CANADA'S POWER TO PERFORM TREATY OBLIGATIONS.

Part II.

Aviation and Radio Decisions.

The recent decisions of the Privy Council in *Re Aerial Navigation*,[53] and *Re Regulation of Radio Communication*,[54] imply that the application of this section to a given treaty is affected or excluded by the form of the treaty or the fact that Canada was or was not a signatory thereto, alone or in conjunction with Great Britain, and that if the treaty, in type or manner of execution or the way in which it affects Canada, does not conform to the kind of treaty known to and envisaged by the framers of the British North America Act it cannot fall within sec. 132.

It is therefore important to examine the treaties there in question and the reason given for holding in the first case that sec. 132 applied and in the second that it did not apply.

A. *Aviation Case.*

A convention signed at Paris in 1919 covered "almost every conceivable matter relating to aerial navigation" (p. 70) and imposed on the contracting parties numerous obligations (pp. 68-69). It was made in terms by "the British Empire" and His Majesty was represented by a Plenipotentiary and by other Plenipotentiaries "for" Canada, Australia, South Africa, New Zealand and India respectively.[55]

This convention followed, in form, the Treaty of Versailles in which for the first time the British Empire appeared as the contracting party. It was drawn up at the Peace Conference but had nothing to do with the Peace Treaties. It was ratified by His Majesty on behalf of the British Empire on June 1, 1922, and brought into force in Canada by a statute, which however did not refer to it.[56] The Privy Council held that the convention fell within sec. 132. At p. 67 after referring to instances, e.g. emergency, under which the Dominion by virtue of its residuary power in sec. 91 "is empowered to act for the whole" the Law Lords proceed "there may also be cases where the

[53] [1932] 1 D.L.R. 58, A.C. 54.
[54] [1932] 2 D.L.R. 81, A.C. 304.
[55] See League of Nations, Treaty Series, 1922, vol. 11, p. 174.
[56] 1919, c. 11; in amended and consolidated form it appears as ch. 3 of R.S.C. 1927; see generally Hudson, Aviation and International Law, 24 Am. J.I.L. 228; note 1924 Brit. Y.B.I.L. 183.

Dominion is entitled to speak for the whole . . . by reason of the plain terms of sec. 132, where Canada as a whole, having undertaken an obligation is given the power necessary for performing such obligation. . . . Their Lordships consider the governing section to be sec. 132 . . . it would appear to follow that any convention of the character under discussion necessitates Dominion legislation in order that it may be carried out" (pp. 67-68). And at p. 68 they enumerate what "appear to be among the principal obligations undertaken by Canada *as part of the British Empire.*"

These references imply that sec. 132 applies only to obligations actively assumed by Canada by a treaty to which she is a signatory as part of the Empire.

B. *Radio Case.*

The International Radiotelegraph Convention and Annexed General Regulations was drafted at an International Convention at Washington and signed by representatives of 78 governments on November 25, 1927, including those of Great Britain, Canada, Australia, etc.[57] The Canadian representatives were appointed by a Canadian Order-in-Council approved by the Governor-General on August 11, 1927, and by a similar Order-in-Council approved on October 7, 1927, were authorized "to sign on behalf of Canada any agreement which may be reached at the Conference in the form of a *Convention between Governments.*" The convention is expressed to be concluded among the "governments" of the enumerated countries and was ratified as such by "His Majesty's Government in Canada" by an instrument under the hand of the Secretary of State for External Affairs deposited on October 29, 1928, pursuant to an Order-in-Council of July 12, 1928.[58]

In the Radio Case the Privy Council dealt with this Convention as follows: "is it said with truth that, while as regards aviation there was a treaty, *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 has been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the Convention.

[57] For complete text see (1929) 23 Am. J.I.L. Supplement, p. 40; and for a discussion of the course of proceedings at the Convention and its results see Article (1928) 22 Am. J.I.L., p. 28.

[58] Cf. Appendix to Case of the Dominion in the Radio Reference in the Supreme Court of Canada, pp. 137-40. As to the effect of this form of agreement and whether such an Intergovernmental Agreement is a "treaty" see, *infra*, p. 674.

. . . But while this is so, the aviation case . . . cannot be put on one side."

