WARRANT OF SURRENDER.

After the certification of the Commissioner's decision to the Department of State, the President's warrant, known as the Warrant of Surrender, is issued by the Secretary of State as the Minister representing him in foreign affairs and transmitted to the demanding government, which will then detail the officers named in the Warrant of Recipias, issued in Canada by the Governor-General, to bring back the prisoner to the place where the alleged offence was committed. The Warrant of Surrender is handed to the marshal or officer having charge of the prisoner as his receipt for the accused. The Warrant of Recipias is retained by the officers as their authority to take the prisoner out of the country of asylum.

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ADVISORY OPINIONS IN INTERNATIONAL JUSTICE.

Perhaps no question of equal interest and importance is subject to greater differences of opinion at the present time than that concerning the place of advisory opinions among the functions of the Permanent Court of International Justice. Despite the act that ten advisory opinions have already been requested and handed down by the Court, doubt remains in the minds of some lawyers and laymen as to the extent of the competence of the Court to give such opinions. Others, while not entering into the question of competence, question the wisdom of giving advisory opinions as a matter of judicial policy. In fact, to quote Judge John Bassett Moore, "No subject connected with the organization of the Permanent Court of International Justice has caused so much confusion and proved to be so baffling as the question whether, and under what conditions the Court shall undertake to give 'advisory' opinions."[1]

Added interest and significance is lent to the question by the reservation which President Coolidge of the United States found it necessary to propose in his Message to Congress of December 3, 1924, when he advocated adherence by the United States to the Protocol of Signature of the Court. He said in part, "I believe it would be for the advantage of this country and helpful to the stability of other

[1] Publications of the Court, Series D, No. 2, 383.

nations for us to adhere to the protocol establishing the Court, upon the conditions stated in the recommendation which is now before the Senate *and further that our country shall not be bound by advisory opinions* which may be rendered by the Court upon questions which we have not voluntarily submitted for its judgment."

In order to treat at all adequately the question which is the subject of this study it is necessary to discuss the following propositions into which the main question naturally divides.

First, whether the Permanent Court of International Justice has competence to give an advisory opinion at all;

Second, if the said Court has competence to give an advisory opinion, may it determine whether or not it will exercise such competence in a given case;

And *third,* if the said Court has such competence, in what cases should it give an advisory opinion?

1. An argument has been advanced to the effect that the Permanent Court of International Justice, being a court of final recourse, could probably take unto itself competence to give an advisory opinion without objection, particularly in view of the last paragraph of Article 36 of the Statute of the said Court which reads, "In the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the Court." The context of this paragraph, however, which refers to jurisdiction in contested matters, would seem to negative its relevancy to advisory opinions. Be that as it may, the fact remains that a careful examination of the Statute of the Court discloses no provision which expressly gives the Court competence to give an advisory opinion. Thus it may safely be said that the party states to the Protocol of Signature to which the said Statute is adjoined, did not by signing expressly assent to such a competence.

There has also been some argument tending to establish that the competence of the Court to give an advisory opinion is found in Article 30 of the Statute of the Court and the Rules of Court passed thereunder, by implication. Article 30 reads, "The Court shall frame rules[2] for regulating its procedure. In particular, it shall lay down rules for summary procedure." There is no mention of competence here. Argument that original competence may be derived from Rules of Court appears to be "putting the cart before the horse." Rules of Court govern *mode* of procedure; they are a tool, the condition precedent to whose use is the possession of competence by the Court to act in the mode prescribed by them. They in them-

[2] Rules of Court, Art. 71 to 74 inclusive.

selves have no inherent virtue which will give a Court competence to use them. The one or more legislative documents comprising the constitution of the Court should be the source of any such competence, and, once given thereby, a subsequent change in the Rules of Court will not destroy the competence. To say that the Court gets competence merely by passing Rules of Court would be equivalent to saying that it can "lift itself by its own boot-straps."

