A SERIOUS QUESTION

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PROVINCIAL POWERS

Probable Effect Upon Canadian Credit of the New Doctrine of Provincial Omnipotence.

A WEAK SPOT IN THE FEDERAL CONSTITUTION

The interesting letters on the Electric Power legislation of the Ontario Government, which recently appeared in the "Financial Post" of Toronto, are here reproduced in condensed form.

The new doctrine that a Provincial Legislature is omnipotent within its sphere, its legislation, no matter how vicious or contrary to the general interest, being no longer subject, if technically *intra vires*, to disallowance by the Federal authority, is likely to be attended with grave consequences to Canadian credit. The other day in Quebec the Legislature re-wrote a dead man's will. The Supreme Court at Ottawa said it was wholly improper legislation and should have been disallowed; but, as it was within the competence of the Legislature, the Minister of Justice at the time let it become law. In New Brunswick, the Legislature recently taxed railways operating within the Province to the extent of three per cent. of their gross earnings, but offered to remit the tax to any road that used coal from a certain mine, belonging as a matter of fact to certain politicians. This Act is still on the statute-book. In Ontario, when the Liberals were in office, the Legislature levied a tax of 100 per cent. of the value of their product upon the Sudbury nickel mines, but was willing to remit

it if they agreed to have their crude nickel smelted to purity within Ontario—really at Hamilton in a refinery in which prominent politicians were interested. Mr. Mills, who was Minister of Justice, threatened to disallow the Act if an attempt was made to enforce it. In the Florence mining case, the Whitney Administration determined a question of title that was before the courts. Whether the Florence company had or had not a just claim to the minerals at the bottom of Cobalt Lake is immaterial; the point is that the Legislature settled a controversy in litigation by passing an Act which, according to Mr Aylesworth, the present Minister of Justice, amounted in effect to "confiscation without compensation"; yet, because it was *intra vires*, he ruled that the Act must stand.

And now we have the Electric Power Acts of the same Legislature which prohibit aggrieved persons from appealing to the Courts for redress, validate contracts which a Superior Court judge has held to be invalid, and damage vested interests by setting up Government competition in the transmission of power from Niagara, notwithstanding that the Government, through its Park Commission, had expressly covenanted not to compete.

ATTITUDE OF THE BRITISH INVESTOR.

In constitutional as in other affairs, mischief once done has a tendency to perpetuate itself; and unless the Judicial Committee of the Privy Council sets limits to the authority of the Provincial Legislatures, or limits are imposed by an amendment to the British North America Act, we are certain to find ourselves, sooner or later, in a serious predicament. The British investor, who on public and private account has over 1,500 million dollars out in Canada, is evidently alarmed at the recent doings of the Legislatures, more especially at Sir James Whitney's Power legislation. He is nervous, too, over the numerous public-ownership schemes now on foot throughout the Dominion, for, in his opinion, the atmosphere surrounding municipal government here is not always the purest nor the men elected to carry on

such government always the best. If, on top of the civic mismanagement and corruption which he expects to witness, the Local Legislatures are to be at liberty to pass hocus-pocus legislation of the sort just described, injuring private investments and preventing the victims from applying to the courts for relief, he may suddenly conclude that this is not any too safe a place for his money; and then what?

It is easy to say we could borrow from the United States or from France. The French Government closely scrutinizes every foreign project that goes to Paris for funds, and, as a rule, the French capitalist expects more for his money than the British; whilst our American neighbors require all their spare cash for their own works of development. A Toronto newspaper points to the large sum on deposit in Canadian savings banks and asks, "Why not borrow from our own people"? The obvious answer is that Canadians cannot afford to lock up their money in Provincial or municipal bonds since they can turn it to better account in commercial and industrial enterprises. Sir James Whitney has been trying for some time to sell $3,500,000 of Provincial securities in Canada for the building of his transmission lines; but as yet has not succeeded in disposing of much more than half, simply because local capital prefers and is able to find a more remunerative field.

CANADIAN INDEBTEDNESS.

We in Canada are aware that there is scarcely any limit within reason to our capacity for bearing debt and taxes. A wonderful development is visible everywhere. The exodus of Canadians to the United States has greatly diminished and the movement of population is now in our favor, American settlers flocking into the Canadian West at the rate of 70,000 a year, with working capital estimated at $1,000 per head, or $70,000,000. Meanwhile immigration from the United Kingdom and Continental Europe has attained unprecedented proportions. New industries are springing up and old ones expanding as never before. Bank

deposits are increasing, domestic and foreign trade growing, and capital coming in for investment in sums that a few years ago would have been deemed quite beyond our reach —these and other evidences of a healthy material development are plain to everybody, and withal we are merely on the threshold of the great future that awaits us.

These things are obvious enough to us on the spot, but it is only natural that the British investor should be inclined to look at the other side of the shield, to regard reckless and uncontrolled Provincial and municipal legislation as a menace, and to press the question why we owe so much more, man for man, than the Americans, by whose standards he usually judges us.

Our net interest-paying Federal debt at the present time—that is, our net debt less the Dominion notes in circulation—is about $37 per head for a population of 7,000,000. That of the United States is $10 per head. A large proportion, seven-ninths, of their interest-bearing debt is in 2 per cent bonds, whereas our bonded debt pays higher rates. The result is that the interest charge on the Federal debt of the United States in 1908 was $21,000,000, while the interest charge on ours was $11,000,000, or over half. If we continue to augment our debt in the next few years as rapidly as we have augmented it during the last two or three, since the construction of the Government section of the new Transcontinental Railway was begun, we shall soon owe half as much as the United States, for their debt is being reduced, while our annual interest charge will considerably exceed one-half of theirs; which would be a grave enough condition of affairs.