Then, referring to the argument of counsel for the Province that while some of the stipulations in the convention fairly fell within the enumerated heads of sec. 91 the residue must belong to the Province under 92(13), "Property and Civil Rights" or 92(16) "matters of a local or private nature," they said:

"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 persons who might infringe some of the stipulations in 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. *This idea of Canada as a Dominion being bound by a convention* equivalent to a treaty *with foreign powers was quite unthought of in 1867.* It is the outcome of the gradual development of the position of Canada *vis-a-vis* to the mother country of Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not therefore to be expected that such a matter should be dealt with in explicit words in either sec. 91 or sec. 92. *The only class of treaty which would bind Canada was thought of as a treaty by Great Britain and that was provided for by sec. 132.* Being therefore not mentioned explicitly in either sec. 91 or sec. 92 such legislation falls within the general words at the opening of sec. 91 . . . " "In fine, *though agreeing that the Convention was not such a treaty as is defined in sec. 132, their Lordships think that it comes to the same thing* . . . 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 of Canada" . . . "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" (pp. 83-84).

The Privy Council clearly implied that such a Convention should be enforced by Dominion legislation under the *residuary clause of sec. 91* and that it was immaterial whether it dealt with matters which ordinarily fell with sec. 92, i.e., that Dominion legislation under the residuary clause in aid of such a Convention would override sec. 92. It then held that the whole field of radio communication in Canada including interprovincial broadcasting fell within sec. 92(10).

The writer is not now concerned with these latter points for he is willing to agree that radio broadcasting does ordinarily fall within Dominion jurisdiction and that to the extent that it does not fall within it, nevertheless, when it becomes a matter of treaty engagement, the Dominion acquires exclusive jurisdiction to deal with it.

The writer, however, is concerned to point out (1) what he considers an unwarranted method of approach to the question as to what classes of treaty fall within sec. 132, (2) that the Convention in question does fall within sec. 132 and not within the residuary clause, and (3) the undesirability of making the power of the Dominion to implement treaties rest in some cases on sec. 132 and in all others on the hitherto emasculated residuary clause of sec. 91.

(1) *Method of Approach to Act.*

This first point as to the method of approach to the determination of the treaty enforcing power of Canada brings one back to the assertion (*a*) that sec. 132 construed almost literally applies to all classes of treaties imposing obligations on Canada or (*b*) that in any event if construed as such a provision in a Constitution should be construed, (i.e. with the purpose of effectuating the dominant intention of its framers albeit with respect to new circumstances) it does so apply.

(*a*) No problem is more familiar to the Courts—and none requires so much the application of the power of reconciliation of what Marshall, C.J., has termed "the rigour of the lawyer and the breadth of the statesman,"—than the problem of applying the terms of a constitutional enactment to new circumstances undreamt of by its framers. The late Professor LeFroy put the matter well:

"There can be no doubt that the phrases by which subjects of legislative power are conferred must acquire a more extended connotation as the inventions of science and developments of the national life extend the significance of such phrases beyond what they comprehended when the Constitution was originally framed. Thus in *Pensacola Telegraph* v. *Western Union*, 96 U.S. 1, the power of the Congress of the United States to regulate commerce with foreign nations, and among the several states, and with the Indian tribes was held not confined to the instrumentalities of commerce as they were known and used when the constitution was adopted. As the Court says: 'It keeps pace with the progress of the country and adapts itself to the new developments of times and circumstances. It extended from the horse with it rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successfully brought into use to meet the demands of increasing population and wealth.' "[59]

[59] Cf. LeFroy, Constitutional Law at p. 176; Dominion Law Annotations, Revised, vol. 1, p. 557.

And as Mr. Justice Story said in *Martin* v. *Hunter's Lessee,* 14 U.S. at 326, "The Constitution unavoidably deals in general language. . . . The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence."

In the Aviation and Radio Cases the Privy Council assigned to specific heads of sec. 91 two matters which could not have been in the contemplation of those who framed them. As Rinfret, J., said in the Radio Case,[60] "As was necessary in the Aviation Reference so here we have to adapt the constitutional Act of 1867 to a subject which not only had no existence but of the possibility of which there was not at the time even a suspicion. It is correct to say, however, that the British North America Act 'is always speaking and that its provisions should receive an interpretation as broad in proportion as scientific inventions and the development of national life demand newer constitutional solutions.'" No one can doubt that this is essentially the correct procedure and it is submitted that by its application sec. 132 can be considered to apply to classes of treaties negotiated and made in a different manner and form than those present to the minds of its framers; provided only that they affect Canada in the same way, i.e., impose international obligation upon it.

Viscount Dunedin's method in the Radio case was simply this: the idea of Canada as a Dominion being bound by a treaty was unthought of in 1867; the only class of treaty which would bind Canada was thought of as a treaty by Great Britain; this was provided for by sec. 132 therefore other classes of treaty don't fall within that section but elsewhere, namely, in the residuary clause of sec. 91.

