TREATIES.

When do British (including Canadian) Treaties need Legislation?

In 1908, Anson attempted to answer this question by saying:

> Where a treaty involves a charge upon the people, or a change in the general law of the land, it may be made but cannot be carried into effect without the consent of Parliament;
> and further;
> apart from precedents relating to Indian territory, it has of recent years been thought desirable, if not necessary, that the consent of Parliament should be given to the cession of territory in time of peace. Cessions made at the conclusion of peace or in course of a war, or of lands acquired by conquest or cession for which Parliament has not legislated, and for which the King has not, by his own act, deprived himself of the power of legislating by Order in Council, would seem to stand on a different footing.

A similar classification to that of Anson is given by Holdsworth and others under the Heading of Constitutional Law, in *Halsbury's* Laws of England. They mention treaties which render necessary taxation or a grant from the public funds, or which affect the existing laws of trade and navigation or the private rights of the subject, as requiring Parliamentary sanction, and state that in the case of treaties involving an important cession of territory it is "deemed safer" to obtain that sanction; but that in the case of treaties "made to put an end to a war or, possibly, to prevent war, . . . it is doubtful whether the sanction of Parliament would be always required."[1]

It may be noted that in both these treatments three classes of treaties are recognized—namely, (i) those for which legislation is essential to their effectiveness; (ii) those for which legislation is advisable and usually sought in their support; and (iii) those for which legislation is unnecessary.

This mode of classification may be valuable for some purposes; but, in theory a treaty either requires legislation or it does not, and it is our primary object to discover, if possible, the dividing line between these two classes. Therefore, we shall, for the present, set aside the discussion as to when it is usual or desirable to obtain legislative sanction in support of a treaty, and confine our attention to a consideration of the subject which is before:—"When do British Treaties need Legislation?"

It seems that little can be gained by the enumeration of special cases, such as treaties involving a charge upon the public or taxation,

[1] See *Walker* v. *Baird*, [1892] A.C. 491; contention of counsel for the appellant that, as to the Crown's right to bind its subjects, treaties for the preservation of peace are analogous to treaties made for the purpose of putting an end to a state of war.

or a change in the laws of trade and navigation, after the fashion of Anson and Holdsworth. More importance attaches to their general statements. Anson claims that "where a treaty involves . . . a change in the general law of the land, it may be made, but cannot be carried into effect without the consent of Parliament." This while it may be true, does not serve as a clear and uniformly accurate test. Moreover, I do not think that the somewhat similar criterion offered by Professor McNair is entirely satisfactory.[2] He lays down the rule, in his own words, that: "When a treaty involves for its enforcement in England any change in the law administered by any English court of law"—(other than the law affecting the belligerent rights of the Crown, which demands separate treatment)—"it is necessary in order to give effect to the treaty that Parliament should enact such legislation as may be required to make that change in the law."

"This principle," Professor McNair maintains, "has been illustrated by numerous decisions." This may be true; but illustration does not constitute full proof of the validity of this principle as the one test of the necessity of legislation. The principle that treaties affecting private rights require legislation is also illustrated by numerous decisions. Yet manifestly the rule does not include all cases in which legislation is required; nor is it entirely free from exceptions. Thus a treaty cannot of itself justify the payment of funds out of the National Treasury, though such action could scarcely be said to affect "private rights." Even if we grant that the principle may be true so far as it goes, we may still contend that it does not go far enough.

Therefore, with all deference to the authorities quoted, it is submitted that we must look elsewhere in order to discover the true criterion.

In view of various decisions and general principles of law the real test lies in the application of the rule that the Crown cannot do by a treaty what it could not do without it. It would follow from this principle that treaties, involving actions on the part of the executive which, if attempted independently, would be unlawful, must be sanctioned by Parliament in order to be effective in England. The absolute validity of any treaty made by the Crown is not questioned. What is questioned is the power of the Crown to make treaties,—already binding in the eyes of International law,—binding and effective in the eyes of the English Courts and British subjects.

The claim is made that the Crown can only make treaties effective in so far as it possesses discretionary power independently of such treaties. Hence, our discussion evolves into a consideration of the

[2] 1928 British Year Book of International Law, pp. 57-65.

extent of the prerogative, in the widest sense, and its relation to treaties, as seen in the light of decided cases and well-considered opinions.

It would not be appropriate at this point to describe in detail the nature and extent of the discretionary powers of the Crown.

It is generally conceded that the Crown may, among other things, engage in war and make peace, relinquish its belligerent rights, acquire territory, cede territory, at least during, or at the conclusion of, a war, maintain and control the army and the navy except in so far as these are governed by statute, grant recognition to foreign sovereigns, receive foreign ambassadors and appoint diplomatic representatives.

On the other hand, the Crown is not allowed, among other things, to legislate independently of Parliament, to nullify legislation effected in the entire Parliament by dispensing with the operation of statutes in individual cases, or by suspending their operation altogether, or to raise money without parliamentary grant.