I am not concerned at present, however, with the financial situation of the Dominion, but with that of the Canadian Provinces and municipalities, on the one hand, and of the American States and municipalities, on the other. The indebtedness of the latter was compiled in 1902 by the census officials when it amounted to $23.75 per head. Unfortunately there is no way of ascertaining the debts of our Provinces and municipalities. The Dominion census officials take no account of them, and the statements issued by partisans on

one side or the other can scarcely be depended on. It is tolerably safe to say, however, that they are 40 or 50 per cent. greater per head than those south of the line. Apart from their direct debts, the Provinces, following the Ottawa example, are taking to contracting indirect liabilities by guaranteeing railway bonds, a practice forbidden to all or nearly all the States by their constitutions. The amount of bonds guaranteed by the Provinces to date is $40,000,000.

An answer to the question why we are spending so much more than the Americans is, I think, afforded in part by the following brief recital showing how we have enlarged the spending powers of the Provincial Legislatures, and incidentally of the municipalities, whilst the spending powers of these bodies in the United States have of late been greatly restricted.

THE INTENTION OF THE CONFEDERATION FRAMERS.

The fathers of Confederation started work in 1864. At that time the American Civil War was raging. Outwardly, it was a collision between State Rights and the tendency towards centralization or nationalization. The State Rights men of the South, who desired to retain human slavery, were driven by the exigencies of their argument to contend that each State was and had always been a sovereign body, and that the Federal authority was the creation of the States; consequently, to preserve their autonomy, the States had a right to nullify or refuse obedience to such Federal laws as they disliked, and, as a last resort, to withdraw from the Union. The framers of Confederation therefore determined to make our Provincial Legislatures wholly subordinate bodies by comparison with the American State. As Sir John Macdonald put it:—

"The United States commenced at the wrong end. They declared by their constitution that each State was a sovereignty in itself and that all the powers incident to a sovereignty belonged to each State, except those powers which were conferred upon the General Government and Congress. Here, we have adopted a different system. We have strengthened the General Government. We have given the General

Legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the Local Governments and Local Legislatures shall be conferred upon the General Government and Legislature. We have thus avoided that great source of weakness which has been the cause of the disruption of the United States."

The dominant note of all the Confederation speeches was that the individual Provinces were to have no such length of tether as the individual States. Their powers, on the contrary, were to be so circumscribed that it would be impossible for them to advance the doctrine of Provincial Rights in any extreme form or set themselves up as local sovereigns within the general commonwealth. The principal means for thus reducing them to an inferior and more humble position were that the Lieutenant-Governors of the Provinces, instead of, as on the other side, being chosen by the people, should be appointed by the Federal Government and should have power to reserve Provincial legislation for the consideration of the Federal authority; that the Judiciary in the Provinces, instead of being selected by the people or the authorities of the Provinces, should likewise be appointed from Ottawa; last but not least, that the Federal Government should have the power to disallow Provincial legislation. It is probable that in granting the Provinces yearly subsidies from the Federal chest toward defraying the cost of local government, the founders may have supposed that they could thus be rendered more tractable and submissive to the Federal Government than an American State, which has to meet its expenditure from its own resources and in that aspect is entirely independent; but one need not press the point.

Much importance, let me repeat, was attached to these devices for restricting the authority of the Local Legislatures. Ours being a written constitution, like that of the United States, the Provincial courts would, it was said, frequently be invoked to determine constitutional questions; and with a Federal judiciary in each Province and a higher Federal

judiciary in the Supreme Court at Ottawa, the creation of which was provided for, no harm could come to national or private interests from Provincial usurpation. Lest a case arising from doubtful Provincial legislation might not reach the courts till some damage had been done, the Lieutenant-Governor could hang up all such legislation for review at Ottawa; and the Ottawa Ministers had power to disallow, not only the Bills which might be reserved by their own officer, but any others which they found to be *ultra vires* or considered prejudicial to the well-being of Canada. "This power of negative," said Sir John Rose, "this controlling power on the part of the Central Government, is the protection and safeguard of the whole system." All the fathers seem to have believed with him that it would prevent "any assertion of sovereignty on the part of the local governments, as in the United States," and also, as Sir Alexander Galt said, "protect every private interest that could give a satisfactory account of itself."

THE POWER OF DISALLOWANCE.

There is nothing in the parliamentary debates or in the speeches of the Confederation delegates at Quebec and Charlottetown to show it, yet one is obliged from the nature of the case to assume that what the founders had in mind respecting the exercise of the power of disallowance was something like this—that while the courts should decide such technical points as whether an Act of the Provincial Legislature was *intra vires* or not, the Federal Ministers should look more particularly to the probable effect of the Act upon the common welfare. If it was intrinsically unsound from a moral point of view, it could not fail to hurt the country at home and abroad, and should therefore be disallowed; and so if it threatened the public credit by destroying public or private investments without affording compensation. The power of disallowance, in short, was to fill the place, as it were, of the Judiciary in the United States which decides not merely whether an Act of a State Legislature is *intra vires* or not, but also whether it is or is not in accord with the maxims of public policy contained in the Federal constitution as well as in the State constitutions, some

of which were originally taken or deduced from the principles of government in Magna Charta and the Bill of Rights. The Canadian constitution contains no such precepts for the guidance of the Provincial Legislatures; but one can imagine that the fathers of Confederation took for granted that, in reviewing Provincial Acts, the Federal Ministers would bear them in mind and let no Act go that, although *intra vires*, was obviously at variance with them. We must assume that such considerations were present in the minds of Sir John Macdonald and George Brown, or else conclude that those able men, while bent on limiting the authority of the Legislatures,—which, as they knew, would nearly all consist of but a single Chamber—actually invested them with an omnipotence equal, in its place and measure, to that of the Imperial Parliament, which, as somebody has said, may do anything in the world that is not naturally impossible.