This is a bastard method which is neither the traditional method of avoiding all reference to external aids or facts and construing the Act by reference solely to what has been said—for he does consider the situation existing in 1867 as to treaties. Nor is it a method of construing the Act as a living instrument adapting its terms to a new condition—for he does not consider whether the terms of sec. 132 may not be sufficiently elastic to cover treaties affecting Canada to-day in the same way in essence, though in accidental features of negotiation and signature differing from those of 1867.

[60] [1931] 4 D.L.R. at 875, S.C.R. at 555. In the Radio case itself Viscount Dunedin held that the ultra-modern subject of radio communication fell within the terms "telegraphs" and "works and undertakings" though it is certain that the idea of this as a subject-matter of jurisdiction "was quite unthought of in 1867."

The language of sec. 132 did not literally apply to any treaty made before 1867 for no such treaty was made by the "British Empire;" so even then the section in effect meant "treaties between His Majesty the King and foreign countries and binding upon Canada as part of the British Empire." With this necessary gloss the section can be applied as literally to-day as in 1867, for the section is obviously concerned with the enforcement of any treaty imposing obligations on Canada, irrespective of its form or manner of negotiation or signature. To say that because a given class of treaty was unthought of in 1867 it does not come within sec. 132 is merely to echo the argument, repudiated in the Combines Act Case,[60a] that the phrase "Criminal Law" means only what it meant in 1867 but which the Privy Council said means whatever is criminal law in the generic sense of a matter prohibited under penal consequences. The answer is that sec. 132 covered in 1867 a generic situation and contemplated for its application merely a treaty binding on Canada and that it covers the same situation to-day. And so, applying the strict method of discovering the intention of the framers from the language of sec. 132 itself, one must reach the conclusion that it applies to all modern classes of treaty.

A possible argument is that sec. 132 when it refers to Canada being bound "as part of the British Empire" meant bound by a general Empire treaty which affected Canada generally and not specially; but this would have no basis in reason and moreover in manner of negotiation and form there was no distinction between any such classes of treaty.[61] Such a construction would exclude from the scope of sec. 132 such treaties as the Migratory Birds Treaty of 1919 and the International Waterways Treaty of 1909.

(b) Turning now to the construction of sec. 132 as a term of a constitutional statute—as a branch "of a living tree capable of growth and expansion within its natural limits"[62]—we have to see if the section can be construed to extend to treaties made in the modern manner. For, as Lord Sankey has said, (*ibid.* at 107) it is not the

[60a] [1931] 2 D.L.R. 1, A.C. 310.

[61] It is interesting to note that writing in 1929 before the Aviation and Radio Cases, Keith repudiated the suggestion that because of the different circumstances prevailing in 1867 the Courts should act on the meaning which sec. 132 had in 1867, saying that such a principle as applied in the Persons Case was a different matter from holding that "the wide terms of sec. 132 may not be interpreted to cover a procedure which is changed indeed since 1867, but not essentially different. It seems that we need not accept the suggestion that a treaty concluded in the new form for Canada by a plenipotentiary under full powers is not a treaty between the Empire and a foreign power. It is impossible to hold that the terms of sec. 132 apply merely to treaties affecting the whole Empire." (1929), 11 Journ. Comp. Leg. 123.

[62] *Re Persons*, [1930] 1 D.L.R. 98, A.C. 134.

duty of a court "to cut down the provisions of the Act by a narrow and technical construction but rather to give it a large and liberal interpretation."

The Privy Council has said that the Radio Convention "is not a treaty between the British Empire as such and foreign countries;" [Why?] "for Great Britain does not sign as representing the Colonies and Dominions" (p. 82), and again "Canada as a Dominion is one of the signatories." That is to say, sec. 132 is confined to treaties which bind Canada in the same way and for the same reasons as treaties did in 1867, namely, treaties by Great Britain. Since "the idea of Canada *as a Dominion* being bound by a treaty was unthought of in 1867" and "is the outcome of the gradual development of the position of Canada *vis-a-vis* to the Mother Country," sec. 132 does not apply. These and other expressions indicate that the growth of constitutional conventions within the Empire and any changes whereby treaties are negotiated in whole or in part by Canada or signed by it along with Great Britain or alone necessarily involve the non-application of sec. 132. (It may be noted that in the Air Convention also the British Government did not act for the Dominions which were represented by their own delegates and signed separately).

Surely it is more consonant with the proper construction of the British North America Act to make it keep pace with these growths and changes rather than to hold that the latter render the section largely nugatory as being confined to treaties such as the Rum Treaty of 1924 and other treaties in which Great Britain is the sole signatory within the Empire.

One should have thought that if the section applied to such a case it would apply *a fortiori* to a treaty in the negotiation of which Canada was represented and to which she was a party along with Great Britain and particularly where it was negotiated and signed entirely by Canadian representatives.