Having found no provision in the Statute of the Court expressly giving the Court competence to give an advisory opinion, such competence, if any, must either be found in some other legislation which may be properly placed as a constituent part of the constitution of the Court, or some provision of the Statute which may be correctly interpreted to give such competence by implication. To aver otherwise and at the same time to contend that the Court has such competence would be to deny that competence to give an advisory opinion is not inherent within a judicial tribunal, that is, that the giving of advisory opinions is not a "judicial function,"—a proposition which is commonly stated by judges in certain jurisdictions.[3]

The Statute of the Permanent Court of International Justice was formulated and adopted in accordance with and under the provisions of Article 14 of the Covenant of the League of Nations.[4] The said Article 14[5] reads as follows:

"The Council shall formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly."

The French version of the last clause of Article 14 above quoted is as follows: "Elle donnera aussi des avis consultatifs sur tout difference ou tout point, dont la saisira le Conseil ou l'Assemblée."

In considering the effect of Article 14 it is obvious that, in conformity with an elementary principle of statutory construction, it must be read and considered as a whole. Its meaning should not be determined by taking each sentence out of the context and attempting to interpret that sentence as it stands alone.[6] This being so,

[3] See 18 Am. Jour. of Int. Law, 28.
[4] Statute for P.C.I.S.—Title and Art. 1.
[5] Great Britain Treaty Series, No. 4, 1919. Reprint with additional matter, His Majesty's Stationary Office, p. 27.
[6] Cf. Pub. of the Court, Series B. No. 2, p. 23. "In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases, which, if detached from the context, may be interpreted in more than one sense."

reading Article 14 as a whole the intention is clear that the Court named in the first sentence shall have the competence and character indicated in the remaining two sentences of the said Article.

Clearly Article 14 gives the Council or Assembly of the League competence or power to refer a dispute or question for an advisory opinion to the Court to be established under the provisions of the said Article. Article 14 has been in no way abrogated and is now still an integral part of the Covenant of the League of Nations and in full force and effect. It would be not only very strange, but most unreasonable, to hold that Article 14 should be interpreted so as to enable the Council or Assembly to request the Court for an advisory opinion and in the same breath to contend that the Court established under the provisions of the same Article is meant to have no competence to give such an opinion.

Further, express references to Article 14 of the Covenant are made in the Statute of the Court. The title reads, "Statute for the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations." And the first sentence of Article 1 of the Statute reads, "A Permanent Court of International Justice is hereby established in accordance with Article 14 of the Covenant of the League of Nations."[1] It may be argued that these references merely recite the fact that the duty imposed on the Council of the League by the first sentence of Article 14 of the Covenant has been fulfilled. But, in addition to the words "provided for" in the title of the Statute, notice should be taken of the words, "*by Article 14 of the Covenant.*" The *whole* of Article 14, not the first sentence alone is included in the reference. And in the first sentence of Article 1 of the Statute the words are, "established, in accordance with Article 14 of the Covenant." Two express references are hardly necessary to fulfil a solely historical purpose.

From the above it is logically to be inferred that Article 14 of the Covenant of the League of Nations should be considered together with the Statute for the Court when seeking to determine the competence of the said Court because:

A. Article 14 sets out the general character and competence of the Court to be established under its provisions, and

B. The Statute of the Court by two express references declares itself to be "provided for" and "established in accordance with Article 14 of the Covenant."

But in addition to the two express references to Article 14 of the Covenant there is a provision of the Statute which impliedly gives

[1] Publications of the Court, Series D, No. 1.

the Court competence to give an advisory opinion on request from the League of Nations. In fact such competence may well be argued to belong to the Court by implication even if all mention of express reference to Article 14 were omitted. Article 36 of the Statute declares that the jurisdiction of the Court comprises not only "*all* cases which the parties refer to it," but also "all *matters* specially provided for in treatises and conventions in force." Giving advisory opinions by the Court on questions referred to it by the Council or Assembly is a "matter specially provided for" in Article 14 of the Covenant of the League and the said Covenant is a part of the Treaty of Versailles, a "treaty . . . in force."