It is scarcely to be believed that the vision of the founders was so engrossed by the spectacle of a fratricidal war as to hinder them from noting the extreme conservatism of the Federal and State constitutions in the United States respecting private property, contracts, the right of the people to appeal to the courts, and other weighty matters falling within the purview of our Provincial Legislatures. Not only does each State constitution contain elementary provisions drawn from pure and undefiled British sources against unprincipled and dishonest legislation, but the Federal constitution contains others; and whenever the occasion arises in the ordinary course of justice, the Judiciary, State and Federal, is there to see that the State Legislature has not broken them down.

In addition, each State Legislature, like Congress itself, has two Chambers for the better protection of the public interests and of the rights of the individual. There is a story that, while breakfasting with Washington, Jefferson asked him why he had agreed to a Senate. "Why," asked Washington, "did you just now pour your coffee into your saucer before drinking it?" "To cool it," replied Jefferson, "my throat is not made of brass." "Even so," answered Wash-

ington, "we shall pour our legislation into the Senatorial saucer to cool it." Whatever may be said for or against second Chambers, no one denies that they are a brake upon wild and unjust lawmaking. Yet we are to imagine that the framers of the B.N.A. Act, who had resolved to give the Provincial Legislatures less rope than the State Legislatures enjoyed, gave them a great deal more; in fact, left them to do absolutely what they pleased within the bounds of their jurisdiction, untrammelled by Magna Charta or even, as Mr. Justice Riddell has said, by the Ten Commandments.

THE NEW DEPARTURE.

For some time after Confederation the Federal Government disallowed Provincial legislation, not only when it was *ultra vires*, but also when it appeared to be contrary to good morals or in violation of natural justice and private rights. In other instances it called the attention of the Provincial Governments to cases where the Acts were retroactive in their operation or otherwise improper, and counselled them, virtually under threat of disallowance, to alter or repeal them. In this way the Federal authority exercised for 30 years a more or less active supervision over Provincial law-making, but it has now abandoned its veto power, except were an Act is *ultra vires*. That is to say, it now confines itself to a function that is discharged, indirectly, just as well or better by the courts of law, leaving the general interest and all the other higher considerations to their fate, and giving the Legislature an absolutely free hand within its sphere.

The story of the circumstances which led to this partial abandonment of a vital Federal prerogative would take us too far afield. Briefly, the Liberals, when in control of the leading Provincial Legislatures, had urged that disallowance should be strictly confined to such Provincial Acts as were *ultra vires*, and had attacked the Conservative Ministry at Ottawa for disallowing Acts which they deemed objectionable for other and equally important reasons; and, on obtaining control of Federal affairs in 1896, determined, for the sake of being

thought consistent, to adopt that policy. In other words, the emasculation of the Federal power of disallowance was due to the party manœuvring of the Liberals rather than to any belief on their part in the impeccability of a single-chambered Legislature. Still less could they have supposed that a prudent exercise of the power would be detrimental to genuine Provincial liberties, to Provincial liberties properly so-called. Such uncompromising Liberals as Mr. Edward Blake, Mr. Fournier and Mr. Laflamme were, as Ministers of Justice, among the keenest critics of Provincial legislation, and raised no objection to, but seem to have approved of the rule laid own by Sir John Macdonald shortly after Confederation, that such legislation might be disallowed, not only for being unconstitutional in the sense of conflicting with Federal jurisdiction, but as being prejudicial to the interests of the Dominion as a whole—the latter phrase covering the moral and utilitarian reasons for setting a Provincial Act aside.

Mr. Aylesworth says that any one who feels that he has been injured by a Provincial statute, which, bad in itself, is *intra vires* and thus, by the new rules, beyond reach of the disallowance power, has the right of appeal to the people, who will, no doubt, see that wrong is righted; but obviously that means of obtaining redress is philosophical rather than practical. When the United States constitution was on the anvil, it was suggested that a veto on Acts of the State Legislatures should be conferred upon Congress. It was argued that the placing of such a power in the hands of Congress could not fail to offend the local pride of the individual States, always jealous of their autonomy; while its exercise would produce frequent collisions between the Federal and State Legislatures. In the end the better plan was adopted of leaving both Federal and State legislation to the courts. This was no new thing. On the contrary, it dates back to that period in English history when the judges were regularly summoned to Parliament to see that the legislation did not contravene Magna Charta or the dictates of fairness and reason. The first English emigrants to America were familiar with this system, which existed, in a shadowy

form, down to the time of Queen Anne, when the theory that the courts could annul acts of Parliament for violating what was known as the higher or unwritten law, still lingered in the popular belief. And as some of the American Colonies possessed written charters, it was natural that the people should call on the judges to interpret them, and that they should adopt the same feature when the written constitution of the United States came to be framed. At Confederation the danger of letting the Federal Ministry disallow Provincial legislation was pointed out by some of the foremost Antis; but, as said, the express object of the framers was to render those bodies subordinate. Yet they have now become all-powerful within their limits, their legislation when *intra vires* being, like the decisions of the Pope when he speaks *ex cathedrâ* on certain subjects, absolutely irreformable and final.

RESTRICTIONS UPON THE AMERICAN LEGISLATURES.