If the subject-matter of a treaty falls within the class of things which the Crown may do without a treaty, then legislation is not necessary; if the subject-matter falls within the class of things which the Crown may not do whether a treaty exists or not, then legislation is necessary before the treaty may be given legal effect in English Courts.

This is the principle. Let us now examine some of the cases bearing on the subject of treaties and legislation.

In support of his view, Professor McNair quotes Sir Robert Phillimore's judgment in the *Parlement Belge*.[3] * Though Sir Robert's decision was overruled by the Court of Appeal, we may agree with Professor McNair that his opinion with regard to the effect on English Courts of the Convention between Great Britain and Belgium, was left intact, and *was* of some authority.

It was admitted that the Convention had not been confirmed by any statute; but it was contended, on the part of the Crown, both that it was competent to Her Majesty to make this convention, and also to put its provisions into operation without the confirmation of Parliament. The latter proposition was denied by the plaintiffs,

[3] (1879) 48 L.J., P.D.A. 78.

* Cf. Kier and Lawson, Cases on Constitutional Law, 2nd edition, pp. 300-1. "Sir Robert Phillimore decided that no immunity from arrest attached at international law to public vessels other than warships, and that such an immunity could not be effectually granted by a treaty concluded by the Crown without the assent of Parliament, This decision was reversed in the Court of Appeal on the ground that all public vessels are immune from arrest at international law—and the second portion of Sir R. Phillimore's decision remains good law.

the owners of the steamship *Daring*, who had made a motion for leave to issue a warrant of arrest against the steamer *Parlement Belge*, in order that action might be taken against her for damage done to the plaintiffs' vessel. It was claimed in defence that the *Parlement Belge*, as a mail-steamer belonging to the King of the Belgians and operating between Ostend and Dover, was exempt from arrest under the Convention of February 6th, 1876.

Sir Robert Phillimore noted in his judgment that by the Declaration of Paris in 1856, the Crown, in the exercise of its prerogative, had deprived the country of certain belligerent rights, which were considered by high authorities as of vital importance. "But," he said, "this declaration did not affect private rights of the subject; and the question before me is whether this treaty does affect private rights and, therefore, required the sanction of the legislature."

Sir Robert Phillimore also noted that there were not precedents on the subject, and, for this reason, he proceeded on analogy. He thought that an ambassador might lose his diplomatic privileges by trading, and, likewise, a foreign sovereign's vessel might also lose its immunity by carrying on trade.

He refused to accept the contention of the Crown, saying:

> If the Crown had power without the authority of Parliament by this treaty to order that the Parlement Belge should be entitled to all privileges of a ship of war, then the warrant, which is prayed for against her as a wrong-doer on account of the collision, cannot issue, and the right of the subject,—but for this order unquestionable,—to recover damages for injuries done to him by her is extinguished. This is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of the constitution. Let me consider to what consequences it leads. If the Crown, without the authority of Parliament may by process of diplomacy shelter a foreigner from the action of one of Her Majesty's subjects who has suffered injury at his hands, I do not see why it might not also give a like privilege or immunity to a number of foreign individuals. The law of this country has indeed incorporated those portions of international law, which give immunity and privileges to foreign ambassadors; but I do not think that it has therefore given the Crown authority to clothe with this immunity foreign vessels, which are not really vessels of war, or foreign persons, who are not really ambassadors.

Unfortunately for the "private rights" theory and the views of Professor McNair, it would seem that two later decisions have served to reverse the opinion of Sir Robert Phillimore, which have just been quoted.

Thus in *Fenton Textile Association* v. *Krassin*,[4] the English Court of Appeal had to consider whether M. Krassin, a Russian official agent appointed under the Trade Agreement between Great Britain and Russia, was entitled to immunity from civil process or not, and

[4] (1922) 38 T.L.R. 259.

held that, neither under that agreement nor apart from it, could he claim this immunity; but the agreement was discussed on the assumption that it bound the court, and Atkin, L.J. (at p. 262), saw "no reason why sovereign states should not come to an agreement as to the rights and duties of their respective envoys, ordinary and extraordinary, and why such agreements should not enlarge or restrict the immunities which otherwise would be due under the well-established usage of nations."

Here the grant of immunities was supposed to have been made under an agreement; but it appears that this grant could have been made with equal efficacy in the absence of a treaty.

Again, in *Engelke* v. *Musmann and the Attorney-General*,[5] it was held by the House of Lords that the acceptance and recognition of persons who form the staff of an Ambassador, and, who as such become entitled to the privilege affording immunity from all writs and processes at law, are matters which are within the cognizance of the Crown acting through the Foreign Office. Therefore, if the Attorney-General informs that Court that a particular person has been accepted and recognized by the Foreign Office as a member of the staff, that is sufficient evidence and the Court must act on it. It excludes evidence being taken by cross-examination on affidavits before the Court on any such matters.

