

Clause XI. of the Royal Instructions directs the Governor to receive the advice of his Executive Council, and, if he should not concur therein, to state on the minutes his reasons at length. It seems to me that there should invariably be some record on the minutes of the Council that such advice was tendered.

You will observe that the clause directs the Governor to take the advice of "our Executive Council"—that is, apparently, of the Council collectively—but directs him subsequently that, whether "the members of our said Executive Council concur therein or otherwise," he is to take such action as he thinks fit. I shall be obliged if Ministers will consider and inform me what procedure they think should be adopted in advising the Governor at meetings of the Executive Council held to consider questions of the pardon or reprieve of criminals condemned to capital punishment.

I have, &c.,
ON SLOW.

Enclosure No. 2.

His Excellency the Governor.

Premier's Office, Wellington, 3rd February, 1891.

I HAVE the honour to acknowledge the receipt of your Excellency's memorandum of the 29th ultimo, in which you call attention to the minutes of the meeting of the Executive Council at which the decision was come to commuting the death sentence passed on Mahi Kai to one of penal servitude for life.

Ministers agree with your Excellency in thinking that no alteration or addition can now be made to the papers of Ministers which contain no advice to the Governor, and that the minutes should be signed in the form in which they now stand.

Your Excellency asks that Ministers will consider what procedure they think should be adopted in advising the Governor at meetings of the Executive Council held to consider questions of the pardon or reprieve of criminals condemned to capital punishment.

Ministers, in offering advice, respectfully direct attention to Lord Knutsford's despatch in the Kitt case, 30th October, 1888, addressed to the Administrator of the Queensland Government, in which the doctrine of responsible government is applied, with reservations, to cases where the representative of the Crown is called upon to exercise the prerogative of pardon. Lord Knutsford observes, "A Governor who by acting in opposition to the advice of his Ministers had brought about their resignation will have assumed a responsibility for which he will have to account to Her Majesty's Government." Further, "It is in accordance with constitutional practice, and is indeed implied in Lord Carnarvon's despatch, that in cases which do not affect Imperial policy or colonial interests he ought not, without very strong and exceptional reasons, to act against their advice." Again, "While, therefore, Sir A. Musgrave appears to have acted strictly within the directions which had been given, he would have exercised a sounder judgment if he had subordinated his personal opinion to the advice of his Ministers."

These are the principles of responsible government, and it is difficult to understand how the Governor of a colony could read them in any other sense. Nor does the reservation made by Lord Knutsford in capital cases affect the doctrine of responsible government as broadly stated in his despatch. He says, "So long, however, as the present rule remains in force, the Governors of the Australasian Colonies should be guided by Lord Carnarvon's despatch." According to that despatch, the Governor, not only in capital cases, which are specially provided for in the Instructions, but in all cases, must not act without having received the advice, either of his Ministers collectively in the Executive Council, or of the Minister more immediately responsible for matters connected with the administration of justice. Having received that advice, he is to decide for himself how he will act, and he may, and indeed must, if in his judgment it seems right, decide in opposition to the advice tendered to him, but he will allow greater weight to the opinion of his Ministers in cases affecting the internal administration of the colony than in cases in which matters of Imperial interest or policy, or the interests of other countries or colonies are involved.

The power here reserved is neither more nor less than the power rightly given to a Governor under Clause VII. of the Royal Instructions under the system of responsible government. In other words, the Governor may in any case refuse to accept the advice of his Ministers, but in doing so he accepts a responsibility involving certain consequences. The practice, however, has been, where the Royal prerogative is exercised, for the Governor to accept a personal responsibility, and actually to shield his Ministers from either the responsibility of defending him or being under the necessity, if they cannot do so, of resigning.

Ministers think that, in all cases coming within the rule where the Crown is called to exercise its prerogative of pardon, the ordinary practice of Ministerial responsibility should prevail, the Cabinet offering advice to the Governor in writing. That the matter should then be brought before a meeting of the Executive Council, where the collective advice would be repeated, while the reasons of the decision of the Governor to accept the advice of his Ministers, or otherwise, would, with the written advice, be in due course entered upon the minutes.

It is hardly necessary to explain that if this course were followed in the future the practice would be changed, and Clause XI. of the Instructions would fall into desuetude. Under the existing practice the Governor accepts a personal responsibility, which makes him liable to hostile criticism, and weakens the position which the representative of Her Majesty should occupy. If, on the contrary, the well-trodden path of constitutional practice were followed, Ministers would bear the responsibility, and have to defend the act of the executive authority.

The objection that Ministers would be liable to be unduly influenced by public opinion equally applies to every other executive act relative to the peace, order, and good government of the colony, as well as to the practice obtaining in the Mother-country in respect of pardons, where the Home Secretary is solely responsible.