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CANADA AND WAR.

Two capable constitutionalists¹ recently declared that, although Canada may refrain from active participation in British wars,² she cannot be neutral in the technical sense, and cannot of herself declare war. It is submitted that these gentlemen have failed to keep pace with the activities of the Imperial Conferences and the British parliament.

That Canada is now a sovereign State with all the powers as to war and other affairs as have other sovereign States, clearly appears from consideration of the following facts: Canada is not, in any respect, under the control of the United Kingdom; she fulfils the two international tests of sovereignty,—she exchanges diplomatic representatives with foreign countries and enters into treaties with them quite independently of the British government; the King is divisible, sometimes acting "in respect of" one of his Kingdoms separately from the others; he has separate sets of ministers; and each set has the exclusive right to tender advice to him with respect to the affairs of the country which they represent. If these assertions can be established Canada is undoubtedly a sovereign State. Her relations with the United Kingdom and the others of the Six Kingdoms is that of a Personal Union. And she can declare neutrality and war as she pleases.

1. *Freedom from Control*—Until recently the United Kingdom controlled the Dominions administratively, judicially and legislatively. Now it has no such power. Observe the following: The

¹ Richard Jebb in the *Nineteenth Century*, July 1932; and Professor F. R. Scott (McGill) in *Foreign Affairs*, July 1932.

² Canada's attitude in this respect was well illustrated in connection with the Chanak affair in 1922. See Ewart, *Independence Papers*, vol. II., pp. 159-163; and vol. I., p. 8; Toynbee, *The Conduct of British Foreign Relations since the Peace Settlement*, pp. 47-51.

most important of the resolutions of the Conference of 1926 was that which terminated all administrative association between Canada and the United Kingdom. It provided as follows:

In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain, or of any Department of that Government.

Prior to the adoption of that resolution, the Governor-General was appointed by the King on the advice of the Secretary of State for the Dominions; took instructions from the Secretary; and reported to him. Now the Governor's relations are with the King; he is appointed by the King on the advice of the government of the Kingdom concerned; he reports only to the King; and he has no relations of any kind with the Secretary.

Judicially—prior to the Statute of Westminster, British legislation (the Colonial Laws Validity Act) made impossible the termination, by the Dominions, of appeals from their courts to the Judicial Committee of the British Privy Council. The prohibiting statute having been modified in that regard by the Statute of Westminster, the Dominions may now do as they please.

Legislatively—the most important provision of the Statute of Westminster was as follows:

No act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested and consented to the enactment thereof.³

Nominal sovereignty over Canada remains, but it is to be exercised only at the request and with the consent of Canada. Another clause of the statute declared that:

the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation [of the United Kingdom] in so far as the same is part of the law of the Dominion.

And still other clauses removed every other defect in Canada's sovereign status with the sole exception of power to amend her own constitution. Other Dominions have that power. The only reason for Canada's exception is that she has not as yet desired to acquire the power. And it was for that reason that the nominal sovereignty of the British parliament was continued.

³ "A dependency may become an independent state, in consequence of the dominant country voluntarily relinquishing its supremacy": Sir G. Cornwall Lewis, *Essay on the Government of Dependencies*, (1841), p. 331.

The real sovereignty being in Canada and the nominal terminable as soon as she wishes, can it be fairly said that Canada is a sovereign State? A parallel may help to supply the answer. If A has a right of way over the land of B, the title of B is qualified by the servitude in favor of A. But if A can exercise his right only when requested to do so by B, the right is purely nominal, and the title may fairly be said to be unqualified. If that view is not satisfactory to those Canadians who desire that for support of the sovereignty of their country no argument should be necessary, it is, at least, an amply sufficient foundation for the assertion that all the attributes of sovereignty attach to a state whose defect is merely nominal.