Thus we see that the Crown may exercise its prerogative of receiving diplomatic representatives, either with or without the existence of a treaty; even though the dilemma which Sir Robert Phillimore predicted might result.

We may now note in succession some other cases in which the exercise of the discretionary power of the Crown has been considered in relation to treaties.

In *Rustomjee* v. *Regina*,[6] Lord Coleridge, C.J., declared:

> The making of peace and the making of war, as they are the undoubted, so they are, perhaps, the highest, acts of the Crown. The terms on which peace is made are in the absolute discretion of the Sovereign. . . . The Queen might or not, as she thought fit, have made peace at all; she might or not, as she thought fit, have insisted on this money being paid her. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal, and her acts are not to be examined in her own Court.

The case of *Walker* v. *Baird*,[7] can scarcely be regarded as being decisive as to the binding effect of treaties. However, counsel for the defence admitted that an ordinary treaty could not justify inva-

[5] L.J. 97 K.B. 789, [1928] 1 K.B. 9.
[6] (1876) 2 Q.B.D. at p. 73.
[7] (1892) A.C. 491.

sion of private rights, and their contention that the treaty in question was analogous to a treaty of peace was not looked upon with favour, though the Privy Council refused to decide whether a treaty for the preservation of peace was on the same footing as a treaty to end a war; nor did they think it necessary to consider what effect might be given to a treaty of peace without legislation.

But it is worth noting that all the Treaties of Peace which concluded the late war received legislative sanction. Whether this sanction was absolutely necessary or not is open to question, which neither of the two cases just cited would seem to decide conclusively. Nevertheless, the procedure followed at the close of the Great War is a precedent, and it would seem to have been highly desirable in order that the Crown might act freely in giving effect to the treaty provisions, and particularly those concerning contracts and other transactions between British and enemy subjects, which would otherwise have been enforceable in the courts of law upon the restoration of peace, instead of being remitted to the clearing offices and the Mixed Arbitral Tribunals.

Doubtless, the Crown may acquire territory by treaty or otherwise. Can it cede territory without the consent of Parliament? This question was raised before the Privy Council in the case of *Damodhar* v. *Deoram Kanji.*[8] According to that case it would seem that the Crown, by reason of its prerogative, may cede territory, but cannot take the much smaller and less important step of rearranging jurisdictions. This decision has since been adopted in several Indian cases; but the rule may well be held to apply solely to India.

In *The Elsebe Maas,*[9] it was held that "Prize is altogether a creature of the Crown," and in *The Zamora,*[10] the Judicial Committee of the Privy Council expressed the opinion that though there is no power in the Crown, by Order in Council, to prescribe or alter the law which Prize courts have to administer, yet the Prize court will follow the directions of the Crown in every case where they amount to a mitigation of the Crown's rights in favour of the enemy, or neutral, as the case may be.

In *Duff Development Co.* v. *Kelantan Government,*[11] it was held that it is the prerogative of the Crown to recognize or to withhold recognition from States or chiefs of States, and to determine from time to time the status with which foreign powers are to be deemed

[8] (1876) App. Cas. 332.
[9] 5 C. Rob. 123.
[10] [1916] 2 A.C. 77.
[11] [1924] A.C. 824.

to be invested. In such cases the declaration of the Crown, whether expressed in a treaty or otherwise, is binding upon the Court, provided the statement is duly and clearly made.

Now let us conclude with some quotations from the *Pigeon River* case, recently decided in Ontario. The case was first tried before Wright, J., who said in the course of his judgment: "A treaty is deemed a contract or convention between the two nations, and does not become a part of the law of the land unless by express Act of the legislative body."

He also said:

> The views of the text-writers on the subject of treaties and international law as well as the cases referred to by counsel, have led me to the conclusion that in Canada and in Great Britain a treaty does not confer, as between the State and the subject, or as between subjects, any rights, upon the latter, and that under our constitution such rights can only be enforced by the common law of England or by legislative enactment of a duly competent legislature.
>
> Applying this principle to the present case it would appear that the Ashburton Treaty does not and was not intended to confer upon a citizen of Canada any right or authority as against the Government of Canada or against any other citizen of Canada.

On appeal, judgment was delivered by Riddell, J., who said:

> The proposition . . . is undoubted law that in British countries treaties to which Britain is a party are not as such binding upon the individual subject, but are only contracts binding in honour upon the contracting States.[12]

This concludes the consideration of the cases and opinions which have a bearing on the answer to the question, "When do British Treaties need Legislation?" We are offered at least three tests:

(1) When a treaty affects private rights or requires taxation.

(2) When a treaty involves a change in the law of the land.

(3) When a treaty involves action which is not within the ordinary scope of the discretionary powers of the executive.

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[12] Note, too, the judgment of the Supreme Court of Canada in this case ([1932] 2 D.L.R. 250), which reverses the judgment of the Appellate Division of the Ontario Supreme Court:—

"The treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power. For a breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are under our law enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject." P. 260.