While we have thus been extending the powers of the Provincial Legislatures by allowing them to pass any legislation, good or bad, that comes into their heads, provided it is within their jurisdiction, the powers of the State Legislatures, limited as they originally were, have recently been greatly restricted. Years ago the individual States went mad on the subject of public improvements, and borrowed money for railways, canals, local banking and what not, till some landed in the mire of repudiation and most were seriously embarrassed. The financial credit, not of the States alone, but of the Federal Government, was injured: and as the municipalities had been equally reckless, there were grave apprehensions as to the willingness of the foreign investor to risk any more of his money in American enterprises. Fortunately, the people came to their senses and determined to reduce the spending and borrowing powers of States and municipalities alike. From this they proceeded to reduce the cost of legislation by substituting biennial for annual sessions of the Legislature, simplifying the procedure and so forth. At this stage, too, the Federal and State Courts, which previously had been rather anxious to avoid any appearance of controlling legisla-

tive activities, began to curb State and municipal legislation by a more rigid interpretation of the constitutions; whilst the governors of States were encouraged to a more frequent exercise of their veto, which, as a rule, can be over-ridden only by a two-thirds majority of the Assembly.

Take, for example, the case of the State of Michigan. It was admitted into the Union in 1837 and at once rushed into debt for railways and other local works. In 1850 another constitution was adopted. In the interval the people had learnt from experience that economy is in every way preferable to extravagance; and the new constitution limited the borrowing and spending powers of the State Legislature and of the municipal bodies in drastic fashion, the provisions in that respect being re-enacted in a third constitution adopted in 1908. The State may contract debts to any amount for the purpose of repelling invasion, otherwise it can borrow only to meet deficits in revenue, but such debts shall not aggregate at any one time more than $250,000. No scrip, certificate or other evidence of State indebtedness shall be issued except for the debts above mentioned. The credit of the State shall not be granted to or in aid of any persons, association or corporation, public or private. The State shall not subscribe to nor be interested in the stock of any company, association or corporation. The State shall not be a party to or interested in any work of internal improvement, nor engage in carrying on such work, except road improvement and reforestation. Counties may not incur any indebtedness which shall increase their total debt beyond 3 per cent of the assessed valuation. By the constitution of 1908 cities are left to the discretion of the Legislature in the matter of restrictions upon their borrowing powers, but the Legislature has the thrifty instincts derived from the reign of economy which began 60 years ago.

Note the results. The State has no bonded debt, but has a nominal trust-fund debt arising out of a transaction in school lands with the Federal Government. The municipalities owe very little. Detroit, the prinicipal city, had

in 1908 a net debt of less than $7,000,000. Its population exceeds that of Toronto, which, nevertheless, has a net debt of over $23,000,000, and, in addition, has recently authorised the issue of consolidated loan debentures to the amount of $6,000,000 for electrical power distribution, a filtration plant and a trunk sewer. Including that of Detroit, the net municipal and school indebtedness of the State of Michigan in 1902 (in every instance I use the latest available figures) was $35,000,000. Its population is greater than that of Ontario and is growing more rapidly. Yet Ontario in 1906 had a net municipal indebtedness of $76,000,000. In the 20 years from 1886 to 1906 the population of Ontario increased from 1,828,000 to 2,142,000, or only 18 per cent, which is below the natural growth alone; but the municipal debts and the annual aggregate of municipal taxation doubled in that period, whilst notwithstanding the great increase in the assessment the rate of taxation rose from under 13 to over 16 mills in the dollar. In Michigan there has been no increase of debt or taxation worth speaking of outside Detroit and one or two other cities; but there has been an immense improvement in the credit of the State since the old times when, as the saying was, any man who could find a hollow log for keeping the depositors' money could start a bank, while the Legislature and municipalities fancied that the more they owed the more they we reprospering. It is not palatable to a Canadian to have to draw such contrasts as these between the financial condition of Ontario and that of a neighboring American commonwealth, but there is no help for it.

A PERTINENT CASE.

Bonusing, as seen, is not permitted by the Michigan constitution. A few years ago the Legislature voted bounties to the manufacturers of sugar from beets grown within the State, provided that they had paid not less than $4 per short ton to the farmer who raised the beets. The Supreme Court of the State, in 1900, declared the Act unconstitutional on the ground that it involved taxation for a private

purpose. It pointed out that taxes can be levied only for public purposes, to accomplish some end of government. The Legislature cannot take the property of A and give it to B, nor tax it for B's benefit. The bounties were to come out of the pockets of people not engaged in the manufacture of sugar and who had no interest in it. The State itself could not carry on such a manufacture and had no right to use public funds to enable private individuals to carry it on. As Mr. Justice Cooley had said in a similar case, it is not in the power of the State, under the name of a bounty or under any other cover or subterfuge, to furnish capital to set private parties up in any kind of business or to subsidize their business after they have entered upon it. The discrimination by the State between different classes of occupation, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandizing or milling, printing or railroading, is not legitimate legislation but an invasion of that equality of right which is a maxim of State Government. The State can have no favorites. Its business is to protect the industry of all and to give all the benefit of equal laws. It cannot compel an unwilling minority to submit to taxation in order to keep upon its feet any business that cannot stand alone.

Another of the judges in this case said: "Taxation for private purposes is no more legal than robbery for private purposes." Let the reader consider for himself how far this sound and trenchant criticism is applicable to the sale by the Government and municipalities of Ontario of electric power to manufacturers in such places as are within reach of the Niagara generators, the Government in the first instance furnishing the money to defray the cost of that display of paternalism in behalf of a favored few. On the American side, the transmission of power from Niagara is left entirely to private enterprise.

