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POWER OF PROVINCIAL LEGISLATURES TO ENACT STATUTES AFFECTING THE RIGHTS OF NON-RESIDENTS.

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1. **Introductory.**—In an article contributed by the present writer to the CANADA LAW JOURNAL of Feb. 2, 1914, the meaning of the clause of the British North America Act [sec. 92 (13)], by which a Provincial Legislature is empowered to make laws "in relation to civil rights in the Province," was discussed under one particular aspect, *viz.*, that which is concerned with the scope of the law-making power in respect of non-resident members of a Provincial company. I suggested that the criterion with reference to which the validity of laws affecting such members must be tested is to be found in the doctrine that, while the situs of their shares is in the Province in which the company was organized, the situs of many, if not most of their personal rights in regard to the disposition of the shares, is in the jurisdiction in which they reside. From this doctrine I drew the deduction that the Legislature of the Province in which the company was organized is authorized to modify the "rights" of its non-resident members by means of a law which deals directly with their shares as "property," any other description of law which produces such a modification is *ultra vires*.

As an illustration of the category of laws which, under the

general doctrine thus suggested, might properly be regarded as invalid, for the reason that they did not deal directly with the shares of non-residents, but did affect the rights of such persons, I referred to the Ontario statutes which enabled the Hydro-Electric Commission of that Province to carry on its operations in territory in which the Provincial Government, of which that Commission is an agency, had stipulated not to compete with the Electrical Development Company. After the publication of that article I received from a well-known Toronto barrister a letter in which he took exception to my view that these statutes involved a breach of a Governmental agreement. My answer to this criticism appeared in the CANADA LAW JOURNAL of April 1, 1914. Since then my correspondent has not favoured me with any reasons for modifying the opinion which I expressed that, in procuring the passage of these enactments, the Government did actually violate an antecedent compact with the company in question. I wish to point out, however, that, even if my arguments as to this particular matter were unsound, the error is one which in no wise impairs the force, whatever it may be, of my main contention regarding the severability of "rights outside the Province" from the "property in the Province" to which they appertain. It is indisputable that the price at which the shares of the Electrical Development Company were sold when they were first placed upon the market was determined by the belief of the purchasers that the Government would not compete directly with the company. It is also indisputable that the value of the shares was prejudicially affected by the enactments regarding the Hydro-Electric Commission. Having regard to these circumstances, it is immaterial in the present connection whether the restrictive stipulation by which the company intended to secure itself against competition was or was not so worded as to furnish the desired protection. My reference to the enactments was made on the assumption that these enactments actually operated so as to impair a contract with the company. Even if this assumption was erroneous, it was justifiable, for the purposes of a general discussion, to use them as illustrations of the category of laws to which they would have been assignable if the assumption had been well founded.

Having made these prefatory remarks by way of explanation, I shall now proceed to consider three articles in which other writers have recently discussed the meaning of the phrase "civil rights in the Province."

2. Rejoinder to Mr. Masters' comments upon my former article.—I shall first deal with an article in which Mr. Masters has discussed my theory as to the limits of the legislative power. See CANADA LAW JOURNAL, April 1, 1914. He accepts my contention that in *Royal Bank of Canada* v. *Rex*(a), the locality of the trust fund constituted by the proceeds of the sale of the bonds in question was a vital point, and that the decision, as rendered, was inevitable, when the situs of that fund was ascertained to have been at Montreal, at the time when the given statute was enacted by the Legislature of Alberta. But he dissents from the further inference which I have drawn, that, if that fund had then been in the Province of Alberta the statute under review would have been valid His position is thus stated:—

> "If the Legislature may make laws in relation to 'property in the Province' and to 'civil rights in the Province,' then the Act, while *intra vires* as relating to the property, is still *ultra vires* as relating to the civil rights, and, I should say, if *ultra vires* in any respect, is invalid."

Being strongly impressed with the desirability of placing, wherever it is possible, upon the British North America Act a construction which will preclude the Provincial Legislature from exercising their plenary powers in such a manner as to impair the obligation of contracts and confiscate property, I own that I should like to find some satisfactory ground upon which such a theory as is here set forth could be sustained. Mr. Masters, however, has not suggested any such ground, and, for my own part, I do not perceive now, any more than I did when I wrote my former article, under what principle of constitutional law it can be successfully argued that laws which are within the legislative competence, as relating to "property in the Province," can be declared *ultra vires* simply for the reason that they also relate

(a) (1913), A.C. 283.

to "rights" outside the Province. The conclusion is apparently unavoidable that a law which relates directly to the corporate property of a Provincial company or to the shares of its individual members is valid, even though its necessary effect is the impairment of rights which the non-resident members of the company are entitled to exercise outside the Province in respect of the disposition of their shares. When I expressed my opinion to this effect (see especially secs. 2 and 4 of the former article), I did not know whether any authority could be produced in support of it. But I have since found two judicial declarations which, so far as they go, are inimical to the doctrine propounded by Mr. Masters. In *Jones* v. *Canada C.R. Co.*(*b*), where the effect of the clause concerning "property and civil rights" was discussed by Osler, J., with reference to an enactment which purported to validate a transaction requiring the holders of a railway company's debentures to exchange them for shares, the learned Judge made the following remarks:—

> "I am of opinion that, where debts or other obligations arise out of or are authorized to be contracted under a local Act which is passed in relation to a matter within the powers of the local Legislature, such debts or obligations may be dealt with or affected by subsequent Acts of the same Legislature in relation to the same matter, and this notwithstanding that by a fiction of law such debts may be domiciled out of the Province."

In that case, it will be observed, the proceeds of the debentures had been actually paid over to the company. So far, therefore, as the situs of the property affected by the statute in question was concerned, the situation involved was essentially different from that which was presented in *Royal Bank of Canada* v. *Rex*.

In *Attorney General of Manitoba* v. *Manitoba License Holders' Association*(*c*), where the clause under consideration was that which relates to matters of a "merely local or private nature in the Province," the Privy Council, after commenting upon its decision in *Attorney General of Ontario* v. *Attorney General for the Dominion*(*d*), proceeded thus:—

(*b*) 46 U.C.R., p. 261.
(*c*) (1902) A.C. 73 (79).
(*d*) (1894) A.C. 189.

> "The judgment, therefore, as it stands, and the report to Her Majesty consequent thereon, shew that in the opinion of this tribunal matters which are substantially of local and private interest in a Province—matters which are of a local or private nature from a Provincial point of view, to use expressions to be found in the judgment—are not excluded from the category of matters of a merely local or private nature, because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the Province."

Until these statements have been categorically disapproved or qualified by a competent authority, it would seem that Mr. Masters' theory must be regarded as untenable. They are essentially inconsistent with the notion that a statute which is *intra vires* in respect of its immediate subject-matter is invalidated by the circumstance that it also affects a subject-matter over which the Legislature has no control.

Another objection taken by Mr. Masters to my views is embodied in the doctrine which he propounds, that

> "the Legislature of a Province, having authority to incorporate 'companies for provincial purposes,' no rights of a foreign shareholder in a company so incorporated could prevent it making any laws affecting the latter which otherwise would be within its competence."

The language thus used indicates that the essence of the theory which I put forward in the former article has not been thoroughly comprehended by my critic. From the remarks made above it will be apparent that I fully concede that a Provincial Legislature, being invested with an unqualified authority to make laws in relation to "property in the Province," has the incidental power to deal with "rights that are not in the Province" by means of laws which belong to that category. I agree, therefore, with Mr. Masters in regard to his main conception, as expressed in the passage above quoted, that a law affecting a Provincial company is *intra vires*, although it may operate so as to modify the rights of foreign shareholders. The only point with respect to which we differ, so far as this particular aspect of the inquiry is concerned, is that he relies upon the clause concerning the "incorporation of companies," while I deduce my conclusion from the clause concerning "property and civil rights." The citation of the former clause seems to me quite unnecessary in the present connection. The latter clause is a

generic provision, which would manifestly have authorized Provincial Legislatures to incorporate companies, even if the former clause had not been inserted in the organic statute. Laws which regulate the formation of companies are certainly laws "in relation to civil rights." The special power of making laws in relation to incorporation may doubtless be regarded as including by implication the power of making laws which affect either the companies themselves in their corporate capacity or the members of the companies in their individual capacity. But, having regard to the broad provision as to "property and civil rights in the Province," it would seem that this is a case in which there is no necessity whatever to resort to the theory of implied powers.

Equally unfounded, I venture to think, are the two objections which Mr. Masters thus formulates in the concluding paragraph of his article:—

> "If the position be sound that the civil rights out of the Province must be enforceable out of the Province to invalidate an Act relating to such rights, then I conceive *cadit quaestro*, for obviously no rights of a shareholder can be enforced elsewhere than in the Province of origin of the company. But, irrespective of that position, the fact that the rights of a shareholder exist only in common with those of the body of shareholders, and that any proceeding to enforce such rights must be on behalf of all shareholders, shews, to my mind, that the civil rights, if any there are to be affected by legislation, must be those of the body of shareholders, that is of the company itself, and so 'civil rights in the Province.'"

