

THE RADIO CASE.

In various respects the decisions of the Judicial Committee in the Aeronautics (or Aviation) and the Radio cases are closely associated. Both cases arose in connection with conventions with foreign States. Both decisions dealt with the jurisdiction of the Dominion Parliament in respect of the obligations of the conventions. In both, the jurisdiction of the Dominion Parliament was for a satisfactory reason upheld. And in both, the Committee quite unnecessarily added observations that (with all due respect) are obviously erroneous. In the one, the Aeronautics case, the Committee held that the British North America Act was, or was the result of, a contract between the provinces. While in the other, the Radio case, a new and disruptive idea was introduced into current conceptions of our constitution. The Aeronautics case was commented upon in an earlier number of this Review.¹

Consideration of the question of the jurisdiction of the Dominion Parliament in the Radio case was referred to the courts in the following form:

1. Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed?

2. If not, in what particular or particulars or to what extent is the jurisdiction of Parliament limited?

1. The questions, as will be observed, did not involve consideration of the existence of the convention above alluded to, and the Committee satisfactorily disposed of them by holding that radio communication fell within each of two subjects of jurisdiction assigned by the constitution to the provinces, namely:

Telegraphs and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limit of the Provinces.

In a later paragraph the Committee completed the argument by saying that:

As their Lordships' views are based on what may be called 'the pre-eminent claims of section 91, it is unnecessary to discuss the question which was raised with great ability by Mr. Tilley, namely, whether, if there had been no pre-eminent claims as such, broadcasting could have been held to fall either within "Property and Civil Rights," or within "Matters of a merely local or private nature."

¹ (1931) 9 C.B. Rev. 724.

In referring to "the pre-eminent claims," the Committee had in mind that part of sub-section 29 of section 91 of the British North America Act (the section containing the schedule of subjects assigned to the Dominion Parliament) which reads as follows:

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

In the *Great West Saddlery case*² the Committee had said:

As is now well settled the words quoted (the final paragraph of s. 91) apply, not only to the merely local or private matters in the province referred to in head 16 of s. 92, but to the whole of the sixteen heads in that section.

In other words, the Committee held that radio communication falls within two subjects assigned to the Dominion Parliament; and, because of the clause quoted from section 91, it was immaterial to consider whether, as argued by the provinces, it fell within:

Property and civil rights in the Province or within generally all matters of a merely local or private nature in the Province.

That is sound reasoning (if I may be permitted to say so) and quite conclusive of the questions submitted.

2. Developing their second line of reasoning, the Committee gave to our constitution one of those incredible twists that have come to be associated with the name of Lord Haldane. No Canadian lawyer, and probably no intelligent Canadian layman, could be induced to believe that if the Dominion Parliament had no power to enact certain legislation, it could acquire the power by promising a foreign state that it would enact it. The Committee held that that could be done.

To appreciate the view of the Committee it will be well to recall the *Aeronautics case* in which the question submitted to the courts was:

Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any Province thereof, under the Convention entitled "Convention relating to the Regulation of Aerial Navigation?"

The answer of the Judicial Committee was in the affirmative. It rested its decision chiefly upon section 132 of the British North America Act which is as follows:

The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province

² [1921] 2 A.C. 91, at p. 99.

thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

The case was apparently simple. The British Empire had entered into a convention. Section 132 gave to the Dominion Parliament power to perform the obligations of such conventions. The Dominion therefore had the power.

To the convention in the Radio case, on the other hand, the British Empire was not a party. "Great Britain," *eo nomine*, was a party, and, upon precisely equal footing, so also was Canada and a large number of other States. Canada moreover had appointed her own representatives to the conference that framed the convention, and she had signified her own ratification of it. Recognizing the distinction, in form, between the two cases, the Committee said, in the Radio case, that:

While as regards aviation there was a treaty,³ the convention here is not a treaty between the Empire as such and foreign countries, for Great Britain does not sign as representing the Colonies and Dominions. She only confirms the assent which had been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the convention.

The statement as to British confirmation is erroneous. Great Britain was, as has been said, a party to the treaty. She did nothing by way of confirmation. The mistake however is not material to the argument.

The Committee thought that the two cases were, in essence, closely parallel. But the difference between them appears to be both obvious and important. If a treaty is made by the British Empire, legislative jurisdiction over everything necessary to the implementing of it is conferred on the Dominion Parliament by section 132. If, on the other hand, the treaty is made by the Dominion her parliament has implementing power only so far as she is given it by section 91 of her constitution. In other words, she cannot expand her legislative powers by agreeing that she will expand it.