THE RESTRICTIONS UPON AMERICAN MUNICIPALITIES.

I have quoted this decision of the Michigan Supreme Court in order to show how grandmotherly government is viewed

there. In most of the other States the Legislatures are bound down by like constitutional restrictions and they in turn restrain the municipalities from rushing into debt for every fleeting craze. In some instances the power of the American municipalities to tax is limited, as with us, to a definite percentage of the assessed value; in others, the debt must be restricted to a specific sum; in others again, two-thirds or three-fourths of the ratepayers voting must vote for a bylaw creating debt. But the most effective provision against municipal extravagance lies in the State constitutions which, in many cases, forbid the State and municipalities from giving money or property of any sort and from lending their credit in any manner to private corporations or individuals, and, in some States, order that the State and municipal debts shall be extinguished within a prescribed period. By such means State and municipal credit has been rescued from disgrace, and, speaking generally, placed on a high basis. The State Governments have well-nigh disappeared from the money market, being no longer borrowers save occasionally of temporary loans; and even in such cities as New York, Boston and Philadelphia, where the presence of a foreign element renders good government difficult, there has been a marked improvement since the era of unrestricted outlays.

With us, unfortunately, many are possessed by the idea that the more we can borrow and spend on Provincial or municipal account the better. The frequent raids by the Provinces upon the Federal chest for "better terms" are justified on this ground; and because the Provincial Government obtained a large sum for the mining rights in Cobalt Lake it was seriously argued that the question as to whether the Legislature had the right to settle a question of title then before the courts, need not trouble us. Those who are now calling for heavy outlays on grandiose and possibly unsound schemes of public-ownership, on the theory that the expenditure of so much money must benefit the local wage-earner, do not see that such borrowings are bound to impair our ability to obtain capital for enterprises of a private or semi-private character that

would furnish employment and develop the Province at large to a far greater extent.

Sir James Whitney should read the history of the old Municipal Loan Fund before spending another dollar on his transmission line. The municipalities of Upper and Lower Canada were authorised to borrow from the Government for public ends, such as the construction of railways, canals, harbors and roads. A sinking fund was created by the simple expedient of compelling them to pay 8 per cent. while the Government debentures on which the money was raised carried only six. The security appeared to be unquestionable for, amongst other things, the Government might order the sheriff to levy a tax running to 12½ cents on the dollar upon the assessed value of all the property within the municipality, as well as to seize the municipality's own property, whatever it might be. Yet first one municipality and then another defaulted. To save themselves the defaulters made a political issue of their indebtedness, and elected to the Legislature the man who was likely to have most influence with the Government on condition that he should insist on its keeping its hands off—a most demoralizing condition of affairs. Financially, the project left the Government of Upper Canada, which had the power to advance $1,500.000, face to face with overdue debts and interest amounting to $12,000,000, for which the Government of Ontario got ten or twelve cents on the dollar. The chances that the municipalities which intend to buy and sell electric power will default in their payments to Sir James are every whit as great.

THE RISK TO THE DOMINION.

That we have been going too fast and too far of late in piling up Provincial and municipal debt is, I think, only too obvious; and with the Legislature now free to do as it pleases without let or hindrance within its wide sphere, and our public men now content to follow rather than to guide, to be not the rudder of the ship but the sail, tossed to and fro and carried about by every wind of doctrine, we may expect to witness a prodigious waste of money on the public-ownership measures

now in fashion, unless indeed the home and foreign investor takes fright and brings the orgy to a sudden and perhaps calamitous termination. What I am pleading for is that we should save ourselves from that day of wrath by turning to more economical practices and by inducing the Federal authority to resume its former policy of keeping an eye upon the loose and erratic Provincial legislation which threatens us with a surplus of financial evils.

It may be said by Mr. Aylesworth, whom everyone respects, that if a Province or a municipality chooses to go head and ears in debt, that is its own affair; the Dominion, if concerned at all, is only concerned in a remote degree. That is doubtless true from a lawyer's standpoint. But the foreign investor does not distinguish between our different loans, charging them all up, Federal, Provincial and municipal, to the borrowing entity known to him as Canada. A short time ago an influential London newspaper, commenting on such facts as that Winnipeg's debt is greater than the combined debts of St. Paul and Minneapolis, while the debt of the Province of Quebec is double that of the State of New York, sinking funds deducted, said that " Canada is certainly going too fast " and " displaying a tendency to spend too freely;" the Dominion being confounded with its units. It was the same in the days when the State Legislatures and municipalities were recklessly incurring liabilities for public improvements—the British capitalist confounded their borrowings and expenditures with those of the Government at Washington, charging everything to the account of " America." In his standard work, " Public Debts," Professor H. C. Adams, an American scholar, relates that when an agent from Washington went to England to float a loan, Baring Bros. told him that, " if the States were left to control their own finances," many of them being at the time embarrassed, " the Federal Government could secure no money in London at any price." He quotes a similar case in 1844, where the European capitalists declined lending money to the Federal Government, " partly perhaps from real doubts as to the solidity of our institutions, and partly, probably, with a view to make us feel discredit so sensibly

that our National Government should be induced to assume, as it has no right to do, the debts of the delinquent States." I need not labor the point. Any Canadian financier, including his worthy colleague, the Finance Minister, can tell Mr. Aylesworth that we are judged in London, not alone by the debts contracted by the Ottawa Government, but by the debts and general financial standing of the Provinces and municipalities as well. Hence such Provincial legislation as that connected with the Electric Power experiment of the Ontario Government may very readily affect the credit of the Dominion as a whole, and, lest it do, should be disallowed whether *intra vires* or not. Just now, indeed, Canadian credit in London is not what it was a few years ago, and Provincial laws should be scrutinised with unusual care.