The proposition which is here treated as "obvious" in the former sentence of this passage, and the doctrine propounded in the second as to the nature of the rights of a shareholder, are, it is submitted, absolutely incorrect. There is nothing, either in the organic statute itself or in any general principle of jurisprudence, that would warrant the supposition that the rights acquired by a non-resident shareholder as a result of an assignment, pledge, or testamentary disposition of shares in a Provincial company, are not "rights" within the meaning of the clause under discussion. Surely Mr. Masters would not seriously contend that such a shareholder who desires to enforce rights of this description against persons who are non-residents must

resort to the Courts of the Province in which his company was incorporated?

3. **Criticisms of other writers upon Royal Bank of Canada v. Rex.**— When I wrote the article which appeared in the February number of this journal I was not aware that the subject with which it dealt had previously been discussed by Mr. Lefroy, both in the Law Quarterly Review and in his treatise on Canada's Federal System, and by Mr. Ewart in the Canadian Law Times. Both of these learned authors have, I find, expressed the opinion that the decision of the Privy Council in the case of *Royal Bank of Canada v. Rex* was unsound. But their animadversions have been made from different points of view, and reflect entirely diverse sentiments regarding the tribunal whose judgment they condemn.

Mr. Lefroy's attitude is that of a critic who, having carefully studied all the reported decisions "upon questions arising out of the provisions of the British North America Act, 1867, relating to the distribution of legislative power between the Dominion Parliament and the Provincial Legislatures, has never seen the smallest loophole for criticism, or for doubt, as to the correctness of any one of them before this last judgment."(*a*) The spirit in which his censures have been uttered is, therefore, that of an unwilling witness who is compelled to give testimony unfavourable to the party whom he wishes to succeed. On the other hand, the feelings with which Mr. Ewart has undertaken his attack upon the judgment are those of a person in whose view it constitutes merely a striking illustration of his theory, that the Privy Council is incompetent to handle appeals from Canadian Courts.(*b*) He does not, like Mr. Lefroy, regard the case as a single aberration from the straight road of sound juristic doctrine, but treats it as a flagrant addition to a long list of errors by which litigants from the Dominion have in his opinion been seriously prejudiced. Mr. Lefroy pronounces his condemnation with reluctance and regret. Mr. Ewart's criticisms are

(*a*) Law Quarterly Review, vol. 29, p. 288.

(*b*) See the series of articles contributed by him to the Canadian Law Times during 1913.

the outcome of an indignation engendered by continued brooding over the manifold imperfections of the tribunal assailed.

An attentive perusal of the arguments relied upon by these gentlemen has, I confess, failed to satisfy me that the case in question is bad law. Nor do I feel disposed to recede in the least degree from the opinion which I expressed in my former article, that the ulterior development of constitutional jurisprudence to which that case may possibly have opened the door will be highly beneficial, as affording a certain amount of protection against the evils of confiscatory legislation. In presenting the considerations which I deem sufficient to justify this adherence to my original views, I am, of course, duly sensible of my temerity in entering the lists against two critics of such eminence, that one of them, in spite of his firm conviction that the Privy Council has in every previous instance correctly determined the points of constitutional law submitted to it, has not shrunk from declaring that this creditable record has at last been broken, while the other, surveying the situation from the still loftier heights of consistent disapproval, merely finds in the case a fresh proof of the deplorable incapacity of the tribunal which decided it. The grounds upon which I venture to do battle with such redoubtable antagonists will, therefore, be stated with diffidence—a diffidence, nevertheless, which will be tempered in some degree that I shall be supporting the same side of the controversy as the Privy Council itself. This is a circumstance from which I derive much comfort, though I suppose that one of my opponents will scarcely appreciate my feelings in this regard.

4. Mr. Lefroy's theory as to the meaning of the phrase, "civil rights in the Province."—Let us turn, in the first place, to Mr. Lefroy's criticisms. In his article in the Law Quarterly Review (vol. 29, p. 288), he comments as follows upon *Royal Bank of Canada v. Rex*:—

> "It is a question in my mind whether the restriction which the judgment places upon the power of our Provincial Legislatures can, or ought to be, accepted as permanent until their lordships have at all events expressly overruled what I will now venture to suggest as the true construction of the clause in question. When has a man a

'civil right in the Province'? I submit he has a civil right in the Province whenever and so far as he can invoke the aid of the Courts of the Province by way of action or by way of defence, quite irrespective of where that civil right arose, and quite irrespective of whether the same state of facts gives him also a civil right which he can enforce, by way of action or by way of defence, in any other jurisdiction. What is a civil right, except the right to invoke the aid and put into operation the machinery of the civil Courts, directly or indirectly? In other words, my submission would have been that when the Imperial Parliament gave our Provincial Legislatures exclusive jurisdiction over 'civil rights in the Province,' it was simply giving them complete control of their own Provincial Courts. And this is entirely consistent with the power given them in the very next clause of the British North America Act, namely, over 'the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts.' . . . My contention is, that just as the Imperial Parliament can entirely control the action of the Courts in Great Britain, and nullify any existing rights of action or defence, so can our Provincial Legislatures, so far as their own Courts are concerned, do the same thing, by virtue of their power over 'civil rights in the Province' and 'the administration of justice in the Province,' saving always matters coming under Federal control."

Similar views are embodied in the following passages of the learned author's work on Canada's Federal System (p. 506):—

"It might have been thought, disregarding as *obiter* the dicta in the *Dobie Case* [(1882) 7 App. Cas. 136], that No. 13 of section 92 has the effect of giving Provincial Legislatures complete control of what rights can be enforced by way of action, or by way of defence, in the Provincial Courts, just as No. 14 gives them complete control over the administration of justice in the Province. But their lordships now distinctly hold, in this Alberta case, that this is not so in the case of a right which has arisen and is enforceable outside the Province. Provincial Legislatures cannot direct their own Courts to refuse to recognize such a right in an action brought in them. . . . What the writer would have liked to have seen submitted to the Board is, that a civil right in a Province or anywhere is nothing else than a right to invoke the assistance of the civil Courts of that Province, or other place, to give effect to some claim of a party to litigation, whether by way of action, or by way of defence to an action; that so far as anyone has such a right, he has 'a civil right' in that Province, or other place, whether he has or has not a similar right, under the same set of facts, elsewhere or not; and over such a civil right in a Canadian Province the Provincial Legislature has plenary power, saving always the powers of Parliament."

The essence of the doctrine set forth in these statements seems to be simply this: A Provincial Legislature, being invested by

the organic statute with complete authority over the Provincial Courts, possesses, as a necessary incident of the authority so conferred, the power of declaring the grounds upon which litigants in those Courts shall be entitled to rely, "by way of action or by way of defence;" and the rights created by such a declaration are those which are imported by the phrase "in the Province." In other words, Mr. Lefroy takes the position that the Provincial Legislatures have received plenary power to direct the Provincial Courts to recognize, or refuse to recognize, any description of civil rights, and that, so far as each Province is concerned, a direction given in pursuance of this power absolutely fixes the quality of the rights to which it has reference, irrespective of whether those rights would or would not be treated as enforceable in other jurisdictions. This doctrine seems to be open to criticism in more than one respect.

In the first place, it is objectionable, as ignoring altogether the probability, approaching to certainty, that the phraseology of the clause under discussion was chosen with reference to the familiar rules of private international law, which rest upon the distinction between the situs of substantive rights incident to property and the situs of the property to which these rights are incident. If an erudite professor of jurisprudence had not deliberately maintained the contrary, one would have thought it almost too plain for argument, that this clause simply declares that the scope of the legislative power extends to substantive rights, according as the persons entitled to exercise them are or are not domiciled in the Province at the time when the enactment affecting them is passed. In this point of view laws affecting the rights of persons outside the Province will be *ultra vires*, except in cases where they specifically relate to, and primarily operate upon, a subject-matter in the Province, whether it be persons or property. See sec. 2, ante. Mr. Lefroy cites no authorities in support of his theory that the clause in question should be construed on the peculiar footing which he suggests. The only corroborative reason which he has assigned for ignoring the obvious construction to which I have just adverted, and resorting to one which requires us to assume that the phrase "in

the Province" imports something more than mere locality, is that under the clause following the one which deals with "Civil rights," a Provincial Legislature is empowered to make laws in relation to "the administration of justice in the Province." It is submitted, however, that the words of this provision are not such as to justify the argument which he bases upon it. Manifestly it has nothing whatever to do with the creation of substantive rights. It merely authorizes a Provincial Legislature to determine the character and constitution of the tribunals, and the nature of the procedure, by which such rights—not only those specified in the preceding clause, but also those which arise from legislation in pursuance of all the other clauses of the same section of the Act—shall be enforced.