It has been said that the British parliament may at any time repeal the Statute of Westminster. It may. But a repeal of a statute does not destroy or extinguish its effect. Many a man has been put to death in pursuance of a statute, but its repeal has never revived a corpse. A British statute of 1782 renounced jurisdiction over Ireland, and Ireland thereupon became a sovereign state.⁴ The British parliament could subsequently repeal the statute, but repeal would not destroy its effect. For that purpose a statute of the Irish parliament was necessary, and that cost a lot of money.

2. *Canada's International Standing*—If it be urged that what has been said relates merely to what may be called intra-imperial affairs, the reply is that Canada's international standing is complete, indeed that in that department there is not even a nominal residuum of British control. Canada exchanges diplomatic representatives with foreign countries. It is solely in pursuance of her advice that the King appoints the ministers plenipotentiary. And they act solely upon her instructions. If, too, a change in the form of government in a foreign state is to be followed by recognition by other states of the new government, as in the case of the recent revolution in Spain, Canada makes separate recognition.⁵

As to treaties, it is clear (a) that the United Kingdom cannot bind Canada by treaties, either war or other, and (b) that Canada has that power. The first of these points was well settled in connection with the peace treaty with Germany. At Paris, Sir Robert

⁴ "During the eighteen years which followed 1782, Ireland was, legally, an independent state, the king of which was also king of Great Britain; and its political relation to Great Britain was precisely similar to that which subsisted between England and Scotland in the interval between the union of the two crowns and the union of the two kingdoms": Sir G. Cornwall Lewis, *op. cit.*, p. 154.

⁵ See per Mr. Bennett in the Commons on 23rd April 1931: Ewart, *Independence Papers*, vol. II., p. 472.

Borden (to whom we are heavily indebted), insisted that: all the treaties and conventions resulting from the Peace Conference should be so drafted as to enable the Dominions to become Parties and Signatories thereto. This procedure will give suitable recognition to the part played at the Peace Table by the British Commonwealth as a whole and will at the same time record the status attained there by the Dominions.⁶

The peace treaty having been drawn in appropriate form it was signed (28 June, 1919), by the representatives of Canada. The British government desired that the treaty should be ratified by the King on their advice only. The Canadian government, on the other hand, insisted not only that ratification by Canada was necessary, but that the treaty should be previously submitted for approval to the Canadian parliament. Lord Milner, the Colonial Secretary, admitted that:

For a treaty of this far-reaching importance, and one embracing the whole Empire, the King certainly ought only to act at the instance of all his constitutional advisers—the Dominion Ministries as well as that of the United Kingdom.

But he urged that the Dominion ministers had “signed preliminaries of treaty,” and that he was being severely pressed by the French government “to ratify at earliest possible date.” But Sir Robert was obdurate and cabled as follows:

Your message reached me yesterday afternoon and this morning Parliament has been summoned for Monday, 1st September. I cannot emphasize too strongly the unfortunate results which would certainly ensue from ratification before Canadian Parliament has had an opportunity of considering treaty.

On the 12th September, the Canadian government adopted an Order-in-Council, which after reciting the treaty, proceeded as follows:

And whereas the Senate and House of Commons of the Dominion of Canada have by resolution approved of the said Treaty of Peace;

And whereas it is expedient that the said Treaty of Peace be ratified by His Majesty for and in respect of the Dominion of Canada;

Now therefore, the Governor-General in Council, on the recommendation of the Secretary of State for External Affairs, is pleased to order and doth hereby order that His Majesty the King be humbly moved to approve, accept, confirm and ratify the said Treaty of Peace, for in respect of the Dominion of Canada.⁷

In the same connection, another feature of the peace conference is important. During the negotiations, with a view to securing France against invasion by Germany, two treaties, one between the

⁶Borden, *Canada in the Commonwealth*, p. 110.

⁷Canadian Parl. Papers, Sessional Paper 41j A. 1919, pp. 10-13; Lowell and Hall, *The British Commonwealth of Nations*, pp. 628-30.

United Kingdom and France and the other between the United States and France, were tentatively arranged. At the instance of Sir Robert Borden the following clause was inserted in the former of these documents:

The present treaty shall impose no obligation upon any of the Dominions of the British Empire, unless and until it is approved by the Parliament of the Dominion concerned.

