upon. For present purposes it is sufficient to quote subsection 1 thereof:—

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

These words are so clear that comment or elaboration would appear to be superfluous.

In my opinion, therefore, the powers referred to still subsist. Again, while this question has not been considered by the Privy Council, as recently as 1921 it was stated in *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (1):—

> It is indisputable that in point of law the authority (i.e., to disallow) is unrestricted.

And still later, in *Attorney-General for British Columbia* v. *Attorney-General of Canada* (2), there appears at page 210 a statement that the Governor in Council disallowed a certain provincial Act within a year from the date of its passing "during which his power of disallowance remained operative."

The circumstances under which the powers referred to may be exercised are matters upon which this Court is not constitutionally empowered to express an opinion since the power of disallowance is granted by the Act to the Governor General in Council and the power of reservation is to be exercised by the Lieutenant-Governor "according to his Discretion, but subject to the Provisions of this Act and to the Governor General's Instructions."

I would, therefore, answer "Yes" to questions 1 and 3, and to question 2,—"The exercise of the said power of disallowance is subject only to the limitation of one year after the receipt of the Act by the Governor General, within which period the Governor General in Council must

(1) [1921] 1 A.C. 202, at 210. (2) [1924] A.C. 203.

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determine whether or not to disallow the Act." So far as I am aware there are no provisions of the *British North America Act* subject to which the discretion of the Lieutenant-Governor as to reservation is to be exercised, and I would therefore answer question 4,—"The exercise of the said power of reservation is subject only to the discretion of the Lieutenant-Governor and to the Governor General's instructions."

HUDSON J.—Section 90 of the *British North America Act* and the other sections incorporated therewith by reference have not been repealed, so that in the case of Acts passed by the legislature of any province and assented to by the Lieutenant-Governor in the name of the Governor General, there is no room for serious argument. The Governor General could without doubt disallow such Acts and in the case of reserved Bills the matter is equally plain.

It appears, however, that the Acts of the Legislature giving rise to this reference were assented to by the Lieutenant-Governor in the name of the King, and in this situation it is argued that under section 90 the power thereby given to the Governor General has no field of operation. It was suggested that any possible alternative inevitably involves some apparent disregard of the words used and that the least possible distortion of the words would appear to be, to omit to make the directed substitution of the "Governor General" for "the Queen" and in this way authorize disallowance by the Sovereign, the Governor General being merely a channel of communication for that purpose. It was further argued that the situation would then correspond with the position of Lieutenant-Governors as defined in the *Maritime Bank* v. *Receiver-General* (1), *Bonanza* v. *The King* (2), and *In re The Initiative and Referendum Act* (3), where it was said:

> The Lieutenant-Governor is as much the representative of His Majesty for all purposes of Provincial Government as is the Governor General for all purposes of Dominion Government.
>
> and
>
> when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the Province, it is in contemplation of law the Sovereign that so gives or withholds assent.

(1) [1892] A.C. 437. (2) [1916] 1 A.C. 566.
(3) [1919] A.C. 935.

The Quebec and London Resolutions and early draft Bills of the Confederation Act have been quoted and it is not necessary for me to repeat them. They leave no room for doubt that it was intended that the power of disallowance should be vested in the Governor General and that the Lieutenant-Governors should have the power to reserve legislation for the pleasure of the Governor General. In the final drafting of the Bill there seems to have been some sacrifice of clarity for the sake of brevity.

After the Act was passed the practice was adopted in most of the provinces of giving assent to Bills in the name of the Sovereign. This practice was referred to and approved in Todd's Parliamentary Government in the British Colonies, 1st Ed. (1880), which was then and since has been regarded as standard authority. At page 329 he states:

> 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, 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," 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."
>
> (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. 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

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REFERENCE *re* THE POWER OF THE GOVERNOR GENERAL IN COUNCIL TO DISALLOW PROVINCIAL LEGISLATION AND THE POWER OF RESERVATION OF A LIEUTENANT-GOVERNOR OF A PROVINCE.

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disallowance may be duly notified to the provincial authorities concerned therein. This also is in accordance with constitutional practice in the Dominion provinces.

(4) And finally, with respect to provincial Bills which 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.

This practice has been continued by these provinces up to the present time. During all of this period, numerous Acts passed by legislatures and assented to by Lieutenant-Governors in the name of the Sovereign have been disallowed by the Governor General, and many Acts passed by legislatures and submitted to Lieutenant-Governors for their assent in the King's name have been reserved for the pleasure of the Governor General. The right of disallowance by the Governor General has, on many occasions, been recognized by the courts in the provinces, by this Court and also by the Privy Council, although it does not appear that in any of these cases the point raised by Mr. Biggar has heretofore been made. Some of the provincial legislatures, and notably Alberta itself, have by their own legislation recognized this procedure.

A rewriting of section 90 to incorporate therein a right of disallowance reserved to the Sovereign, to be finally exercised in London and not in Ottawa, would be contrary to the uniform practice existing since Confederation and a violation of the clear intention of Parliament.

In none of the decisions of the Privy Council dealing with the position of Lieutenant-Governors do their Lordships consider the possible effect of section 90. In any event it is not necessarily inconsistent to hold that an assent by a Lieutenant-Governor is the act of the Sovereign, and at the same time to hold that such act is subject to the right to a subsequent veto by another representative of the Crown.

The assent of the Lieutenant-Governor is the essential act to enable the Governor General to exercise the power of disallowance, and in the application of section 90 it matters not whether the Lieutenant-Governor purports to give his assent in the name of the King or of the King's

representative at Ottawa. I am of the opinion, (1) that the practice adopted of Lieutenant-Governors assenting to Bills in the name of the Sovereign is justified; (2) that nevertheless the power to disallow still remains in the Governor General. The questions submitted should be answered as follows:

Question 1. Yes.

Question 2. The power of disallowance by the Governor General in Council is subject to no limitation or restriction if exercised within the prescribed period of one year.

Question 3. Yes.

Question 4. The exercise of the power of reservation by the Lieutenant-Governor is subject to no limitation or restriction, save that the discretion of the Lieutenant-Governor shall be exercised subject to any relevant provision in his Instructions from the Governor General.

The (unanimous) answers of the Court to the questions referred, as certified to His Excellency the Governor General in Council, are set out on p. 73 *ante*.

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