Another weighty objection to Mr. Lefroy's doctrine is that under it the situs of civil rights becomes a matter determinable *solely* by the declaration of a Provincial Legislature. The unsoundness of such a position is at once evident when we advert to the consideration that the very declaration to which this effect is ascribed is itself a mere nullity, unless the right dealt with is *in point of fact* "in the Province." In a case where the competency of a Provincial Legislature to pass a law in relation to a certain "civil right" is the very question to be determined, it is difficult to see upon what principle of constitutional law it can be successfully argued that the right can be brought within the scope of the law-making power by the mere process of enacting a statute which purports to modify or abolish it. To assert that this is the effect of the declaration is a mere *petitio principii*.

Furthermore, it seems to be reasonably clear that the limitations which Mr. Lefroy's doctrine would impose upon the jurisdiction of the Federal Supreme Court and the Privy Council are not in conformity with the judicial system of the Dominion. Granting for the moment that his theory with regard to the competency of a Provincial Legislature to control the Provincial Courts is correct, it is certain that this control does not extend to the higher tribunals. So far as can be gathered from his article, he has entirely failed to advert to this aspect of the matter —which is somewhat surprising, for it exhibits the unsoundness

of his doctrine in the clearest possible light. Even if the Provincial Courts have, as he maintains, no option but to adjust the claims of a non-resident in accordance with the terms of any Provincial statute which affects his rights, such a statute assuredly cannot preclude him from having the decision reviewed. Upon that review its validity will be determined, not with reference to the fact that the Provincial Legislature has undertaken to deal with his "civil rights," but with reference to what the Court itself regards as the proper construction of the qualifying phrase, "in the Province," and to its opinion respecting the significance of the evidence set out on the record. There is apparently only one ground upon which Mr. Lefroy can, consistently with the maintenance of his doctrine, meet the difficulties suggested by the consideration that the Dominion Supreme Court and the Privy Council are not under the authority of the Legislature whose declarations are held by Mr. Lefroy to be absolutely determinative of the quality of civil rights, irrespective of whether the persons concerned are or are not domiciled in the Province. He may take the position that, in some particular case, the correctness of his doctrine as to the construction of the phrase, "civil rights," may be recognized by those tribunals, and that, after a single ruling to this effect, the incongruity between that doctrine and the judicial system of Canada will cease to be predicable. In other words, he may entertain the supposition that the appellate Courts which are not subject to the control of the Provincial Legislatures may hereafter render a decision which would virtually amount to a renunciation of their appellate jurisdiction in a certain class of cases. But it is so unlikely that such a decision will ever be rendered that this aspect of the matter may reasonably be treated as a negligible factor in the discussion.

5. Discussion of Mr. Ewart's criticisms upon Royal Bank of Canada v. Rex.—In the opening sentence of his criticism upon the judgment of the Privy Council in *Royal Bank of Canada* v. *Rex*, Mr. Ewart remarks:—

> "The decision appears to indicate that a Provincial statute which deals with a subject within the jurisdiction of the Legislature, but which has, as one of its effects, a prejudicial operation upon a right of

action existing outside of the Province, is *ultra vires*. That is a new and very disturbing idea. (Canadian Law Times, vol. 33, p. 2[illegible].)

In another place, commenting upon the circumstance that the Privy Council had not expressed any opinion as to the soundness of the argument submitted on behalf of the Royal Bank, *viz.*, that as the proceeds of the bonds were not transmitted to Edmonton in actual specie, there was no "property" in Alberta with which the Legislature could deal, he suggests that the argument was probably thought immaterial(*a*):—

"For in any case there was a civil right of the Government and the railway, in respect of the liability of the bank, within the Province. The decision proceeds upon the ground that the Province had no power to deal with 'property and civil rights within the Province,' in such a way as to affect a civil right outside the Province."

When the two statements are read together it is apparent that what Mr. Ewart designates in the first as the "subject" of the statute under review is the "civil right" to which he alludes in the second; that he regards the existence of this "civil right" as being predicable from the existence of a liability on the part of the bank to pay over the proceeds of the bonds to the railway company; and that in his view the situs of this liability and the "civil rights" corresponding to it was in the Province of Alberta, and consequently within the jurisdiction of the Provincial Legislature. From these premises the conclusion is deemed by him to be deducible, that, as the statute was *intra vires* as being in relation to a "civil right in the Province," the Privy Council was not justified in holding it to be invalid on the mere ground that, under the given circumstances, it operated so as to affect civil rights outside the Province.

The first portion of this argument seems to be based upon the hypothesis that, at the time when the statute in question was

(*a*) It is scarcely necessary to remark that, in the crude shape in which this point is stated by Mr. Ewart, it certainly would have been quite "immaterial." Clearly the question whether the proceeds of the sale of the bonds had become "property in the Province" did not necessarily depend upon whether the money had been sent there in specie. A credit at the Edmonton Branch of the Royal Bank opened on the *ordinary* footing, and not subject to any special control on the part of the Manager at the Head Office, would have been as effective as the transmission of the actual specie to give the money a Provincial situs.

passed, the Royal Bank was subject to a liability which was complete in such a sense that an enforceable right to the proceeds of the bonds had already vested in the Government and the railway company. If this is the position which Mr. Ewart intends to take, it is clearly shewn by the undisputed facts stated in the report to be entirely unwarrantable. From those facts it is quite apparent that all the parties concerned took it for granted that the money which the Provincial Treasurer demanded from the Royal Bank after the statute came into force was not yet due to the railway company, and that it was merely on deposit to be paid over in instalments as the work of construction progressed. Possibly Mr. Ewart is prepared to go the length of contending that the merely inchoate right which existed under these circumstances was a "civil right" within the meaning of the British North America Act. But it is apprehended that the extreme doctrine would scarcely meet with general approval. Legislation creating rights which should take effect upon the fulfilment of certain conditions or the occurrence of some specified event would no doubt be *intra vires*. But when the validity of a statute is being tested, as in the present instance, with reference to the question whether pre-existing contractual rights which it purports to qualify or annul were "in the Province," there can be but little doubt that the phrase "civil rights" should be construed as importing only such matured rights as would serve as a foundation for a claim or a defence. In this point of view it would follow that, as no right of action in respect of the trust fund had accrued to the railway company when the given statute came into force, Mr. Ewart's assumption that the statute was valid, because it was "in relation to a civil right," must be pronounced untenable, for the simple reason that there was then no subsisting right with regard to which it could operate.

But even if this theory of the situation existing when the statute was enacted is erroneous, there is a further point to be determined in Mr. Ewart's favour before the validity of his argument as a whole can be conceded. It must be shewn that the situs of the right of the Government and the railway company with regard to the trust-fund was "in the Province." This very

important phase of the subject has not been discussed at all by Mr. Ewart. Doubtless he deemed the point to be sufficiently clear to warrant him in taking it for granted that the right was within the jurisdiction of the Provincial Legislature. But in the opinion of the present writer such an assumption was quite unwarrantable.

If the right had been one corresponding to an obligation to pay a debt the existence of which was conceded, the case might conceivably be regarded as falling within the scope of the general rule of private international law, that "the locality of a debt is at the domicile of the creditor."(*b*) But, under the given circumstances, it is manifest that there was no such debt in the sense contemplated by this rule. The only right which, at the time when the statute in question was passed, was predicable in respect of the trust-fund, was the right of the railway company to bring an action for the purpose of determining whether the Royal Bank was under a legal obligation to pay over the money. The situs of that right must, it is apprehended, be taken to have been either in Alberta or in Quebec, according as the situs of the trust-fund is regarded as having been at Edmonton or Montreal. In this point of view the validity of the given statute depended upon the effect to be ascribed to the opening of the special account at Edmonton.

That the situs of the trust-fund was in Montreal, where the Royal Bank had its head office and had accepted the charge of the trust-fund, was manifestly assumed by the Privy Council, for the hypothesis underlying its judgment is that the rights with which the given statute purported to deal were rights springing out of an executory contract, the performance of which had never been carried to such a stage as to bring the money agreed to be paid for the railway bonds within the territorial limits of Alberta. The position taken in this regard is clearly indicated by the emphasis which Lord Haldane, in his summary of the evidence, laid upon the circumstance that the special account opened in

(*b*) *In re Goodhue* (1872), 19 Grant's Ch., p. 454, *per* Strong, V.C., citing *Sill* v. *Warswick* (1791), 1 H. Bl. 665 (690). See generally Wharton on Confl. of Laws, 3rd ed., p. 171 (§ 80-c.).

favour of the railway company at the Edmonton branch of the Royal Bank was retained under the control of the head office. The full significance of his statement in this connection and the point of view from which it was made will become still clearer if we advert to the passages in the argument of counsel which have a relation to this particular aspect of the case.

Sir Robert Findlay, who appeared for the Royal Bank, reasoned thus:—

> "At the time the Act was passed the situs of both debtor and creditor in respect of the money deposited was outside the Province; and on the evidence neither the profits nor the civil rights which were dealt with by the Act were within the Province of Alberta or the jurisdiction of the Legislature. The creditors in this case were the bondholders and their trustee. . . . The debtor also was outside the Province. The head office of the Bank was in Montreal, and the deposit in question being large in amount and unusual in character was always under the control of the Montreal head office, and though the special account was kept at a local branch within the Province, no withdrawals were allowed without authority from the head office, which retained complete control of the fund. The appellant bank was liable to its creditor at its head office, and his claim could be enforced either in the Courts of Quebec or New York."