Indeed the Aviation Case held that it did apply to one to which Canada was a signatory along with Great Britain. This may be distinguished on the ground that the British Empire *eo nomine* was a party and that Canada signed as a part thereof; but if this be a ground of distinction the situation equally was unthought of in 1867 and in fact never did occur except in the few years following the Great War.

Again, in the Aviation Case the Privy Council founded the right of the Dominion to speak for the whole of Canada on "the plain terms of sec. 132 where *Canada as a whole, having undertaken an*

obligation is given the power necessary and proper for performing such obligation" (p. 67).

This implies that sec. 132 applies to obligations actively undertaken by Canada by virtue of its own participation in the negotiation and signature of a treaty; a conclusion which is inconsistent with the governing idea of the judgment in the Radio Case four months later, whereunder such a treaty as the Aerial Navigation Convention separately signed by Canada would be ruled out of the scope of sec. 132 because it applies only to treaties made by Great Britain (p. 83). In short, under the Radio Case the section applies only to treaties made by Great Britain, i.e., by His Majesty simpliciter as before 1867. Under the Aviation Case it applies (*a*) to a treaty made *eo nomine* by the British Empire, and (*b*) to a treaty whereunder Canada as a whole has undertaken obligations, i.e., by separate signature; but both of these are opposed to the ruling in the Radio Case because neither case could have been in the minds of the framers of sec. 132. Moreover there is a third and most important type of treaty which is the peculiar result of recent conventions and practices, namely, treaties entirely negotiated and signed by Canada and to which Great Britain is not a party. Of this class is the St. Lawrence Deep Waterway Treaty of July, 1932, which is expressed to be made by His Majesty the King "*in respect of* the Dominion of Canada" acting through a Plenipotentiary to whom he granted Full Powers on the advice of the Dominion Government and whose signature he ratified on the same advice. Such a treaty was unthought of in 1867 in point of its manner of negotiation, form, signature and ratification. It was not made by the British Empire *eo nomine*—it is not a treaty made by Great Britain. It does not under the Radio construction fall within sec. 132; it must find its power of enforcement elsewhere. Under (*b*) *supra* it is within sec. 132 per the Aviation Case because even more definitely than by the Aerial Navigation treaty did Canada as a whole undertake obligations thereunder.

That the method of construction adopted in the Radio Case of restricting the scope of a section by reference to the historical position of Canada in 1867 in the matter of the way in which treaties then affected it, is unwise and to be avoided, is illustrated by the absurd result that such a treaty as the St. Lawrence Waterway Treaty and the Radio Convention, in which Canada has the utmost concern and under which it accepts most onerous obligations are to derive no power of enforcement from sec. 132—the very provision which alone exists specifically in the Act for the performance of Canada's external obligations.

This alone should show the necessity of a liberal and progressive interpretation of the British North America Act and in particular of sec. 132. That the sole power to enforce such treaties is now held to reside in the hitherto debilitated residuary clause of sec. 91 only "points the moral and adorns the tale" of the inveterate practice of the Privy Council in its application to the British North America Act of arbitrary rules of statutory construction "which have at times robbed it of its historical contexts and divorced its meaning from the intentions of those who in truth framed it,"[63] and as the result of which Prof. H. A. Smith, writing in 1927,[64] correctly said that "sixty years of constant litigation have resulted in giving Canada a constitution which in principle is practically the reverse of that contemplated by her founders."

To the demerits of a judicial policy which refused to be guided by the "historical origins" of the British North America Act and which permitted reference to the Quebec Resolutions, on which it was founded, only "as a matter of historical curiosity"[65] we now have added reference to external conditions in 1867 for the purpose of negativing a connotation which the words of sec. 132 can reasonably bear and which intervening developments make it necessary that they should bear.

It is for such reasons that the Aviation and Radio Cases—which have been welcomed as marking a tendency to restore the Dominion to a place commensurate with the effort of the Fathers to secure Federal primacy in national matters—are unsatisfactory; for the Radio Case has not only destroyed much of the scope of sec. 132 but it has by, what Ewart calls, an "incredible twist" brought under the residuary clause of sec. 91 something which was never intended to be there. More important than these results it exemplifies a method of approach to the construction of the British North America Act which may be fraught with more error than the literalistic doctrines of Haldane.