The great significance of this clause is that, for the first time, the United Kingdom would be under war-obligation to a foreign state, and Canada would, or would not, as she pleased. The King was binding one part of the Empire, and not the other parts. The treaty never became operative. But there remained nevertheless the definite establishment of the rule that, without Canada's assent, British war-treaties ought not to pledge Canada's co-operation.

The Locarno treaty (1925), conformed to the rule. By it the British and other governments guaranteed (a) the boundaries between Germany and France, and between Germany and Belgium, and (b) the observance by Germany of certain articles of the treaty of Versailles. The treaty contained the exemption clause. And unanimously the Dominions declined to assume any obligation. With the result (note it well), that the United Kingdom was actually under war-obligation to foreign states while Canada was not.

Treaties with three of the other enemy states—Austria,⁸ Bulgaria,⁹ and Hungary¹⁰—were negotiated and executed in a manner similar to the treaty with Germany. And so also was the first treaty with Turkey. But it was not ratified. And, for some reason, in resuming negotiations, the British government determined to proceed without the collaboration of the Dominions. Canada was not invited to attend the conference at Lausanne. She took no part in the negotiations. She was not consulted during their pendency. The treaty was made in the name of the British Empire, and it contained no clause of the Borden 1919 type. Having been signed by the British representative, the Colonial Secretary asked the Dominion government to join in its ratification. The reply was as follows:

Canadian Government, not having been invited to send representatives to the Lausanne Conference, and not having participated in the proceedings of the Conference either directly or indirectly, and not being for this reason a signatory to the treaty on behalf of Canada (see my telegram of December 31, 1922, to your predecessor), my Ministers do not feel that they are in a

⁸ *American Journal of International Law*, supp., vol. 14, p. 1.

⁹ *Ibid.*, vol. 14, p. 185.

¹⁰ *Ibid.*, vol. 15, p. 1.

position to recommend to Parliament approval of the Peace Treaty with Turkey and the Convention thereto.²¹

The action of the British government was a complete departure from the preceding practice. And it was all the more notable in that it not only effected peace between Canada and Turkey, but imposed heavy war obligations upon the Empire without the assent of Canada. Mr. Mackenzie King was, of course, absolutely right in refusing to sanction the proceedings by concurring in ratification.

Consideration of Canada's power to negotiate treaties involves two points—form and signature. Commence observation with the treaty of March, 1923, which established as between Canada and the United States a closed season for halibut in the Pacific. In form, the King (with, of course, the addition of his title as King and Emperor), was at the request of Canada a party to it. It was signed by a Canadian, and, for the first time, without any accompanying British signature. The right of Canada to negotiate and sign her own treaties had been established. But it bound the whole Empire and recognizing the incongruity the Imperial Conference of 1923, recommended as follows:

Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the government of that part. The Full Power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear.

Conforming with this recommendation, the treaty, (1924), for the suppression of smuggling along the boundary between Canada and the United States, began as follows:

"His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Emperor of India, in respect of the Dominion of Canada"; and "His Britannic Majesty, in respect of the Dominion of Canada, names as His Plenipotentiary, the Hon. Ernest Lapointe, K.C., a member of His Majesty's Privy Council for Canada, etc."²²

Observe the words "in respect of." The party to the treaty is the King in his capacity (as was the form in the Hanoverian period), as King of Canada. Such treaties are not Empire treaties. They do not bind the Empire. The recent treaty between Canada and the United States with reference to the St. Lawrence is the latest of

²¹ Cmd., 2146.

²² Sessional paper No. 251, Canada, 1924. Quoted in Corbett and Smith, *Canada and World Politics*, p. 101. The words "in respect of the Dominion of Canada" may be seen in the Canadian Order in Council of 13 September 1919, quoted *ante.*, p. 498. Inadvertently, as may be presumed, the Conference of 1926 made use of the phrase "on behalf of" instead of "in respect of."

several treaties framed in correct form. It was signed for Canada by a Canadian only. The form of Canadian treaties has been satisfactorily established.