One of Mr. Buckmaster's contentions on behalf of the Province is thus summarized in the report:—

> "The evidence shewed that the deposit was, in pursuance of an agreement to that effect, made in the appellants' branch bank at Edmonton in the Province, under the Guarantee Act (16 of 1909), and that it was a condition of the delivery up of the bond in suit that it should be so made. The circumstance that persons outside the Province had rights that were affected by the Act in question did not render the legislation invalid. So long as the property affected by the Act is situated within the Province, it is immaterial that the owner or other persons affected thereby are outside the Province. If the property so affected were land within the Province, legislation regarding it would not be invalid, so far as it affected the interests of an owner outside the Province, and in that regard no material distinction can be drawn between landed property and the fund in question."

From a comparison of these opposing arguments, it is evident that the language used by Lord Haldane as to the special account is to be understood as importing an acceptance of Sir Robert Findlay's theory regarding the situs of the trust-fund. That the Privy Council did not regard that account as having created a

debt enforceable at Edmonton on the same footing as if the credit had been one of the character created by a deposit made in the ordinary manner is also indicated by the circumstance that the judgment distinguishes *Rex* v. *Lovitt*(*c*), which involved the power of a Provincial Legislature with respect to the taxation of money deposited in and controlled by the Provincial branch of a bank with its head office in London. The special account was plainly considered as being simply a method adopted for the more convenient transmission of the instalments of the loan which the bank at Montreal, as the agent of the purchasers of the bonds, would, if the work of construction had gone forward as was expected, have been obliged to pay over to the railway company from time to time.

Mr. Ewart of course does not accept the theory of the Privy Council as to the situs of the proceeds of the bonds. But he has inadequately discussed what was really one of the crucial points in the case. He adverts to the fact that the memorandum delivered by the bank when it received the bonds from the Provincial Government stated that the money paid by the purchasers was "to the credit of the Province of Alberta—Alberta and Great Waterways Railways special account—in the Royal Bank of Canada, Edmonton." From this transaction he assumes it to be a necessary inference that "as between the bondholders, the bank, and the Province, the money was within the jurisdiction of the Legislature of the Province." Having regard to the element of the control which was retained by the head office over the special account, this result was plainly not one that followed as a matter of course from the general terms of the memorandum. The very slight attention which Mr. Ewart has bestowed upon this very important aspect of the evidence is shewn by his assertion that a case cited as a precedent by the Privy Council, *National, etc., Assoc.* v. *Wilson*(*d*), is "easily distinguishable," for the

(*c*) (1912) A.C. 212.

(*d*) 5 App. Cas. 176. So pleased is the critic at having detected the Privy Council in citing a case that was really not in point, that he emphasizes his statement by a mark of admiration. To catch the Privy Council tripping in the matter of a citation is certainly legitimate matter for self-congratulation. Whether the exploit has been achieved in the present instance is quite another question.

reason that the money in question was still in the hands of trustees for the bondholders when the controversy with respect to its disposition arose. If the construction placed by the Privy Council upon the facts in *Royal Bank* v. *Rex* is accepted as correct, there is plainly no distinction between the cases, so far as the element adverted to is concerned.

From the foregoing remarks it will be apparent I regard the portion of Mr. Ewart's criticism to which they relate as being merely a superstructure of unsound doctrines erected upon a basis of misstated facts. The remainder of that criticism is founded upon a misstatement of another description. There is no warrant whatever for his assertion that the decision in *Royal Bank of Canada* v. *Rex* "proceeds upon the ground that the Province had no power to deal with 'property and civil rights in the Province' in such a way as to affect a civil right outside the Province." The judgment does not contain a single word that indicates an intention on the part of the Privy Council to take the position thus imputed to it. What Mr. Ewart should really have said was, that, if his reading of the evidence is adopted as correct, the decision may be regarded as a precedent for the doctrine suggested by him. That is manifestly a proposition quite different from the one which he formulates. Yet the greater part of his article is devoted to the task of elaborating various "points" which in his opinion prove conclusively that the doctrine which he ascribes to the Privy Council is erroneous. As that doctrine is simply a figment of his own imagination, it would be a work of supererogation to analyse in detail all the arguments which he has marshalled against it. But a few passing remarks may be made with regard to one of them which raises a matter of general interest to students of Canadian constitutional law, and which was evidently regarded by Mr. Ewart as particularly conclusive.

After having referred to the fundamental doctrine that the British North America Act "makes an elaborate distribution of the *whole field* of legislative authority between two legislative bodies,"(*e*) he proceeds thus (p. 276):—

(*e*) *Bank of Toronto* v. *Lambe*, 12 App. Cas., pp. 287, 288.

"By no process of argumentation can any jurisdiction in the matter be placed in the Dominion Parliament. If that be true, and all legislative authority over affairs in Canada is rested in some Legislature or Legislatures here, how can the claim of Alberta be disputed?"

The dilemma suggested by this query is obviously imperfect. If the situs of the trust-fund and the civil rights of the bondholders with regard to it were outside of Alberta, —and this was the state of facts which the Privy Council assumed for the purposes of its decision,—it does not at all follow, as Mr. Ewart assumes, that, because the authority to deal with the subject-matter was not vested in the Dominion Parliament, it must necessarily have been vested in the Alberta Legislature. It is strange that the learned critic should have failed to take notice of the obvious alternative, that, as the trust fund was deposited in the head office of the Royal Bank at Montreal, it was subject to the jurisdiction of the Quebec Legislature. If, therefore, a statute disposing of the fund in the same manner as the one under review had been enacted by that Legislature, its validity could not have been successfully impugned by the bondholders.

6. **Concluding remarks.** — From what I have said in the preceding section it is sufficiently apparent that I do not by any means agree with Mr. Ewart in his view that the decision in *Royal Bank of Canada* v. *Rex* has furnished another example of the incapacity of the Privy Council to deal with Canadian appeals. The reputation of that tribunal is not likely to suffer much damage from the attacks of a critic whose censures are of such a nature as to demonstrate that both the facts involved in the case and the grounds upon which the judgment proceeded have been misconceived by him.

The article which I have been discussing is one of a series which Mr. Ewart has written for the express purpose of discrediting the Judicial Committee. I have not had the privilege of perusing the whole of his other lucubrations; but, if the reasoning which he has employed in them is of the same quality as that which has been analysed above, it seems unlikely they will convince any considerable number of Canadian lawyers and business

men that it is expedient to abolish the appellate jurisdiction of the English tribunal.

In the final article of the series, in which he summarizes the criticisms to which he had previously subjected various judgments—(one of them being *Royal Bank of Canada* v. *Rex*)—we find the following remarkable statement:—

> "I do not say that all the decisions of the Committee are so flagrantly and indisputably wrong as these six. Some of their Lordships are able men, and, considering the handicaps under which they labour, they do surprisingly good work." (33 Can. L. Times, p. 674.)

The true significance of this condescending admission that the incapable tribunal which is the unhappy victim of his animadversions sometimes contrives to do pretty good work, by dint of the exceptional talents which enable a portion of its members to surmount on rare occasions the obstacles which beset their path, will be more thoroughly appreciated when it is mentioned that he specially emphasizes the fact that the six cases reviewed by him were all decided during a very brief period, and declares that the list of blunders might, without any difficulty, be greatly extended.

It is not surprising that a writer who does not shrink from wholesale condemnation of this sort should also have favoured us with the noteworthy opinion that the Supreme Court of the Dominion "never falls into such gross errors as not infrequently characterize the judgments of the Judicial Committee." No doubt the learned Judges who constitute the Court which is extolled in this exaggerated strain have sufficient discrimination to estimate such a eulogy at its true value(*a*). But it is exceedingly regrettable that a gentleman who in general repute ranks as one of the leaders of the Canadian Bar should commit himself to such a preposterous statement.

Of course even those who entertain the highest respect for the Judicial Committee will not go so far as to assert that it has never gone astray in dealing with Canadian appeals. For my own part

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(*a*) The thoughts of some of them will, I daresay, recur to the well-known scene in which the captain of "H.M.S. Pinafore" is compelled to reduce the "never" of his self-laudation to "hardly ever." Whether the panegyric would be palatable to its subjects even with this qualification is a matter with regard to which it would be unbecoming to express an opinion.