The Committee was of contrary opinion. The provinces, the Committee noted, had argued that although, from among the various stipulations of the convention, certain which would fall:

Within one of the enumerated heads of section 91 could be picked out—yet that the residue belongs to the Provinces under the heading either of heading 13 of section 92—Property and Civil Rights—or heading 16—Matters of merely local or private nature in the Province;

and that, so far as these matters were concerned, the Dominion Parliament could not enact legislation. That argument appears to be

³ It was phrased as a convention.

unanswerable in form: The matters dealt with by the convention lie chiefly within the jurisdiction of the provinces; apart from the convention, the Dominion would be powerless to deal with them; agreeing with a foreign State to enact legislation dealing with them cannot give to the Dominion a constitutional authority which it had not before. Unanswerable or not, the Committee overruled it saying that:

Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers, the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must, so to speak, be kept in order by legislation, and the only legislation that can deal with them all at once is Dominion legislation.

It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and, to prevent individuals in Canada infringing the stipulations of the convention, it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

In other words, the Committee held that whether or not the provinces were right in saying that the convention dealt with matters of purely provincial jurisdiction was immaterial.

Their Lordships cannot agree that the matter should be so dealt with.

When, at another place, dealing with the argument of the provinces with reference to "inter-provincial broadcasting," the Committee said that:

Once you come to the conclusion that the Convention is binding on Canada as a Dominion, there are various sentences of the Board's judgment in the aviation case which might be literally transcribed to this.

But the Committee suggested no reason for holding that a Dominion convention containing promises to enact legislation *ultra vires* of the Dominion was "binding on Canada as a Dominion." And the Committee declared that:

In fine, though agreeing that the Convention was not such a treaty as is defined in section 132, their Lordships think that it comes to the same thing.

So far from being "the same thing" the two cases could not well be further apart. Dominion action in the one case would be justified by a section—132—of the constitution. Dominion action in the other case would be a violation of a section—92—of the constitution.

And we so add another peculiar twist to our constitution. Section 92 of it assigns to the provinces exclusive jurisdiction over certain subjects. Nowhere is there given to the Dominion Government authority to trench upon provincial jurisdiction. Nobody imagined that the Dominion Government had any such authority. But the

Judicial Committee has held that by agreeing with a foreign State that the Dominion Parliament will trench, the trenching can be done.

It is right to add that complicity in that respect cannot be charged against either the Dominion Government or the lawyers engaged in the case. Neither in the factum of the government in the Supreme Court, nor in its case in the Privy Council, nor, as I am informed, in the oral pleadings was the twist presented on behalf of Canada. No Canadian lawyer could have thought of it.

A reference to the situation in the United States may be both interesting and useful. The constitution provides as follows:

He [the president] shall have power by and with the advice and consent of the senate to make treaties provided two-thirds of the senators present concur.

No state shall enter into any treaty, alliance or confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls.

From a valuable article in the *American Quarterly*, *Foreign Affairs* for January last by Mr. Charles K. Burdick I make the following quotations:

One may reasonably deduce from these examples a general power in the President and Senate to make law by treaty on any subject, except appropriations and the raising of money, upon which Congress may legislate, as long as that subject is also a matter of international concern.

A treaty is an international agreement, and must have for its subject a matter of international concern. A treaty which did not have such subject would be outside the scope of the treaty-making power, and would properly be held invalid as law under our Constitution. But within the fields appropriate to international agreement treaties which are self-executing in form will have the force of law and will annul all conflicting state laws and treaties which are not self-executing will give validity to statutes passed by Congress, though the statutes in question could not be passed in the absence of such treaties.

It would seem to follow from these provisions that treaties which deal with proper subjects of international agreement are law superior to any conflicting laws in the several States, though they deal with subjects upon which Congress could not legislate.

The reciprocal rights of the citizens of different countries within their respective territories are the most usual and appropriate subject of treaties. We are therefore not surprised to find the Supreme Court upholding the

treaty right of aliens to hold, or to succeed to property within a State, though the treaty in question conflicts with state legislation. The same tribunal held a state statute void which prohibited the issuance of pawnbrokers' licenses to aliens, in so far as it conflicted with the treaty right guaranteed to the Japanese to carry on trade in the United States on equal terms with United States citizens. State courts have held that tax laws which are in conflict with treaties are unenforceable. Twenty-five years ago, when Elihu Root was Secretary of State, a controversy arose as to the right of California to segregate Chinese and Japanese children for educational purposes. Mr. Root was clear that a treaty with Japan guaranteeing to citizens of Japan treatment equal to that given citizens of any other country would invalidate state legislation requiring Chinese and Japanese children to attend separate schools. The controversy was settled without court action.

There are some exceptions to the power of the President with reference to treaties.

Notwithstanding the broad language used in the Constitution there is probably no one who will assert that the power to make law by treaty is unlimited, and that no treaty could be declared unconstitutional. Those things which the federal government is absolutely forbidden by the Constitution to do at all, it certainly cannot do through the provisions of a treaty.

The form of government established by the Constitution is clearly intended by the terms of that instrument to be altered only by amendments adopted in the way there provided. It is therefore universally agreed that changes in the form of government as established by the Constitution could not be made by treaty.

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