Therefore, in determining whether the Court has competence to give an advisory opinion, Article 14 of the Covenant of the League of Nations and the Statute for the Court should be read together. The Statute does not expressly give such competence, but Article 14 says that, "The Court may (also) give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

II. The next question to be considered is whether or not the Court must exercise its competence to give an advisory opinion on a dispute or question referred to it by the Council or by the Assembly of the League of Nations.[8]

In dealing with this question it is necessary to meet an apparent discrepancy between the French and English texts of Article 14. The English "may" is clearly permissive and not mandatory and would thus allow the Court discretion. The French "donnera," if unmodified, is of the force of "will" or "shall" in English and thus *possibly* imperative. But taking into consideration, first, that the first paragraph of the conclusion of the Treaty of Versailles says, "The present treaty, of which the French and English texts are both authentic[9] . . ." and thus logically leads away from the stricter of two possible interpretations in case of an apparent discrepancy, and second, the well known aversion of certain eminent jurists to the inclusion of the giving of advisory opinions among judicial functions,[10] it is here reasonably to be inferred that the English text is to be taken as conveying the meaning here intended.

Thus it may be stated with some assurance that the Court may refuse to give an advisory opinion in a given case.

[8] A resolution to include mandatory direction to give advisory opinions was deliberately rejected. See records of the First Assembly, Plenary Meetings p. 464; The records of the First Assembly, meetings of Committees I., p. 401, and see Discussion, Pub. of the Court, series D No. 2, p. 396.

[9] G. B. Treaty, Series No. 4, 1919, p. 425.

[10] e.g. Atty. Gen. for Ontario, Atty. Gen. for Canada, 1912 A.C. 573, 586, 22 Col. L. Rev. 497, 507, 224 N.Y., 13, 16, 119.

III. As the Permanent Court of International Justice has, and is exercising, competence to give an advisory opinion, a brief sketch of the place of the advisory opinion in jurisprudence generally should not be amiss.[11] Such an examination may serve to throw some light upon its probable place and utility in the field of international justice. As prior to the year 1922 the advisory opinion was practically unknown to international law, the experience of Municipal Courts is perforce the "well" from which guiding principles must be drawn.

Objection to inclusion of advisory opinions among judicial functions comes largely from the United States and is based upon the federal constitutional doctrine of separation of executive and judicial powers, the exercise of the latter power having been expressly limited to "cases" and "controversies." Although several of the States of the American Union, following the lead of Massachusetts,[12] have provided constitutionally for advisory opinions by state courts, and some experience reflecting their value has been gained, the device on the whole has not been given a fair trial in American jurisprudence.[13]

In England the practice of the judges giving advice to the King in his judicial, executive and legislative capacity goes back nearly to "the limit of legal memory" in Anglo-Norman times. That of advising the Lords arose a relatively short time afterward. Since the reorganization of the judicial system by the Judicature Acts the custom has been going out as far as the House of Lords is concerned,[14] but the right still exists.[15]

In 1833, on organization of the Judicial Committee of the Privy Council, a statutory provision provided "That it shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any . . . matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon. . . ."[16] The Judicial Committee is thus "undoubtedly liable to be asked questions of any kind by the authority of the Crown, and the procedure is used from

[11] See U. S. Constitution, Art. III., 2 & Frankfurter, "A note on Advisory Opinions," 37 H.L.R. 1002. See statement of the Committee on For. Rel. of U. S. Senate of May 27, 1924, that jurisd. of the Permanent Court of Int. J. to give advisory opinions is "believed by the committee to be a highly dangerous and undesirable jurisdiction." 68th Cong. 1st session, Senate Report No. 634, p. 3.

[12] Mass. Const. (1780) C. 3, Art. 2. (140 advisory opinions have been given under this Mass. provision where the device can be said to have worked well.)

[13] See Manley O. Hudson "Advisory Opinions of National and International Courts," 37 H.L.R. 970 and 977-8.

[14] See Ellingwood, "Departmental Cooperation in State Government," (1918) for excellent account.

[15] 1912 A.C. 585.