2. *Section 132 Applies to all Treaties Imposing Obligations.*

(*a*) If, as per the Radio Case, one is justified in gathering the intention of the framers of sec. 132 by reference to external facts one may look not only to the fact that constitutionally and internationally Canada was then only bound by treaties negotiated and signed by representatives of Great Britain but also to the further fact

[63] Kennedy, Aspects of Constitutional Law, 1932, p. 70.
[64] (1927), 9 Jour. Comp. Leg. at 162.
[65] *Great West Saddlery* Case, [1921] 2 A.C. at 116.

that all treaties which did bind Canada did so simply because they were made in the name of His Majesty by plenipotentiaries authorized by him and that they derived their validity from the executive act whereby His Majesty ratified them. Every treaty made to-day conforms to these essential facts and derives its international efficacy from them and no treaty can at present be internationally binding unless those facts are present.[65a] Even treaties made by the Empire *eo nomine* depend on the circumstance that, however described (e.g. by geographical terms) His Majesty the King is the contracting party who authorized and later ratified the making of the treaties by the persons so authorized by him. No amount of constitutional convention as to consultation, advice or participation in negotiation or signature can alter their essential nature. The Aerial Navigation Convention was *eo nomine* a "British Empire" treaty and Canada was represented at the Conference which drafted it and signed it "as part of the British Empire" along with Great Britain as a "part." But the convention, in international law, was with His Majesty the King as the Head of the Empire. The Radio Convention was made at a Conference at which Canada was separately represented and to which she was a party in the same sense as were Great Britain and the other Dominions and she signed separately; but (assuming as the Privy Council did that it really was a treaty) it would bind Canada in the same way.

The Japanese Treaty of Commerce and Navigation of 1911 (which was held by the Privy Council[66] to bind Canada and to justify legislation in aid thereof under sec. 132) and the Rum Treaty with the U.S.A. in 1924 were both signed without Canadian participation; yet they are binding though made in the name of the King simpliciter as would have been the Treaty of Locarno (without the exempting clause) though made in the name of the King simpliciter and without Canadian participation. And the Prime Minister of Canada (Mr. King) formally admitted that the Lausanne Treaty of 1923, as to which Canada was not even consulted, was binding internationally; and it is clear that this was not because it was made, by the Ministry of Great Britain, *eo nomine* by the British Empire but because signed for and ratified by His Majesty.

Similarly the St. Lawrence Waterway Treaty and others recently negotiated by Canadians are binding because made in the name of the King, the only effect of the words "His Majesty in respect of

[65a] As to treaties in the form of Inter-governmental Conventions see, *infra*, p. 674.

[66] [1924] A.C. 203.

Canada" being to confine the contemplated operation of it to Canada.

In short it is submitted that sec. 132 applies to all treaties provided only that the real contracting party is His Majesty the King, that they were negotiated by his representatives and that he ratified their acts, and that they apply to and impose obligations upon Canada. The only phrase in sec. 132 which is not literally complied with is that such treaties are not usually made "between the British Empire and foreign countries." But as this was equally so in 1867 it may be regarded as a merely descriptive designation of the treaty making authority in the Empire, viz., His Majesty the King.

Inter-Governmental Agreements as Treaties.

Reference may be made here to the fact that the Radio Convention was in the form of a Convention between Governments. It is submitted that this Convention and other Inter-Governmental Agreements are "treaties" in the generic sense in international law and "treaties" within sec. 132 of the B.N.A. Act.

Apart from governmental agreements for reciprocal trade legislation, such as the abortive Reciprocity Pact of 1911, which are not matters of international relations proper and are subject to discontinuance on change of government,[67] there is nothing inherent in this form of agreement which excludes them from the category of treaties.

Treaties, in the words of Oppenheim, are "conventions or contracts between two or more States concerning various matters of interest";[68] or, more exactly, perhaps, between the sovereign powers of states, for treaty making is a competence attaching to sovereignty. As we have seen a treaty is none the less a treaty because it is concluded in the name of the State rather than in that of the sovereign Head of the State, *e.g.*, the Treaty of Versailles, and the Anglo-Russian Treaty of 1924; for the essential fact is that the person or entity which is the constitutional treaty-making power in the state has contracted. Similarly it is immaterial that the "government" of a state has contracted if it did so as the authorized agent of the treaty-making power, which in Great Britain and the Dominions is the Crown.