I confess that I have grave doubts as to the correctness of the recent decision concerning the apportionment of legislative powers with regard to marriage. But my doubts in this instance are not based on any considerations of a juristic character. The reason why I regard the decision as unsatisfactory is that the elements favourable and unfavourable to the conclusion finally adopted were, as Lord Haldane's judgment shews, deemed to be almost evenly balanced, and that, for some reason not apparent from the report, a certain important historical circumstance which had a bearing upon the import of the Act, and which might possibly have turned the scale in such a close case, was not brought to the attention of the Court. The circumstance I allude to is the pronounced hostility which, at the time when the Confederation Act was under discussion, prevailed between the Protestants of Upper Canada and the Roman Catholic Church. It might, I think, have been argued with some chance of success that, having regard to this hostility, the meaning of the Act should have been determined with due reference to the consideration that the former would almost certainly have refused to accept a provision which would confer upon a Legislature dominated by the latter such extensive powers in respect of the validity of mixed marriages as those which it has now been declared to possess. Manifestly, however, the omission of the Court to take this aspect of the matter into account does not imply any juristic incapacity. The fault, if any there were, of such an omission, must be attributed not to it, but to the counsel. It could scarcely be expected that an extrinsic element of this character should occur to anyone who had not some knowledge of the peculiar local antagonisms produced by religious animosity. To find a decision which is assailable on purely legal grounds is certainly a much more difficult task than Mr. Ewart supposes.

This is not the place, however, to discuss at length the general question whether it is expedient that the right of appeal to the Privy Council should be preserved on its present footing. The unrestricted exercise of that right has its advantages and disadvantages, and presumably the considerations for and against its continuance on this footing will be carefully weighed within

the next few years. But when the matter is being settled, the conclusions arrived at will certainly be based upon grounds very different from those put forward by Mr. Ewart. Such sweeping censures and rhetorical diatribes as those which he has launched against a tribunal which includes some of the ablest jurists in the world merely recoil upon their author, and will, I suspect, set some people thinking of the famous *mot*, that, in his review of Macaulay's History, Croker "attempted murder, but committed suicide."

C. B. LABATT.

PEACE WHEN THERE IS NO PEACE.

The literature of the American Society for the Judicial Settlement of International Disputes continues to make its appearance, nothing daunted by the clash of arms, and the fact that the nations of the civilized world are at each others' throats. The quarterly report just received discusses at length the status of the International Court of Justice, and gives an appendix containing various addresses and official documents. There are many good reasons cited why there should be no war and that all that is necessary is a court of arbitration for the settlement of disputes between nations. The nations, however, seem to think otherwise, or perhaps it would be more correct to say that one nation refuses to arbitrate and the result is that all the other nations have to follow its lead into the bloody arena. The other paper is an article on "Justice between nations."

If one had nothing else to do, it might perhaps be interesting to read this learned and eloquent matter, but the inhabitants of the many cultured countries now at war are at present too busily engaged in shooting each other or caring for their wounded and burying their dead to devote any time to visions.

The old Book says that there will, right up to the end, be wars and rumours of wars, nation rising against nation, etc., and that there will be no peace until the time arrives therefor as set forth in its pages. We trust that Holland at least will be saved from

the general conflagration, otherwise we should see the Peace Palace at the Hague converted into barracks, or a hospital, which would be an interesting commentary upon the laudable, but misdirected efforts of those who think that unscrupulous self-seekers can be persuaded to do what is right without the compulsion of "the rod of iron" which in due time will be wielded by the Master hand.

THE MORATORIUM.

At the outbreak of the present international crisis, fraught as it was with the gravest peril to our economic position, it was essential that effective steps should be taken to prevent a breakdown of our finances. The problem was urgent and unprecedented, at least in this country, and the Government was therefore compelled to adopt stringent measures without precedent in our national experience. Not the least remarkable of the methods involved was the principle of the moratorium. The term moratorium is unknown to English law, although its derivation from the Latin *mora* (delay) must sufficiently indicate its meaning. It is the enforcement of the payment of debts which is delayed, a means being thus provided of supporting the credit system on which credit is based during a period of great emergency. The debtor is legally authorised to postpone payments for a specified time, to enable him to take steps to fortify his position and thus tide over the period during which if unprotected he must inevitably have to face bankruptcy. As is well known, the whole basis of our existing financial organism is dependent upon the maintenance of the mutual credit system; it is therefore vital that it should not be allowed to collapse owing to an emergency which cannot be provided against. The debtor is given a breathing space, and no injustice is done to the creditor, who knows that his debtor will eventually prove to be financially sound; and the creditor will suffer no loss, as the debtor, as the price of the relief afforded him, will have to pay a sum by way of interest in addition to the amount of his liabilities.

The efficacy of the moratorium was clearly established during the Franco-Prussian War of 1870-1871, when the French Government from time to time introduced moratory law, and thus maintained the system of French credit unimpaired during a time of grave national emergency. The working of the system is fully set out in the case of *Rouquette* v. *Overmann and Schon* (33 L.T. Rep. 333; L. Rep. 10 Q.B. 525). A moratorium enacted by the edict of the Emperor of the French had been extended from time to time by the National Assembly, and provided for a postponement of the date of the maturity of bills of exchange accepted and payable in Paris till some months after the conclusion of the war. The delay in making presentment was excused, and the international validity of the moratory enactments was recognised by our Courts. It was laid down that the obligations of the acceptor and the indorser must equally be determined by the *lex loci* of performance—that is, the French law. As there must be countless instances at the present time of bills of exchange which have been drawn in one country and are payable in another, it is well to remember that our present Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72, sub-s. 5, already provides that the due date of payment of such bills is determined according to the law of the place at which they are payable. Moreover, by s. 46, sub-s. 1, of the same Act delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder. The French Government having also recently declared a moratorium, holders of bills accepted by French firms are quite secure.

Our own Government, under the stress of the present national emergency, on the 3rd August last passed a Bill through both Houses of Parliament conferring power on the Crown to provide for a moratorium in respect of debts by means of a Royal Proclamation. The Act enables the Crown to postpone the payment of any bill of exchange or of any negotiable instrument or any other payment in pursuance of any contract to such extent, for such time, and subject to such conditions or other provisions as may be specified in the proclamation. On the previous day, in order to meet a special emergency in the bill market, a proclamation

had already been issued dealing with the postponement of payment of certain bills of exchange. This was confirmed by the Act of Parliament passed on the 3rd August. And on the 6th August a further proclamation was issued extending the moratorium to all debts, subject to certain exceptions.

In connection with the first proclamation, a somewhat curious blunder has been made in the drafting of the statute, which provides (s. 1, sub-s. 4) that "The proclamation dated the 3rd day of August, 1914, relating to the postponement of payment of certain bills of exchange, is hereby confirmed and shall be deemed to have been made under this Act." Now the proclamation is in fact dated the 2nd August, but it is, of course, obvious to what proclamation the Act is intended to refer, and it is not in the least likely that the provision would be treated as nugatory. Where Acts of Parliament contain patent clerical errors, they may be read as amended. A similar point arose in the case of *R.* v. *Wilcock* (7 Q.B. 317), which turned upon a statute that in terms repealed "an Act passed in the thirteenth year" of George III., the title of the Act being set out. In fact there was no such statute passed in the year in question, but there was a statute with that title passed four years subsequently. Lord Denman, C.J., in deciding to accept the emendation, said: "A mistake has been committed by the Legislature; but, having regard to the subject-matter, and looking to the mere contents of the Act itself, we cannot doubt that the intention was to repeal 17 Geo. III., c. 56, and that the incorrect year must be rejected." In the present case there was no proclamation issued on the 3rd August; but, seeing that the proclamation of the 2nd August related to the postponement of payment of certain bills of exchange, our Courts would undoubtedly reject the incorrect date. The mistake probably arose owing to the proclamation being issued and dated on a Sunday, and the Bill being rushed through all its stages on the Monday, without a printed copy being in the hands of the members of Parliament.

The first proclamation provided that "if on the presentation for payment of a bill of exchange, other than a cheque or bill on demand, which has been accepted before the 4th August, 1914,

the acceptor reaccepts the bill by a declaration on the face of the bill in the form set out, that bill shall, for all purposes, including the liability of any drawer or indorser or any other party thereto, be deemed to be due and be payable on a date one calendar month after the date of its original maturity, and to be a bill for the original amount thereof increased by the amount of interest thereon calculated from the date of reacceptance to the new date of payment at the Bank of England rate current on the date of the reacceptance of the bill." The form of reacceptance is then set out. The urgency of this matter will be well understood when it is remembered that there are an enormous number of bills in the hands of banks and bill brokers upon which acceptors and indorsers would be called upon for payment at a time when payment would be impossible. The holders are asked to wait a month, subject to the acceptors being willing to reaccept their bills and pay interest for the privilege granted to them. The bank rate of interest had already fallen from 10 per cent. to 6 per cent. by Friday, the 7th August, so that the relief is granted on easy terms. Moreover, traders who have accepted bills in respect of goods purchased by them, though the bills have not been discounted, are also afforded a sensible relief. The debtor benefits by being granted a breathing space, and the creditor is estopped from proceeding to attempt to enforce a payment which might involve his debtor in ruin and be no benefit to himself. To adopt a well-known metaphor, he spares the goose that it may later lay the golden eggs.