[16] 3 and 4 William IV., C41, S4.

time to time, though rarely *and with a careful regard to the nature of the reference.*"[17]

The most recent reference under this procedure was made only last year concerning the powers of His Majesty's government to constitutionally carry out, without the co-operation of the government of Northern Ireland, the terms of Article XII of the instrument (so-called "treaty"), signed by the British and Southern Irish delegations on December 6, 1921, in London. The said Article XII provided for a boundary commission to determine the boundary between the Irish Free State and Northern Ireland. Northern Ireland refused to appoint a member of the commission and the British Government asked the Judicial Committee in effect whether there was any way in which the boundary could be constitutionally determined without the participation of Northern Ireland in the proceedings. The Council advised in the negative. (Counsel on behalf of Northern Ireland and the British Attorney-General were heard.)[18]

In Canada the Supreme Court of Canada is obliged to advise the Governor in Council on request upon a number of specifically enumerated questions.[19] A similar obligation is placed upon the Supreme Courts of seven of the provinces by provincial statutes to advise the provincial executive on request.[20]

As the Supreme Court of Canada owes its origin and powers to a Dominion Statute[21] passed under sec. 101 of the British North America Act of 1867, the American difficulty with the separation of powers doctrine does not here exist. Further, all doubts concerning constitutionality of the provision for advisory opinions were set at rest in 1912 when its enactment was held by the Judicial Committee of the Privy Council to be *intra vires* of the Canadian parliament.[22] Though the device has been used sparingly and not without some judicial perturbation, its value has been apparent as an aid in determining the relative federal and provincial jurisdictions and powers under a written constitution.

Advisory opinion clauses were also incorporated in the constitutions of Panama[23] and Columbia,[24] and of Hawaii[25] when self governing.

[17] Earl Loreburn L.C., 1912 A.C. at 581.
[18] London Times, Aug. 2, 1924.
[19] R.S.C. 1906, C. 139, S. 60.
[20] Ontario, Nova Scotia, Manitoba, British Columbia, Quebec, Saskatchewan and New Brunswick.
[21] (1875) 38 Vic. C. 11.
[22] 1912 A.C. 571 held R.S.C. 1906, C. 139, S. 60, the provision now in force re advisory opinions of the Supreme Court of Canada intra vires the Canadian Parliament under B.N.A. Act, 1867, sec. 101.
[23] Const. of 1904 Art. 105.
[24] Const. of 1886, Art. 90.
[25] Const. of 1854, Art. 88.

Out of the experience of municipal courts have grown certain prejudices and fixed ideas concerning the necessary characteristics and limitations of advisory opinions. For example, Earl Loreburn L.C., speaks of "the supposed intrinsic abhorrence with which their Lordships are asked to regard the putting of questions otherwise than by litigation, to a Court of law."[26] And Judge John Bassett Moore is clearly of the opinion that giving advisory opinions is not properly a "judicial function."[27] Undoubtedly it was at one time regarded as a proper function of the King's Judges in England, though the question of its constitutionality may now be open.[28] It is now numbered among the duties of the Judicial Committee of the Privy Council, which is in effect a Court, as a duty not "subversive of the judicial functions."[29]

The dogmatic constitutional basis of the American objection has already been mentioned.

From their nature advisory opinions are not legally binding. They cannot be enforced like a decision in a litigated dispute by a judgment of obligatory force, and they do not make the matters considered and advised upon *res adjudicata*. Neither do they have the weight of judicial decision, although they of necessity carry the weight of high judicial opinion. These characteristics may be either weaknesses or pillars of strength. Due to lack of enforceability a dissatisfied disputant may with impunity treat the advice with contempt and thus perhaps detract from the Court's prestige. However, the soundness of the judicial reasoning and the justice of the conclusions would inevitably attract the support of world opinion and provide the powerful sanction of moral force. Again, although of no value as precedents they are evidence of the true state of the law relating to the particular matter involved and might be said to be sort of *dicta*.

Here a slight digression to remark upon President Coolidge's above quoted reservation may conveniently be made. He is careful to stipulate that in the event of adherence to the Court the United States "shall not be bound by advisory opinions. . . ." Now, advisory opinions from their nature have no legally binding effect although their moral force may be great. Moreover, at present the Court cannot give an advisory opinion except upon a question on dispute referred to it by the Council or Assembly of the League of

[26] 1912 A.C., 571, 586.
[27] Publications of the Permanent Court of International Justice Series D., No. 2 p. 383.
[28] 1912, A.C. 571, 586.
[29] Ibid. 585.