Various states may have classifications as to the forms which they prefer to use in respect of defined subject-matters, *e.g.*, the British Foreign Office, but such distinctions have "nothing to do with international law."[69]

Satow[70] after enumerating 15 forms which international compacts may take says: "of these, the terms Treaty and Convention appear formerly to have been mainly employed for compacts concluded between heads of states; now the latter term is often used for compacts between governments . . . Which of the above [15] forms shall be used in a particular case is partly a matter of usage, partly of convenience, partly also of choice . . . At the

[67] Keith: Responsible Government, p. 840; Corbett and Smith, p. 55; cf. Toynbee, Conduct of British Empire Foreign Relations, pp. 99, 100.
[68] International Law, vol. 1, p. 700.
[69] Oppenheim, *op. cit.*, p. 717.
[70] Guide to Diplomatic Practice, 3rd ed., 1932, p. 318, *et seq.*

present day it cannot be said that any precise rules of nomenclature exist . . . Treaties are sometimes concluded between governments, and conventions are often now so concluded . . . it is difficult, therefore, in present practice to discern any consistency in the use made of forms and titles for international compacts. In the past treaties and conventions were more particularly associated with compacts between heads of states, whilst agreements and other forms served for compacts between governments . . . and it may be that a return to a more systematic procedure may yet be found on these lines."

And, as a perusal of Book III. of Satow reveals, not even the relative importance of their contents determines whether compacts shall take the form of treaties between Heads of States, or between States or of Governmental Agreements; *e.g.*, the important agreement between Great Britain and Japan as to the maintenance of peace and territorial rights in China, etc., was in the governmental form. Just like Treaties the Agreements may or may not be concluded by delegates armed with full powers from the Head of the State or the Government and may or may not be subject to ratification by them respectively. As regards the full powers issued by Great Britain the only difference is that in the case of a compact between states the appointment is expressed to be by the King and the instrument is signed by him; whereas in the case of a governmental agreement it is made in the name of the Government by an instrument signed by His Majesty's Secretary for State for Foreign Affairs.[71] The same distinction exists in the case of the instruments of ratification.[72]

The Conference of 1923 stated that "apart from treaties between Heads of States it is not unusual for agreements to be made between governments. Such agreements which, are usually of a technical or administrative character, are made in the names of the signatory governments and signed by representatives of those governments, who do not act under Full Powers issued by the Heads of the States; they are not ratified by the Heads of the States, though in some cases some form of acceptance or confirmation by the governments concerned is employed. As regards agreements of this nature the existing practice should be continued."

The Conference of 1926 recognized this distinction of form, but identity of substance, when it recommended "that all treaties (other than agreements between governments) should be made in the names of Heads of States."

The normal practice when such a treaty is made by a Dominion is that the negotiations are conducted and the treaty signed by plenipotentiaries appointed by His Majesty, at the request of His Government in that Dominion, by Full Powers signed by him and bearing the Great Seal of the Realm and ratified by an instrument under the Great Seal signed by the King and issued upon the advice of the Secretary of State of the Dominion. In the case of a Governmental Agreement the full powers are issued by the Governor-General-in-Council of the Dominion and ratified by His Majesty's Government of that Dominion by an instrument under the hand of the appropriate Minister in that Dominion and issued under the authority of a Dominion Order-in-Council. This was the procedure adopted in the case of the Radio Convention.[73]

[71] Contrast forms, Satow, pp. 82, 83.
[72] *Ibid.*, pp. 408-409.
[73] See footnote (58), *supra.*

The memoranda on the methods obtaining in the various Dominions as to the conclusion and ratification of treaties set forth in the volume "Treaty-making Procedure" recently published by the Royal Institute of International Affairs[74] make it clear that the distinction between treaties and Governmental Agreements is purely formal and that the latter differ "in nothing but form from the traditional type of treaty."[75]

The binding effect in international law of such agreements may be regarded as established by the following circumstances: The declaration of the constitutional right of the Dominions to make them contained in Resolution IX. of the Conference of 1923; the fact that the Dominions have already signed treaties in this form without the issuance of full powers from the King, that they have ratified important international conventions by direct authority of Dominion Orders-in-Council without formal intervention of any British Minister, *e.g.,* International Labour Conventions, which are indubitable treaties;[76] that since in the case of treaties in the ordinary form it is in fact the King's Government in the Dominion upon whose advice the King alone acts in regard to the issuance of full powers and ratification and since the intervention of the British Government in the person of Secretary of State for Foreign Affairs is purely formal and of a transmitting nature merely,[77] so also in the case of an agreement entered into in the name of the Government of a Dominion it is the King who acts through and by the advice of his constitutional advisers in that Dominion and thereby binds himself in the same sense as the head of and in respect of that Dominion. Just as in the case of an undoubted "treaty" in the name of a State international law looks beyond the designation to the sovereign power within that State so in the case of an agreement by a Government it looks beyond that designation to the fact that the Government named is that of the King. When, as in the case of the Radio Convention, that Government is *ex facie* "His Majesty's Government in Canada," the ascertainment of the sovereign power contracting is beyond all doubt. When to this is added the declaration by the Conference of 1926 that "the Governor-General of a Dominion is the representative of the Crown holding in all essential respects the same position in 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," and the provisions in secs. 9-13 of the B.N.A. Act whereby the constitution of the King's Privy Council for Canada is determined, the evident conclusion is, it is submitted, that such Agreements made by His Majesty's Government in Canada are "treaties" of binding effect in international law.[78] If this be so, it is submitted, that, for the reasons in this paper elsewhere advanced, sec. 132 applies to them to the same extent as to treaties in the traditional form.