The question of extending the moratorium was carefully considered by the Chancellor of the Exchequer and his legal and financial advisers during the succeeding Bank Holidays, and the results of their deliberation is embodied in the proclamation dated the 6th August. It provides for a very wide extension of the moratorium, and is of immediate importance to all classes of the community. By the terms of this proclamation it is provided that all payments due and payable before the 6th August, or to become due on any day before the 4th September, in respect of any bill of exchange (being a cheque or bill on demand) which was drawn before the 4th August, 1914, or in respect of any nego-

tiable instrument (not being a bill of exchange) dated before that time, or in respect of any contract made before that time, shall be deemed to be due and payable one calendar month after the day on which payment originally became due, or on the 4th September, whichever is the later date. But payments so postponed shall, if not otherwise carrying interest, and if specific demand is made for payment and payment is refused, carry interest until payment as from the 4th August, if due and payable before that day, and as from the date on which they become due and payable if they become due and payable on or after that day at the Bank of England rate current on the 7th August, 1914. [The current rate on that date was 6 per cent.] Certain exceptions are then set out which will be explained later.

The general effect of this is that there is a moratorium in respect of all debts, payment being postponed for a month subject to the payment of interest for the period of the delay. No action can be brought on a cheque during that period, but the drawer or indorser, if he desires to have the days of grace, must pay for them at the Bank of England rate of interest on the 7th August—*i.e.*, 6 per cent. This will afford a sensible relief to all traders as well as the general community. Payments due in respect of contracts cover a very wide field. Presumably this means only payments of fixed sums—in fact, such payments as would be capable of being made the subject of a specially indorsed writ under Order III., r. 6—and does not extend to unliquidated amounts in respect of which it may be inferred that actions could still be brought. The fact that the High Court is now in vacation and that the County Courts have wide powers of postponing the enforcement of judgments will, no doubt, prevent any hardships being inflicted by harsh procedure. In view of the fact that interest will be payable from the date of demand for payment and the refusal to pay, it does not, of course, follow that all debtors will desire to avail themselves of the privilege conferred upon them, and the proclamation is stated not to prevent payments being made before the expiration of the month for which they are postponed.

To deal now with the exceptions to the general rule which are

mentioned in the proclamation. It is not to apply to (1) payment of wages or salary. There is no limit to this provision, which therefore extends to all occupations at fixed remuneration. Next (2) are any payments in respect of a liability which when incurred did not exceed £5 in amount. This will probably need to be interpreted by the courts as there must be many doubtful cases where it is not clear whether the amount to be claimed was when incurred part of a larger sum. The capital sum of a mortgage could not be recovered, but presumably the interest payable under the terms of the mortgage can be if it does not exceed £5. A point has been raised as to whether instalments under a hire-purchase agreement are recoverable. The Chancellor of the Exchequer has already expressed the opinion that where the total amount of the original liability does not exceed £5 they are covered by the moratorium, notwithstanding that the instalments may be less than £5. But this is at least doubtful. It is difficult to see how such instalments differ from the amounts of mortgage interest the liability to pay which is incurred by the instrument of mortgage. A difficulty must also arise in cases where a running account has been kept with a tradesman. In the ordinary way the debt payable is the total amount of the account, which, in the event of an action being brought, must be included in the claim. But there can be no doubt that each item in the account, if it did not exceed £5 when incurred, can still be claimed under the terms of the proclamation. The position of the banker and his customer is certainly anomalous and not easy to estimate. Strictly the banker is the debtor to his client, and it might be held that each sum not exceeding £5 paid into his account by a customer is a debt recoverable. No doubt the point will never be raised, as, after all, the moratorium is only one of the expedients to maintain the credit system, and the use of cheques makes most drawings on banks merely paper transactions which banks will always encourage. The proclamation also does not apply to the payment of (3) rates and taxes. Maritime freight (4) is also excepted, on the ground that it was thought that otherwise it would be impossible to pay wages. It will not apply to (5) any payment in respect of any debt from any person resident outside

the British Isles or from any firm, company, or institution whose principal place of business is outside the British Isles, not being a debt incurred in the British Isles by a person, firm, company, or institution having a business establishment or a branch establishment in the British Isles. This exemption therefore protects foreign firms established here, while leaving liable those situated abroad. Again, discretion would probably prevent proceedings being commenced against them if they are members of nations allied to us in the present war. Of course, trading with other neutral nations must also not be discouraged. Further, it does not apply (6) to any payment in respect of any dividend or interest payable in respect of any stocks, funds, or securities (other than real or heritable securities) in which trustees are, under s. 1 of the Trustees Act, 1893, or any other Act for the time being in force, authorised to invest. This provision will protect the income of large numbers of individuals and will be much appreciated. The anxiety which others may feel as to the receipt of dividends from companies is, after all, independent of all moratorium which could be declared by the Government. Dividends are, of course, only payable after a resolution by the company has been passed authorising the payment; nor would they be declared except upon ascertained profits. Shareholders, moreover, are masters of the situation in the affairs of the company. The liabilities (7) of a bank of issue in respect of banknotes issued by that bank are also exempted. (8) Payments to be made by or on behalf of His Majesty or any Government department, including the payments of old age pensions, must continue to be made. Naval and military pensions are thus also secured, and the Government will meet all liabilities for stores supplied, etc. National insurance has also been maintained in being, and (9) payments to be made by any person or society in pursuance of the National Insurance Act, 1911, or any amending Act (whether in the nature of contributions, benefits, or otherwise) will continue. The Workmen's Compensation Acts also continue as before, and payments (10) ordered thereunder must be paid. Finally (11) the proclamation does not apply to any payment in respect of the withdrawal of deposits by depositors in trustee

savings banks. This is, of course, a valuable protection to the finances of the working classes, whose slender resources would otherwise be curtailed.

It will thus be seen that the whole mechanism of our financial existence has been carefully studied, with a view to mitigating as far as possible such hardshi, as the present emergency entails. And should it appear that any matters have been overlooked, additional provisions can at any time be included in a new proclamation. The duration of the present one is only a month, but before its expiration it will be possible to consider how far it is necessary to continue it. The moratorium will, however, probably be maintained during the whole progress of the war, as has usually been done by foreign countries when they have been compelled to introduce it.

Some criticism has been offered as to the non-applicability to small debts, but it is obvious that in this matter the County Court Judges will continue to exercise their discretion as they always do, and will not make orders upon judgment summonses unless there is evidence of means to pay. The small tradesman must also be protected, and it is not likely that they will act harshly, any more than they have done in the past in districts where there has been a strike in progress.

Finally, it must be remembered that in all matters appertaining to the maintenance of the credit system upon which our trade is based, the good sense and business instincts of the people are the chief safeguards. It may, therefore, confidently be hoped that, with or without the expedients contrived to meet an unprecedented emergency, in the end our national credit will prove to have safely weathered the storm.—*Law Times.*

Modern civilization has introduced great qualifications to soften the rigours of war; and allows a degree of intercourse with enemies, and particularly with prisoners of war, which can hardly be carried on without the assistance of our Courts of justice. It is not, therefore, good policy to encourage these strict notions, which are insisted on contrary to morality and public convenience. —Eyre, C.J., *Sparenburgh* v. *Bannatyne* (1797), 2 Bos. & Pull. 170.

REVIEW OF CURRENT ENGLISH CASES.

ATTACHMENT OF DEBTS—COUNSEL'S FEES—HONORARIUM—GARNISHEE ORDER.

Wells v. *Wells* (1914), P. 157. This was a divorce proceeding by a wife who had obtained an order for payment of alimony *pendente lite*. The order, not having been obeyed, the plaintiff sought to attach counsel fees due to her husband, received by a firm of solicitors, but not paid over. The registrar granted a garnishee order, but Evans, P.P.D., set it aside, and the Court of Appeal (Eady, and Pickford, L.JJ.) affirmed his decision, on the ground that counsel fees are an honorarium and not a debt, and that they could not be recovered as such from the solicitors, though they had received them from the client.

ADMIRALTY—COLLISION—LOSS OF LIFE THROUGH NEGLIGENCE—DAMAGES RECOVERABLE.

The Amerika (1914), P. 167. This was an action on behalf of the Lord High Admiral to recover damages against a German steamship for sinking a submarine. The Registrar fixed the damages for the value of the vessel at £26,500, but disallowed a claim for loss of life of officers and crew. On appeal Evans, P.P.D., reduced the sum allowed to £23,850, but affirmed the Registrar's decision as to the damages for loss of life. The Court of Appeal (Buckley, Kennedy, and Scrutton, L.JJ.) held that the President erred in reducing the damages, merely on the question of quantum, there being no question of principle involved. But on the question of the damages for loss of life, in the absence of any statute to the contrary, they held that the ruling of Lord Ellenborough in *Baker* v. *Bolton* (1808), 1 Camp. 493, that "in a civil Court the death of a human being could not be complained of as an injury," was too firmly established and could only be reviewed, if at all, by the House of Lords.