The form of joint treaties—those intended to bind all Six Kingdoms—was changed appropriately by the Conference of 1926. Noting that the use of the term “British Empire” in the preamble of previous treaties was misleading, it recommended that, in the future, joint treaties should be made in the name of Heads of States, and that the reference in the preamble to the appointment of representatives of the parties should be in the following form:

The President of the United States
 His Majesty the King (*title as above*):
 for Great Britain and Northern Ireland and all parts of the British
 Empire which are not separate Members of the League (of
 Nations), AB.
 for the Dominion of Canada CD.
 for the Commonwealth of Australia EF.
 for the Dominion of New Zealand GH.
 for the Union of South Africa IJ.
 for the Irish Free State KL.
 for India MN.

The signatures would be as follows:

AB.
 CD.
 EF.
 GH.
 IJ.
 KL.
 MN.
 (or if the territory for which each Plenipotentiary signs is
 to be specified:
 (for Great Britain, etc.) AB.
 (for Canada) CD.
 (for Australia) EF.
 (for New Zealand) GH.
 (for South Africa) IJ.
 (for the Irish Free State) KL.
 (for India) MN).

That was the form (down to and inclusive of the first set of signatures) which was adopted in the case of the London Naval Convention of 1930. Observe the wide difference between it and the form of the peace treaty. “The British Empire” was the party to the latter; the British plenipotentiaries signed for the British Empire; and the signatures of the Dominion representatives although attached were superfluous. Now the treaty is in the name of the King—the King of Canada as well as of the United Kingdom—and the pleni-

potentiary of each State signs in the same manner, and on a footing of perfect equality with every other. Formerly it was necessary in order to provide for the unwillingness of any Dominion to be bound by it—to insert an optional exemption clause. Now that is not necessary, for if all the Kingdoms are to join in a treaty, the form above given is to be used.

Canada may join in a treaty with the United Kingdom, or she may enter into a treaty by herself. But there is no way by which the United Kingdom can bind Canada. And it is specially noteworthy that neither in the proceedings of the Conference nor elsewhere is there any indication that the right of the individual states is limited to any particular class of treaties—that, for example, it extends to trade treaties and not to war treaties. The provisions of the Conference relating to joint treaties clearly apply to all kinds of treaties, and no distinction occurs when individual treaties are dealt with. The Halibut treaty, and the St. Lawrence Waterways treaty, were not trade treaties.

In view of all this there need be no hesitation in asserting that Canada's international standing is that of a sovereign State. And international standing includes the subject of war. If, for example, the United States breached one of our treaties with her, could we not, if so we wished, declare war? War, as has been said, is the prerogative of the King. And he acts upon the advice of the ministers of the government concerned.

3. *Advisers of the King*—We are indebted to Sir Robert Borden for the first joint assertion by the Dominion governments of their respective exclusive right to advise the King with reference to their own affairs. At the Peace Conference he, on behalf of the Dominion representatives, circulated a memorandum which declared that:

The Crown is the supreme executive in the United Kingdom and in all the Dominions, but it acts on the advice of different Ministries within different constitutional units; and under Resolution IX. of the Imperial War Conference, 1917, the organization of the Empire is to be based upon equality of nationhood.²³

That principle has been accepted and is now uninterruptedly acted upon. The Conference of 1923 provided that:

The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the government of that part.

The Conference of 1926 provided that:

The plenipotentiaries for the various British units should have full powers, issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire for which they are to sign.

²³ Borden, *op. cit.*, p. 110.

In connection with the appointment of Governors-General, the Conference of 1930 provided that:

1. The parties interested in the appointment of a Governor-General of a Dominion are His Majesty the King, whose representative he is, and the Dominion concerned.

2. The constitutional practice that His Majesty acts on the advice of responsible Ministers applies also in this instance.