[74] Ed. by Arnold, 1933, Oxford Univ. Press.

[75] Corbett and Smith, *op. cit.,* p. 59; Baker, *op. cit.,* 181.

[76] Baker, *op. cit.,* pp. 225, 86, 179-82, 199, 208.

[77] Baker, *op. cit.,* p. 188, *et seq.,* and see footnote 29, *supra.*

[78] It is suggested that this approach excludes the objection that as a matter of constitutional law there has been no formal devolution to the Governors General of the prerogative powers of the Crown as to external affairs. See Baker, *op. cit.,* p. 225, for the contrary view.

(*b*) If this conclusion that sec. 132 suffices for and is the proper authority upon which to found the power of the Dominion to implement international obligations is correct it is obvious that the residuary clause of sec. 91 can have no relevance to the matter. And it is submitted that the very presence of sec. 132 in the Act precludes the idea that sec. 91 was also intended to deal with the subject for there can be no question of "aspects" which would justify duality of treatment or bifurcation of subject-matter.

If it be objected that sec. 132, while contained in a section apart from secs. 91 and 92, must be construed along with them and modified by sec. 91 as was done in *A.G.B.C.* v. *A.G. Can.*,[79] the answer is that in that case the contest was between sec. 125 declaring that Crown property should not be liable to taxation and two *enumerated* heads of sec. 91 (taxation, and, trade and commerce) and sec. 125 had to be adapted to the whole scheme of the Act. But such a conclusion, however appropriate to a case of contest between enumerated heads of sec. 91 and other sections, has no necessary relation to one between the residuary clause of sec. 91 and such a section as 132, for in the former case the Dominion's jurisdiction is not only declared to be "exclusive" but is expressly aided by the *non-obstante* clause which does not apply, of course, to extend jurisdiction under the residuary clause.[80]

There is patent absurdity in attributing any intention to the framers of the British North America Act to deal in sec. 91 and in sec. 132 with two classes of treaty for there was only one known to them, and there is equal patent absurdity in any construction which rests the power of Parliament to implement international obligations upon one or the other power accordingly as the treaty in question is negotiated or signed in the traditional or the modern manner. Such a construction is unnecessary and completely wrong for it involves an almost entire negation of sec. 132, and runs counter to the principle of construction approved by Lord Sankey, L.C., in the Persons Case,[81] "the Courts of Law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace,

[79] [1924] A.C. 222.
[80] Cf. Duff in *Reference re Waterpowers*, [1929] 2 D.L.R. at 488.
[81] [1930] A.C. at 136.

order and good government of a British Colony." Precisely that strict construction was applied in the Radio Case and the result is "subversive of Parliament's real intent."[82]

3. *Undesirability of Referring Treaty-implementing Power to Residuary Clause.*

It is submitted that any construction of sec. 132 which allows important classes of modern treaties to escape its application and to depend for their enforcement on the residuary clause of sec. 91 is unfortunate and undesirable, first, because the scope of the residuary clause is uncertain and variable; secondly, the extent to which it can be made to apply to the enforcement of treaties depends upon judicial interpretation of very general terms and not upon express language as in sec. 132; and, thirdly, because to hold that legislation in aid of a treaty, by virtue of the residuary clause merely, may override Provincial legislation under sec. 92 and Provincial property rights is to be violence to the whole philosophy of the Act and to ignore the decided cases.[83] On the other hand the competency of such legislation under sec. 132 to override Provincial legislation has already been established.[84] And its competency to use, take or destroy Provincial Crown property is, it is submitted, quite clear under sec. 132.

In *In re Employment of Aliens*,[85] Mr. Justice (now Chief Justice) Duff said:

"Three views are perhaps conceivable as to the scope of the authority arising under sec. 132. It might be supposed that it was intended to give jurisdiction only in relation to those matters which are committed to the authority of Parliament by sec. 91 and other provisions of the British North America Act. It might be supposed,

[82] Mr. Tilley, K.C., for the Dominion *arguendo*, in the Radio Case admitted that "the change of method in making treaties binding on the Dominion does not affect the scope of sec. 132, or take away the authority thereby conferred upon the Parliament of Canada to perform the obligations of Canada thereunder," (1932, A.C. at 308), and he proceeded to contend that even if sec. 132 did not in terms apply to the convention there in question Parliament had similar authority under the residuary clause of sec. 132. Geoffrion, K.C., said in reply: "If the Parliament of Canada has legislative authority to perform the obligations of the Convention, although it was not a treaty by the British Empire, sec. 132 of the Act of 1867 was superfluous."