BRIDGE ACROSS HIGHWAY—STATUTORY DUTY TO KEEP BRIDGE IN REPAIR—STANDARD OF REPAIR.

Attorney-General v. *Sharpness N.D. & G. & B. Navigation Co.* (1914), 3 K.B. 1. In this case the defendants, a canal company, were, by an Act passed in 1791, empowered to erect bridges to carry highways over their canal, and a statutory duty was imposed

on them to maintain such bridges in "sufficient repair." The bridges were erected and approved by the Commissioners appointed for the purpose. By reason of an increase in traffic the bridges had become inadequate, and the action was brought to compel the defendants to make them sufficient for present-day traffic. Phillimore, J., who tried the action, held that the defendants' duty did not require them to maintain the bridges for any greater traffic than existed when they were erected in 1791 (1913, 1 K.B. 422); but the Court of Appeal (Williams, Kennedy, and Eady, L.JJ.) considered that the defendants' statutory duty required them to maintain the bridges fit to carry the traffic as it from time to time existed, and therefore they were bound to put them in condition to carry the existing traffic.

COAL MINE—SUPPLY OF EXPLOSIVES—"ACTUAL NET COST TO OWNER."

Evans v. *Gwendraeth Colliery Co.* (1914), 3 K.B. 23. Coal mine owners by statute are required to furnish their employees with explosives at a price not to exceed "the actual net cost" to the owner. The Court of Appeal (Lord Reading, C.J., and Kennedy, and Eady, L.JJ.) hold that these words include not only the cost of carriage to the owner's magazine, but also the cost of distribution from his magazine to his workmen and the decision of Channell and Coleridge, JJ. (1913, 3 K.B. 100) to the contrary was reversed.

PRACTICE—COSTS—TAXATION—SEPARATE ISSUES OF LAW AND FACT—PLAINTIFF SUCCESSFUL ON FACTS—DEFENDANT SUCCESSFUL ON LAW—DISMISSAL OF ACTION WITH COSTS—OMISSION OF COURT TO GIVE ANY SPECIAL DIRECTIONS—POWERS OF TAXING OFFICER.

Ingram v. *Services Maritime* (1914), 3 K.B. 28. In this action issues of law and fact were raised. The plaintiffs succeeded on the questions of fact, but the defendants succeeded on the point of law and the action was dismissed with costs. No directions were given as to the costs of the issue of fact on which the plaintiffs had succeeded. On the taxation of the costs the plaintiffs claimed that their costs of the issue on which they had succeeded should be taxed and deducted from the defendants' costs. The taxing Master held that in the absence of specific directions so to do, he had no power. Bailhache, J., held that he had, but the Court of Appeal (Eady, and Phillimore, L.JJ.) decided that the taxing officer was right.

REPORTS AND NOTES OF CASES.

Province of Nova Scotia.

SUPREME COURT.

Graham, E.J. THE KING v. FOLEY. [August 15.

Indictable Offence—Committal for Trial—Crim. Code, s. 777—Practice.

The prisoner was committed for trial to goal for the theft of an automobile at Halifax by a Justice of the Peace and Stipendiary Magistrate for the County of Halifax. He applied *ex parte* for writs of *habeas corpus* and *recipias corpus* to the goaler and Chief of Police at Halifax (who is the officer by statute of the Court of the Stipendiary Magistrate for the City of Halifax), to be taken from jail and handed over to the Chief of Police and by him brought before the City Stipendiary Magistrate for trial under Crim. Code S. 777.

Held, that as the part of the Code relating to the summary trial of indictable offences under s. 777 provides no machinery for bringing the accused before the Magistrate for trial as contrasted with section 826 of the Code for the speedy trial of indictable offences, recourse was properly had to the common law practice for that purpose and the orders for the writs asked for could be properly made. Power, K.C., for the motion referred to Archbold Cr. Off. Pr. (Ed. 1844) 349, and 2 Gude's Cr. Pr. 235.

The accused was under the above writs brought before the City Stipendiary Magistrate at Halifax and tried for the offence above mentioned and as certified by the goaler under the habeas corpus to the Chief of Police and acquitted.

Province of British Columbia.

SUPREME COURT.

Gregory, J.] HILL v. HANDY. [17 D.L.R. 87.

1. *Mortgage—Foreclosure—Final order—Re-opening accounts—Purchaser.*

A final order of foreclosure may be re-opened for concealment of material circumstances from the court in the foreclosure

proceedings, where the motion is made promptly, and this although the mortgagee had purported to make an agreement for sale of the lands after the final order to a person having notice of the foreclosure proceedings, where there is evidence of collusion between the mortgagee and the purchaser.

2. *Mortgage—Opening foreclosure—Serious error in plaintiff's accounts.*

A final order of foreclosure may be vacated and the mortgage account re-opened where there had been concealment from the court on the plaintiff's part of material circumstances on the application for the order nisi and serious error to the prejudice of the mortgagor is shewn in the plaintiff's account upon which the foreclosure is based, if there has been no laches on plaintiff's part in moving and he did not obtain information until after the making of the final order of the time fixed for redemption.

C. M. Woodworth, for defendant. *W. B. A. Ritchie*, K.C., for plaintiff.

ANNOTATION ON THE ABOVE CASE FROM DOMINION LAW REPORTS.

Where third parties have not acquired rights to the property, and the mortgagee can be recompensed in money, the foreclosure may be opened and the time for redemption extended. But some reasonable excuse must be shewn for not having redeemed by the time fixed: Bell and Dunn on Mortgages, 267.

Where it was shewn that the money was ready, but owing to illness and accident could not be paid at the exact time, this was held to be a sufficient ground: *Jones* v. *Creswicke* (1839), 9 Sim. 304. And the relief was given in a case in which it was shewn that the mortgagee had repeatedly stated, before and after the decree absolute, that he wanted the money, not the property, and the mortgagor was under a reasonable belief that the mortgagee would extend the time for payment and the value of the property considerably exceeded the mortgage debt: *Thornhill* v. *Manning* (1851), 1 Sim. N.S. 451.

A foreclosure was opened eighteen months after the final order, where the mortgagor was illiterate, and had no solicitor in the cause, and misunderstood the object of the bill, which was the only paper served on him, the value of the property appearing to be three times the amount of the mortgage debt: *Platt* v. *Ashbridge* (1865), 12 Gr. 105; see *Ford* v. *Wastell* (1847), 6 Ha. 229.

Where there has been actual, positive fraud, and not mere constructive fraud, on the part of the mortgagee, or where he has insisted on rights which upon due investigation are found to have been overstated, this relief may be afforded to the mortgagor: *Patch* v. *Ward* (1867), L.R. 3 Ch. 203.

This relief has been granted even as against the purchaser from the mortgagee after the final order of foreclosure. But there must be strong grounds for disturbing the purchaser. Thus, if the purchaser bought the lands within a short time after the final order was made and with notice of the fact that they were of much greater value than the mortgage debt, the foreclosure might be opened as against him. But the Court would be disinclined to interfere with a person who purchased the lands many years after the date of the order and without notice of any circumstances which might lead to opening the foreclosure: *Campbell* v *Holyland* (1877), 7 Ch.D. 166.

And where there were such irregularities as were sufficient to give notice to the purchaser from the mortgagee that there was something unusual in the proceedings, and they were in fact irregular, the mortgagor was allowed to redeem: *Johnston* v. *Johnston* (1882), 9 P.R. (Ont.) 259.

The mortgagor must make his application to open the foreclosure within a reasonable time. What is a reasonable time will depend upon the nature of the property: *Campbell* v. *Holyland* (1877), 7 Ch.D. 166.

The terms are in the discretion of the Court. The mortgagor must satisfy the Court that he will be able to redeem if further time is allowed, and he may be required to pay the interest and costs by an early date; or to pay the costs forthwith; or to give security for costs in the event of default: see *Trinity College* v. *Hill* (1885), 8 O.R. 286; *Holford* v. *Yate* (1855), 1 K. & J. 677; *Whitfield* v. *Roberts* (1861), 7 Jur. N.S. 1268; *Howard* v. *Macara* (1859), 1 Chy. Ch. (U.C.) 27.

A long delay of nearly twenty years in moving to re-open a foreclosure on the ground of irregularities was held too late in *Hazel* v. *Wilkes*, 1 O.W. N. 1096, 16 O.W.R. 754.

Relief was given to execution creditors who had moved with reasonable promptness after the final order in *Scottish American Investment Co.* v. *Brewer*, 2 O.L.R. 369.

Under the provisions of sec. 126 of the Manitoba "Real Property Act," R.S.M. (1902), ch. 148, as amended by sec. 3 of chapter 75 of the statutes of Manitoba, 5 and 6 Edw. VII., the Court has jurisdiction to open up foreclosure proceedings in respect of mortgages foreclosed under secs. 113 and 114 of the Act, notwithstanding the issue of a certificate of title, in the same manner and upon the same grounds as in the case of ordinary mortgages, at all events where rights of a third party holding the status of a *bona fide* purchaser for value have not intervened. The judgment appealed from (19 Man. R. 560, 13 W.L.R. 451) was reversed: *Williams* v. *Box*, 44 Can. S.C.R. 1, 13 W.L.R. 451. Leave to appeal to the Privy Council was refused, 44 Can. S.C.R. 1.