GROUNDS FOR DISALLOWANCE.

I now proceed with all due brevity to show on what other grounds the Federal Government would be justified, notwithstanding their close adhesion to the Provincial Rights doctrine, in disallowing much of the Electric Power legislation of Ontario.

First of all, the Electrical Development Company has been treated with marked unfairness. Assuming that it was a monopoly, it was a monopoly created by the Ontario Government, which gave it its charter and franchises either directly by Act of the Legislature or indirectly through the Niagara Falls Park Commission or the Hydro-Electric, both Government agencies. If the rates of the Electrical Development were considered excessive, there was nothing to hinder Sir James from regulating them by statute or from expropriating the whole investment. He certainly had no moral right to damage an enterprise in which so much British and Canadian capital had been sunk by starting Government competition, especially as its contract with the Park Commission, which spoke and acted for the Government, guaranteed (Section 16) that "the Commissioners will not themselves engage in making use of the water to generate electric, pneumatic or other power," except under certain

hypothetical circumstances that have not come to pass. This was tantamount to pledging the Government not to enter the business of generating or by implication of transmitting electric power; and it is no excuse to plead that the Government itself is not actually doing this, but that it is being done through an arrangement between the Ontario Power Company, an American Company on the Canadian shore, and the Hydro-Electric Commission, which, with Mr. Adam Beck at its head, is the Government under another name.

In the United States Sir James' action would be declared void on the elementary ground that it was a violation of contract. Our constitution makes no provision against unjust legislation of the sort, but the Federal Government has in times past disallowed it when detrimental to an existing investment and therefore prejudicial to the general interest. Thus when the New Brunswick Legislature chartered a local telephone company, Sir John Thompson disallowed the Act in 1889 because, amongst other things, it had "the effect of materially diminishing the value of franchises which the Legislature had previously given to another company." In this instance, the situation is worse since the Provincial Government has diminished the value of the franchises which it conferred on the Electrical Development Company by deliberately setting itself up in the business.

Other cases of a like kind are no doubt to be found in the books, but this one must suffice. The New Brunswick Act was *intra vires*. So are Sir James Whitney's Acts. No one disputes that, and it is not necessary for him to assume a "swashing and a martial" air and attack imaginary persons for asserting the contrary. Nevertheless Sir John Thompson ruled that it was not in the general interest that a Provincial Legislature should injure or destroy existing investments without compensation, through the instrumentality of a rival corporation occupying the same field; and it would appear to be *a fortiori* that a Provincial Government should not itself become a competitor against a private investment which it has helped to establish and which it actually went out of its way to safeguard from its competition.

The Dominion Government would not dream of building a Government railway running parallel with the line of a company which it had chartered and whose route it had approved; certainly not after the company had put several million dollars into the work. Mr. Fielding would say at once that such a policy would be detrimental to the public credit; yet is not the public credit imperilled in exactly the same fashion by the present instance of instituting Government ownership against private enterprise?

THE STAYING OF SUITS.

Again, the provisions whereby Sir James forever stays the suits of those who consider the Electric Power legislation affecting municipalities to be unjust and wrongful, would be declared unconstitutional in the United States, where the Judiciary is, as we should say, an estate of the realm and the people entitled to unrestricted access to it. No doubt, however, it is *intra vires* of the Provincial Legislature, but the question is whether legislation of that sort is tolerable in a British country with a Federal form of government, under which the Legislatures, though secondary bodies, exercise authority over our dearest possessions. The Imperial Parliament has recently bestowed plenary powers in certain cases upon such Government departments as the Treasury, the Local Government Board, the Board of Trade, Board of Agriculture and Education Department, their decisions when acting as, so to say, appellate tribunals being declared final; but a movement is on foot to abolish the practice and allow an appeal to the courts. For instance, the Old Age Pensions Act contemplates the possibility of the local pension committee making a mistake and allows an appeal to the Local Government Board, but the decision of the latter is conclusive. Similarly, a school teacher who has a dispute with the local education committee over his allowances may carry the case to the Education Department in London, but beyond it he cannot go; whilst the Board of Agriculture is the last resort open to a tenant with a grievance under the Small Holdings Act, and the Government Board

of Trade to those who may complain of the administration of affairs connected with the Port of London. These matters are of no great concern to the general public, but the English newspapers, with the "Times" at their head, regard the denial of the right to appeal to the courts from such departmental decisions as nothing short of an invasion of British liberty. The "Times" recalls that to Blackstone the statute law appeared futile to secure the actual enjoyment of the great primary rights of an Englishman, if the constitution did not provide certain other auxiliary rights, of which the chief was the right of every British subject to apply to the courts for redress of injuries.

The subject is attracting so much attention that a short time ago (see "Times," page 8, June 19, 1909), when the Chancellor of the Exchequer proposed, in valuing lands for taxation, to make the Government's valuation final, the Lord Chief Justice deemed it well to enter a dignified protest in these words:—

"Time had been when the Judges had stood between the Crown and the liberties of the people, and had protected the people. That was a duty which was not likely ever again to fall upon them. If, however, certain things were true which they saw in the press, it might be that the Judges might be called upon in the future to protect the interests of the people against the Executive; but he hoped that the time would never come when it would be considered that the Executive Government was to be its own interpreter of Acts of Parliament."