[83] *A.-G. for Ontario* v. *A.-G. for Canada*, [1924] A.C. 222; *Montreal Street Ry.* Case, [1912] A.C. 333; *Parsons'* Case (1882), 7 A.C. 96; *Cushing* v. *Dupuy* (1880), 5 A.C. 409; *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31; *Board of Commerce* Case, [1922] 1 A.C. at 197; *A.-G. for Canada* v. *A.-G. for Alberta*, [1916] 1 A.C. 588 at 595.

[84] *A.-G. for B.C.* v. *A.-G. for Canada*, [1924] A.C. 203; *The King* v. *Stuart*, [1925] 1 D.L.R. 12 (Man.); *In re Nakane and Okazaka* (1908), 13 B.C. 370; cf. *R.* v. *Wing Chong* (1886), 1 B.C. Pt. 2, p. 150 (in which a Provincial Act was held invalid as being contrary to a treaty).

[85] (1922), 63 S.C.R. at 329.

on the other hand, to constitute a delegation of the entire authority of the Parliament of the United Kingdom in so far as the execution of such authority might be required for the purpose of giving effect to the treaty obligations of the Empire within Canada or in relation to Canada. On the other hand it may be supposed that a less sweeping authority is conferred by the section; that it is subject to some limitations arising out of co-ordinate provisions of the British North America Act itself. As to the first of these views, it may, I think, be at once rejected upon the ground that otherwise the section would be quite unnecessary. As to the other two; there are certain fundamental terms of the arrangement upon which the British North America Act was founded, and these it is difficult to think it was intended that Parliament should have power to disregard in any circumstances."

One may express respectful disagreement with the suggestion that sec. 132 is subject to limitations arising out of other sections; for to the extent that it does apply its overriding character would seem to be clear. What Mr. Justice Duff had in mind was the inviolate property argument that the allocation of assets and sources of revenue made in the sections in Part 8 of the British North America Act was a permanent one not subject to be altered by the exercise of any legislative power elsewhere conferred in the Act.[86] There is some doubt as to the correctness of this view as to legislation in relation to certain, at least, of the enumerated heads of sec. 91; for it has been held that for the purposes of an interprovincial or Dominion railway Provincial Crown lands may be taken or used.[87] And it is arguable that these decisions are but illustrations of the larger principle enunciated in the Nipissing Case *supra,* that where a legislative power cannot be effectually exercised without affecting proprietary rights, whether of an individual or of a Province, the power so to affect those rights is necessarily involved in the legislative power.

There is no decision which holds and no tenable argument which invests legislation under the residuary clause with like paramountcy. On the other hand the principle of the decisions above noted and the literal terms of sec. 132 would seem to afford ample basis for saying that the authority thereby conferred is a delegation of the entire authority of the Imperial Parliament to give legislative effect to the treaty obligations of Canada, embracing all powers

[86] *In re Employment of Aliens* (1922), 63 S.C.R. at 315; *Re Water Powers Reference,* [1929] 2 D.L.R. at 482-4, 489-90.

[87] *A.-G. for B.C.* v. *C.P.R.,* [1906] A.C. 204; *A.-G. for Quebec* v. *Nipissing Central Ry. Co.,* [1926] A.C. 715.

necessary or proper to the execution of such purposes as are therein included, and that all rights, whether of a person or of the Crown in the right of a Province, must give way before the exercise of this plenary authority. Yet in the Radio Case the Privy Council said: "in fine, though agreeing that the Convention was not such a treaty as is defined in sec. 132, their Lordships think that *it comes to the same thing.*"

Truly an "incredible twist" to our Constitution, as Ewart says,[88] whereby there is read into the residuary clause the express and overriding powers of sec. 132, which *ex hypothesi* has no application to the treaty under consideration. A singular result will be to enable the Dominion by legislation in aid of the St. Lawrence Waterway Treaty, under the residuary clause, to override the proprietary rights of the Crown in the right of the Province of Quebec, if it has such, arising out of its ownership of the bed of the river. For, be it marked, sec. 132 does not apply to, nor under the Radio Case doctrine, can it be called in aid of, such legislation, which, therefore, must depend for its validity solely upon the residuary clause which hitherto has been held to be a reserve power to legislate in cases of war, pestilence or other national emergency.

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[88] (1932), 10 C.B. Rev. 299.