3. The Ministers who tender and are responsible for such advice are His Majesty's Ministers in the Dominion concerned.

Similarly also in connection with the reservation by Governors-General of bills passed by Dominion houses of parliament, the British government at the Conference of 1929 declared:

as regards the signification of the King's pleasure concerning a reserved Bill, that it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in the United Kingdom against the views of the Government of the Dominion concerned.

Finally in connection with the same subject, the Conference of 1929 declared that (*italics now added*):

In cases where there is a special provision requiring the reservation of Bills dealing with particular subjects, the position would in general fall within the scope of the doctrine *that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs*, and that consequently it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in the United Kingdom, in any matter appertaining to the affairs of a Dominion, against the views of the Government of that Dominion.

Persisting, nevertheless, in their objection to elevation of Dominion constitutional status, some reactionary pundits declared that although the Dominion ministers might tender advice to the King, the channel of communication must be a British minister, and that he was "not a mere post-box." Professor A. Berriedale Keith, for example, asserted broadly that:

It is a maxim of British constitutional law that the King cannot act without some British minister being responsible for his actions in matters official.¹⁴

That was true until the King had been furnished with other ministers whose exclusive duty it was to advise him upon matters in respect of which their parliaments and governments had jurisdiction. Recognition of that position occurred when the Conference of 1930, besides establishing the exclusive right of each Dominion to advise the King concerning the appointment of its Governor-General, declared that:

The channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government.

¹⁴ Quoted in Ewart, *Independence Papers*, vol. II., p. 132.

The custom, however, of tendering advice through the Secretary of State for the Dominions in London, continued. The seal, moreover, applied to Dominion documents was the Great Seal of the Realm and it was affixed by Imperial officials. That practice having been challenged by the Irish Free State a new arrangement applicable to that state was agreed to.

The arrangement now made is that the Government of the Irish Free State will advise His Majesty direct, and that the channel of communication heretofore used, namely, the Secretary of State for the Dominions, will no longer be used. In addition, a seal will be struck in the Irish Free State to be used on all documents of the kind referred to issued by the King on the advice of the Government of the Irish Free State and on which the Great Seal of the Realm has been used heretofore.

The new Seal will be the property of the Irish Free State, and will be struck, kept, and controlled in the Irish Free State.

A signet Seal will also be struck, and will be affixed by the Minister for External Affairs on all documents relating to the Irish Free State issued by His Majesty on the advice of the Government of the Irish Free State other than those on which the Great Seal of the Realm has heretofore been used.²⁵

Canada already has a Great Seal. In the employment of it, we ought to follow the example of the Irish Free State. But we do not. The recent St. Lawrence treaty with the United States was negotiated and signed by Mr. Herridge. Our government advised the King to issue to him authority for those purposes, and then instead of handing the authorizing document to the King's representative at Ottawa for signature, we sent it to a gentleman in London—the Secretary of State for the Dominions—with whom we have no official association, asking him to present it to the King. He did, and he attached to it, moreover, the Great Seal of the Realm. Our own Seal ought to have been affixed. Disregard of our Governor-General—of the representative of our King—is marked disrespect which the King might very well resent.

4. *Sovereignty*—It is fortunate that, upon this question of sovereignty, some authoritative pronouncements can be quoted. The constitutional experts of the Conference of 1929 not merely drafted the clauses which were afterwards incorporated in the Statute of Westminster but indicated what the effect of their inclusion would be. They said that:

If the above recommendations are adopted, the acquisition by the Parliaments of the Dominions of full legislative powers will follow as a necessary consequence.

²⁵ Elliott, *The New British Empire*, pp. 509-10. See *Round Table*, June 1931, p. 627, and Prof. McKay in *Current History*, September 1931.

And referring to what would be the international standing of the Dominions, the Conference declared that existing conditions do not merely involve the recognition of these communities as distinct juristic entities, but also compel recognition of a particular status of membership of those communities for legal and political purposes.