The Government forthwith amended its Budget measure by allowing an appeal to the courts. Sir James Whitney is doing precisely what Lord Alverstone condemns—not, however, in mere departmental matters but in matters of vital concern to all, acting as his own interpreter of Acts of the Legislature affecting property and civil rights, over-riding the decisions of the courts or denying the aggrieved person liberty to go there—a truly amazing situation in a democratic country.

In a well-known Prince Edward Island case, Mr. R. W. Scott, while acting as Minister of Justice in the Mackenzie Administration, of which he was Secretary of State, disallowed in 1876 a Provincial Act on the ground that it was "retrospective in its effects" and "deals with rights of parties now in litigation under the Act which it is proposed to amend, or which may yet fairly form the subject of litigation." The circumstances here are analogous if not identical with those we are discussing. Mr. Beardmore, of Toronto, enters suit with the view of setting aside parts of Sir James' legislation, whereupon Sir James declares by virtue of a fresh Act or amendment that all such actions shall cease and not be revived. Once more, is it in the general interest that this sort of tyranny should prevail? If he can hinder me from beginning or going on with a suit in a matter affecting my purse and property, what is to prevent him from leaving the civil courts without any suitors at all and administering the law by order-in-Council or Act of the Legislature after the manner of the Parliaments of France in former days? In short, where is this usurpation of power and denial of access to the constituted tribunals to cease, if the Federal authority encourages it by not interveinng?

POINTS FOR FUTURE SETTLEMENT.

By entering on a large expenditure for the delivery of Niagara power to certain municipalities in Western Ontario, Sir James raises several capital questions which, sooner or later, must be decided by competent authority. For example, granting that electric light is a general public convenience or necessity, like water or gas, can it be said that electric power is a public necessity or convenience in the same or in any sense? Is its sale by a municipality to a local manufacturer an industry in which all or even a majority of the ratepayers are interested, and towards the expense of which they should contribute? Are those municipalities which by reason of their remoteness from Niagara are debarred from purchasing its power, to be taxed for its transmission to a more fortunate few, while the Government does nothing to develop or trans-

mit power to them from the falls, rapids or other potential sources in their own neighborhood? And what is the Dominion Government going to say to his establishing Provincial Government competition against the Cataract Company, of Hamilton, chartered by the Federal Parliament to take water from the Lake Erie level of the Welland Canal for the purpose of generating and selling power?

In the New Brunswick case just spoken of, the Bell Company had been chartered by the Federal Parliament, as well as by the Provincial Legislature, to conduct a telephone business throughout the Province, and was on the spot and had spent a considerable sum in lines and exchanges before the local company, incorporated by the Legislature, appeared; for which reason, together with that already mentioned, Sir John Thompson disallowed the Provincial Act, or, what amounted to the same thing, recommended its disallowance unless the Legislature repealed the objectionable clauses, on the ground that "the Act interferes with and restricts the operation of an Act of the Parliament of Canada." If it is unconstitutional for a Provincial Legislature to charter a company which invades the field of operation of another company previously chartered by Parliament, can it be constitutional for a Provincial Government to start business on its own account, or under an alias, within that area?

The Provincial Act validating Electric Power contracts with municipalities that had in substance been declared invalid by the courts is, no doubt, like the other Acts hitherto spoken of, *intra vires*; that is to say, within its sphere the Legislature can now do anything, right or wrong. It will be remembered that certain municipalities had agreed by vote of the people to take electric power from the Government upon the condition, amongst others, that there should be a limit to the maximum price; but when the contracts came to be signed by the local authorities that clause had been eliminated, so that the ratepayers were being committed to an unstated, and, for the time, unascertainable responsibility. The Mayor of Galt refused to sign, and the court on being appealed to ruled that the contract had been vitiated by the omission

of so important a part, and that for the Mayor to have executed it would have been a breach of faith with the ratepayers; nevertheless Sir James at the ensuing session passed a law pronouncing it valid and binding.

True, the Ontario Statute Book contains numerous Acts validating municipal by-laws, but in every instance, to the best of my belief, these were passed at the instigation of those who had voted for the by-laws and were to be bound by them, and then only after due notice had been given to all others interested. None, I believe, were passed, as in this case, at the request of the parties who were to secure contracts or other benefits under the by-laws; and certainly none overrode a decision of the Superior Court or prevented the ratepayer who might dispute the binding force of an agreement substituted for that originally put forward in a by-law, from going to court to test its validity.

A FAMOUS PRECEDENT.

So far as I know, only one case has occurred in Canada which is at all similar to this. Thirty odd years ago, Mr. Letellier, Lieutenant-Governor of Quebec, dismissed his Ministers notwithstanding that they had a majority in the Legislature. His conduct was impeached by the Conservatives, then in Opposition at Ottawa. He gave the reasons which had influenced him: amongst them, his Ministers had not kept faith with the ratepayers of Montreal, who had voted a bonus to a railway upon conditions as to the location of the line that had not been carried out. On the ratepayers objecting to paying, Ministers had got the Legislature to step in and declare in effect by an Act that, although they, as parties on one side to the contract, had not performed their part of it, the other parties to it, i.e., the Montreal ratepayers, were bound by it. Mr. Letellier said this was *ex post facto* legislation of a bad kind and warned the Ministers that he "could not consent to see Her Majesty's subjects despoiled of the rights guaranteed them by Magna Charta, that their property should not be interfered with except in virtue of a judgment rendered by the tribunals of the country." The Liberal representation in

Parliament supported Mr. Letellier and condemned without stint this particular action of the DeBoucherville Ministry. Sir Wilfrid Laurier and Sir Richard Cartwright were amongst those who voted that the Governor had done right in dismissing them.