An action upon a mortgage, for foreclosure, was begun in 1898, and the usual judgment was pronounced on January 30, 1899. One of the mortgagors defendants died on June 20, 1899, an infant, unmarried, and intestate. On May 2, 1900, a final order of foreclosure was granted, no notice being taken of the death of the infant, and he and not his personal representatives or those claiming under him being declared to stand absolutely debarred and foreclosed. It was held that the final order was irregular

and was not binding on the infant's mother, who was not a party to the action, and in whom an undivided interest in the estate of her deceased son vested at the expiration of a year from his death; and that she was entitled to redeem and to be added as a defendant, upon her own application. *Campbell* v. *Holyland* (1877), 7 Ch.D. 166, was followed. An order was made adding her as a defendant, and directing that the action be carried on between the plaintiff and the continuing defendants and new defendant and that it stand in the same plight and condition in which it was at the time of the infant's death. The effect would be to require a new account to be taken and a new day fixed for redemption, of which all the defendants would be entitled to avail themselves: *Kennedy* v. *Foxwell*, 11 O.L.R. 389 (D.C.).

A decree dismissing a bill on default of payment of the amount found due in a suit for redemption of a mortgage is equivalent to a decree of absolute or unconditional foreclosure: *Patchell* v. *Colonial Investment and Loan Co.*, 38 N.B.R. 339.

The word "foreclosure" as applied to proceedings to enforce a mortgage under the Land Titles Act is apt to mislead if it is sought to treat those proceedings as identical with "foreclosure" proceedings where the mortgage conveys an estate in the land to the mortgagee with a defeasance clause in case payments are made as provided. The mortgagee has merely a lien until payment, and in case of default he can proceed to get an order either to sell the land or to have the title thereto vested in himself, and care must therefore be taken when endeavouring to apply to mortgages under the Land Titles Ordinance (N.W.T.) the rules and principles laid down in other jurisdictions. Where there was no evidence to shew that the plaintiffs intended when they obtained the vesting order to reserve the right to sue upon the covenant, the proper presumption was that the plaintiffs intended to take the land in full satisfaction and to abandon that right: *Colonial Investment and Loan Co.* v. *King*, 5 Terr. L.R. 371 (McGuire, C.J.).

A mortgagee having obtained a foreclosure order nisi, shortly afterwards, and before the period allowed for making absolute the order nisi had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not deposited for registration for some three years after it was entered into, but a few months before its deposit for registration, a tender was made on behalf of plaintiffs of the amount due under the mortgage, which was refused on the ground that the property had been parted with and that the plaintiffs had lost their right to redeem:—Held, that the mortgagee could not, after the order nisi for foreclosure, and before it was made absolute, exercise his power of sale without the leave of the Court: *DeBeck* v. *Canada Permanent Loan and Savings Co.*, 12 B.C.R. 409.

Plaintiff obtained an order nisi for foreclosure. After the order had been made he, under the terms of the mortgage, paid a further sum for taxes. There was, however, no evidence that such payment was necessary to protect the security. He now applied for an order increasing the amount

to be paid upon redemption, and fixing a new date for redemption. The mortgagor had been served but did not appear.—Held, that as the mortgagor had not appeared and would in any event be required to pay the taxes and as reasonableness and convenience should be the basis of practice an order should be made for a new account and a new date for redemption. 2. That as it had not been shewn that the payment of taxes was necessary to protect the security and as the mortgagee could have insisted upon payment before redemption, the costs of the application should be borne by the mortgagee: *Mathew* v. *McLean*, 2 Sask. L.R. 391.

CANADA GAZETTE.

CHAMBER OF THE SENATE.

OTTAWA, Tuesday, 18th August, 1914.

This day, at 3 o'clock p.m., His Royal Highness the Governor General proceeded in state to the Chamber of the Senate, in the Parliament Buildings, and took his seat upon the Throne. The Members of the Senate being assembled, His Royal Highness was pleased to command the attendance of the House of Commons, and that House being present, His Royal Highness was pleased to open the Fourth Session of the Twelfth Parliament of the Dominion of Canada with the following speech:—

Honourable Gentlemen of the Senate:
Gentlemen of the House of Commons:

Very grave events vitally affecting the interests of all His Majesty's Dominions have transpired since prorogation. The unfortunate outbreak of war made it immediately imperative for my Ministers to take extraordinary measures for the defence of Canada and for the maintenance of the honour and integrity of our Empire.

With respect to such of these measures as may require the sanction and approval of Parliament, the necessary legislative proposals will be submitted for your consideration. Other Bills authorizing additional measures which are essential for the public safety will also be presented to you without delay.

Gentlemen of the House of Commons:

Estimates will be laid before you to provide for expenditure which has been or may be caused by the outbreak of hostilities.

Honourable Gentlemen of the Senate:

Gentlemen of the House of Commons:

The critical period into which we have just entered has aroused to the full the patriotism and loyalty which have always actuated the Canadian people. From every Province and indeed from every community the response to the call of duty has been all that could be desired. The spirit which thus animates Canada inspires also His Majesty's Dominions throughout the world; and we may be assured that united action to repel the common danger will not fail to strengthen the ties that bind together those vast Dominions in the possession and enjoyment of the blessings of British liberty.

As representative of His Majesty the King, I must add my expression of thanks and admiration for the splendid spirit of patriotism and generosity that has been displayed throughout the length and breadth of the Dominion.

CHAMBER OF THE SENATE.

OTTAWA, Saturday, 22nd August, 1914.

This day at 4 o'clock p.m., His Royal Highness the Governor General proceeded in state to the Senate Chamber, and took his seat upon the Throne. The Members of the Senate being assembled, His Royal Highness was pleased to command the attendance of the House of Commons, and that House being present, the following bills were assented to, in His Majesty's name, by His Royal Highness the Governor General, viz.:—

1. An act to conserve the commercial and financial interests of Canada.
2. An act to confer certain powers upon the Governor in Council and to amend the Immigration Act.
3. An act respecting Dominion notes.
4. An act to amend the Customs Tariff, 1907.
5. An Act to amend the Inland Revenue Act.
6. An act to amend the Naturalization Act.
7. An act to incorporate the Canadian Patriotic Fund.
8. An act for granting to His Majesty aid for military and naval defence.

To these Bills the Royal Assent was pronounced by the clerk of the Senate in the following words:—

"In His Majesty's name, His Royal Highness the Governor General doth assent to these Bills."

After which His Royal Highness the Governor General was

pleased to close the Fourth Session of the Twelfth Parliament of the Dominion of Canada with the following

SPEECH:

Honourable Gentlemen of the Senate:
Gentlemen of the House of Commons:

I thank you for the prompt and effective consideration which you have given to measures necessary for assuring the defence of the country, for conserving the interests of our people and for maintaining the integrity of the Empire in the present emergency. It is my fervent hope and my confident anticipation that these measures will prove adequate in every way for the great purposes which they are designed to fulfil.

Gentlemen of the House of Commons:

I thank you in His Majesty's name for the liberal provision which you have made for the needs of the country in the grave conditions which have arisen through the outbreak of war.

Honourable Gentlemen of the Senate:
Gentlemen of the House of Commons:

In relieving you for the time being from the important and responsible duties to which you were summoned so suddenly and unexpectedly, I commend to the Divine protection the people of this Dominion in the firm trust that the future will continually grow brighter and that there will be a favourable and honourable issue from the war in which the Empire is now involved.

PUBLIC NOTICE.

OTTAWA, September 2, 1914.

To all whom it may Concern.

It has come to the attention of the Government that many persons of German and Austro-Hungarian nationality who are residents of Canada are apprehensive for their safety at the present time. In particular the suggestion seems to be that they fear some action on the part of the Government which might deprive them of their freedom to hold property or to carry on business. These apprehensions, if they exist, are quite unfounded.

The policy of the Government is embodied in a Proclamation published in *The Canada Gazette* on 15th August. In accordance

with this proclamation restrictive measures will be taken only in cases where officers, soldiers or reservists of the German Empire or the Austro-Hungarian Monarchy attempt to leave Canada or where subjects of such nationalities engage or attempt to engage in espionage or acts of a hostile nature or to give information to or otherwise assist the King's enemies. Even where persons are arrested or detained on the grounds indicated they may be released on signing an undertaking to abstain from acts injurious to the Dominion or the Empire.

The Proclamation after stating that "there are many persons of German and Austro-Hungarian nationality quietly pursuing their usual avocations in various parts of Canada and that it is desirable that such persons should be allowed to continue in such avocations without interruption," directs as follows:—

"That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council or proclamation."

Thus all such persons so long as they respect the law are entitled to its protection and have nothing to fear.

JOSEPH POPE,
Under Secretary of State for
External Affairs.