Nations for such an opinion.[30] It is thus difficult to see how the United States could come under the *direct* force of an advisory opinion of the Court without taking several lengthy and unprecedented strides. Thus the President's reservation is probably but another example of the reasoned caution which marks the United States foreign policy.

Further, from a study of the experience of municipal courts in giving advisory opinions certain principles may be discovered, adherence to which will probably assist in the successful application of the device to international legal problems: (*a*) As advisory opinions are useless as mere speculative opinions on hypothetical questions, they should be given only with reference to a defined *de facto* situation. (*b*) Argument of counsel representing all interested parties should be heard. (*c*) The opinion should be that of the Court, not of the individual judge as such.[31] (*d*) The Council or Assembly of the League of Nations should make a reference "with careful regard" to its nature. If at all avoidable by foresight, in no case should the Court be placed in danger of a wilful disregard of its opinion by an interested party. (*e*) The Court should use the utmost caution when determining whether or not to exercise its competence to give an advisory opinion in a particular case. (This appears to be its policy.)[32]

In municipal law advisory opinions have been mostly all very carefully prepared and of remarkable soundness. The majority of them have rested upon cited cases.[33] Those already given by the Permanent Court of International Justice have enhanced its prestige.[34]

An advisory opinion constitutes at least an authoritative declaration of opinion on the legal question of jural relations involved. It thus enables those concerned to proceed after the opinion is given with assurance when acting in regard to that relation or question. Therefore, other considerations of importance as above indicated allowing, when public confidence, assurance and security are to be advanced by giving an advisory opinion on a question referred to the Court by the Council or Assembly of the League of Nations, the Court should give such an opinion. An example of this type of case is found in Advisory Opinion No. 2 where the Court received through the Secretary General of the League a request for an advisory opinion with reference to the competence of the International Labor Organ-

[30] This is provided for in Article 73 of the Rules of Court.
[31] Article 71 Rules of Court.
[32] See Fifth Advisory opinion.
[33] See Ellingwood op. cit.
[34] See Morley O. Hudson "The Third Year of the Permanent Court of International Justice." 19 Am. Jour. Int. Law, 48.

ization relative to matters of agriculture. The International Labor Organization is constituted under Part XIII of the Treaty of Versailles and giving an advisory opinion here enabled the Organization to proceed with its work assured that its competence extended to the regulation of agricultural matters.[35] To have acquired such assurance by means of a hostile action would have caused much needless delay, inconvenience and expense.

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A POINT OF BANKRUPTCY LAW.

A recent decision of the Appellate Division of the Supreme Court of Ontario *In re Sternberg*,[1] seems to call for some comment both on the question of law and practice involved therein. The facts appear to be as follows: The trustee in Bankruptcy made an application under Bankruptcy Rule 120 to compel a firm of Treifus & Stripp to pay and deliver to him certain moneys and certain diamonds alleged to have been paid and transferred to Treifus & Stripp by the debtor by way of preference in fraud of his other creditors. On the application coming on to be heard an issue was ordered to be tried between the Trustee and Treifus & Stripp. On the trial of this issue one Ellis was called as a witness and his evidence established to the satisfaction of the learned bankruptcy Judge that the diamonds in question were Ellis's property. But at this time Ellis was no party to the proceedings.—The Judge thereupon gave judgment dismissing the trustee's claim to the diamonds as against Treifus & Stripp, and suggested that Ellis should be made a party and the question of ownership as between the trustee and Ellis should also be adjudicated.—Ellis was therefore made a party and as his evidence was given before he was a party in order to make it applicable to the application against him, the Judge directed that he should be treated as added not from the date he was served, but from a prior date when the evidence as to ownership had been given: and by a judgment bearing date when the case was adjudicated against Treifus

[35] See Report of Fourth Session of the International Labor Conference (1922) Vol. II. pp. 204-5.

[1] 27 O.W.N. 212.