The present case is more grave since the Ontario Government, really a party to the contract, for the Hydro-Electric Commission is either the Government or nothing, has undertaken to declare by Act of the Legislature, not before the courts had been invoked, but actually after they had found the mutilated contracts to be bad that, on the contrary, the mutilated contracts are good. Mr. DeBoucherville anticipated an appeal to the Judiciary whereas Sir James boldly reverses its decision. Technically, it may be within the competence of the Legislature to do such things, but is the doing of them in the general interest? It would be difficult, I think, to conceive of a misuse of authority better calculated to bring Canadian institutions into disrepute at home and abroad.

CONTROL OF NAVIGABLE AND BOUNDARY WATERS.

So far, it has been frankly admitted that the Provincial Acts complained of are *intra vires*. But I now venture to contend that the originating measure of all was *ultra vires*, that is to say, the Provincial legislation empowering the Park Commission or the Ontario Power Company to use the water of the Niagara River and supply power to the Hydro-Electric Commission. The Federal Parliament is by the B. N. A. Act given exclusive jurisdiction over navigation. In the United States, Congress controls navigation, because navigation is held to be an agency of commerce, over which it has authority. The Niagara is a navigable river and an international boundary river. The presence of the Falls does not detract in law or in fact from its navigability, or deprive Parliament of its exclusive jurisdiction over the water which renders navigation possible in other portions of the river. The bed up to the middle of the channel may belong to the riparian owner and be subject to Provincial control, but it is held in England, the United States and elsewhere that the water flowing over

the bed of a navigable, and, above all, of a boundary stream, belongs to the Crown or Federal authority, as the case may be, to the extent that exclusive jurisdiction is vested in it.

If the reader will consult the record of Provincial Acts reported on by the Dominion authorities from 1867 to 1895, edited by Mr. W. E. Hodgins, of the Department of Justice, he will see what care Mr. Edward Blake and other Ministers of Justice on the Liberal side took to maintain the exclusive control of the Federal Parliament over navigable and international rivers, and that Conservative Ministers were no less watchful. The subject has frequently come up in connection with Provincial Acts authorising the building of bridges across the St. Lawrence and St. John; and, without citing individual cases, I venture to assert that both political parties have entertained what would almost appear to be an extreme view of the monopoly of jurisdiction of Parliament over all such waters.

In the United States, Congress maintains exclusive jurisdiction. The Secretary of War, representing the Federal Government, deals with such questions as to how much water shall be taken from a navigable or boundary river for electric or other purposes. He dealt with the supply to be allotted to companies on the American side of the Niagara. Similarly, when an American company sought to use water from the American side of the Long Sault Rapids in the St. Lawrence, near Cornwall, it had to go to Congress for authority; although for the purpose of carrying on the business it had been incorporated by the New York State Legislature. Here, however, the Ontario Government and Legislature have from the beginning assumed jurisdiction over the water in the Niagara, although to my mind it belongs exclusively to the Dominion, as much so as jurisdiction over the water of the Welland Canal.

At the outset the Ontario Power Company apparently realized that the Dominion controlled the Niagara, for it obtained Dominion authority to do certain works; but these were subsequently abandoned and an agreement entered into with the Ontario Government whereby it was granted the

privilege of taking water from the river on payment of a rental, and of constructing the works necessary for that purpose.

What the Dominion Government should do is to refer the case to the Supreme Court of Canada, as it is able to do under the Supreme Court Act, and be guided by the decision there given. That would relieve it of the responsibility, which it may not like to assume, of deciding the question of its own accord. It is scarcely necessary to add that the sooner we know whether the Ontario Legislature has been going beyond its jurisdiction or not, the better for the important interests concerned.

If, however, the Ontario Government should refuse to agree to a reference of a special case to the Supreme Court, let an action be brought by a ratepayer, say, of Toronto, Galt or London, against the Hydro-Electric Commission, setting forth that its whole proceeding is unconstitutional and illegal for the reason given. The moment such an action was entered the Dominion Government would no doubt disallow or suspend the operation of the Acts pending a final decision. If they were held *intra vires*, the Ontario Legislature could re-enact them. If, on the other hand, it was held by the courts that the Dominion possesses an exclusive jurisdiction over the water in the Niagara and that the Acts are therefore *ultra vires*, then the entire box and dice of Sir James Whitney's legislation would fall to the ground, and the Dominion Government and Parliament enter into control. In that case we may be sure that Sir Wilfrid Laurier would protect vested interests as far as possible, though, of course, for any vexation or loss they might sustain the Ontario Government would be responsible; and also that he would redress the wrongs done to some of those interests and to the complaining municipalities, in so far as means of redress might lie within the constitutional powers of the Federal authority.

THE PRIME QUESTION OF ALL.

After this point as to who controls the water in a navigable and international river is determined, the more important

question as to whether a Provincial Legislature is omnipotent within its sphere will still remain for adjudication.

If the highest tribunal holds that it is omnipotent, that it can do as it likes with property even to the extent, as Judge Riddell said, of depriving the rightful owner of it and giving it to someone else; that it can establish State competition with private enterprise to which the Government, under another name, had pledged its word that there should be no State competition; that it can authorize and encourage the municipalities to embark on costly ventures of public ownership and then over-reach them in its contracts, besides declaring white what the courts have pronounced black, or denying those who suffer from its legislation the liberty to go to the courts at all—in that event, of course, it will be incumbent on all who have or expect to have a stake in the country to agitate for amendments to the constitution. As "Bystander" observes, we have not by crossing the ocean to a British dominion forfeited the protection of Magna Charta, and must recover it somehow if we are to be really free.

LAYMAN.

September 1st, 1909.