Canada is a "distinct juristic entity"—a legally constituted individuality. And it was Mr. Bennett who said:

The day of the centralized empire is passed. We no longer live in a political empire.

By the adoption of the Statute of Westminster the old political empire disappears.²⁶

In view of all this it is surely impossible to contend that Canada is not a sovereign State. No other state has control over her. The Conference of 1929 declared that she is a "juristic entity." And her prime minister has openly asserted that "we no longer live in a political empire." If Canada is a sovereign State will any one say that she is incompetent with reference to war?

5. *Personal Union*—Although the question of Canada's right to declare neutrality in a British war, or to declare war on her own account has not yet arisen there can be little doubt that that right exists. Observe the following: No longer a part of the Empire, Canada's relation with the United Kingdom, Australia and the others has become that which is known as a Personal Union. The Six Kingdoms have the same King but no other real political association. If, as between Canada and the United Kingdom, that statement may seem to need qualification, consider the relation between Canada and, say, South Africa. In that there is no trace of any political association. Their only connection is that they have the same King. Under such circumstances international usage makes perfectly clear that one of such Kingdoms may be at war and the others at peace. For example, when the Elector of Hanover became King of Great Britain as George I, the northern war was raging between Sweden on the one side, and Denmark, Prussia and Russia on the other. In the following year George, as Elector of Hanover, joined in treaties with these three powers, by which in return for the war-assistance of Hanover, he was put in possession of certain Swedish territory. Thereafter, and for four years, George, as Elector of Hanover, was at war with Sweden, while, as King of Great Britain, he was at peace. When Charles XII (King of Sweden) was urged to help the Jacobites in England, he (to quote a recent writer, Mr. Chance):

admitted the advantage to himself, but refused his consent on the ground that the King of England had not declared war on him.²⁷

²⁶ *The Evening Citizen*, (Ottawa) 12 December 1931.

²⁷ *George I. and the Northern War*, by J. F. Chance, p. 78.

Afterwards, when Peter of Russia urged George, as King of England to furnish the allies with money, George replied: that, as king, he was not at war with Sweden, and as elector, would perform the engagement of his treaties.¹⁸

At another time, Hanover was at war with Russia, but Peter did not fail to distinguish between Hanover and the United Kingdom:

Peter the Great, now, with the view of conciliating British sentiment, declared to the merchants of that nation at St. Petersburg that he imputed the King of England's hostility towards himself entirely to his Hanoverian interests; he did not blame Great Britain, and would continue his favour to them as heretofore, so that they need fear nothing on account of Hanoverian intrigues, but might pursue their trade freely provided they did not concern themselves in those intrigues.¹⁹

Again on the eve of resumption of hostilities between the United Kingdom and France in 1803, King George sent a message to the British parliament announcing the interruption of diplomatic relations, and on the same day (16 May) he issued from Hanover, a proclamation which commenced as follows:

Whatever the event of the differences now existing between our Crown and the French Government may be, we shall, in Our Capacity as Elector and Member of the German Empire, observe the strictest neutrality, and might therefore justly and confidently expect, that whatever termination the present negotiation may have, our German States and faithful subjects will not be affected by any consequences which may ensue.²⁰

Observe the words "in our capacity." They were much in use in those days of dual and sometimes multilateral kingship. Now, as we have seen, we employ the equivalent phrase "in respect of."

And now if the British Government wished to declare war against, for example, France, it would do so in the name of the King "in respect of The United Kingdom of Great Britain and Northern Ireland." It has no power to declare war in respect of Canada. If, on the other hand, France wished to declare war against the United Kingdom, it might or might not, as it pleased, include Canada. Probably it would prefer that Canada should be neutral rather than belligerent.

In view of all that has been said, there can surely be no doubt not only that Canada need not participate in British wars, but that in such wars she may be neutral, and that she may on her own account declare war.

J. S. EWART.

Ottawa.

¹⁸ *Ibid.*, p. 101.

¹⁹ *Ibid.*, p. 416.

²⁰ *Cobbett's Annual Register*, vol. III., p. 859.