

SOME ASPECTS OF TREATY LEGISLATION.

Now that the Government of Canada is asserting a right to enter into treaties with other countries on its own behalf, and is disclaiming responsibility for treaties entered into on behalf of His Majesty by representatives of His Majesty's Government of Great Britain only, it may be well to consider the legislative power which the Parliament of Canada may invoke for the purpose of implementing treaty obligations entered into by the Dominion Government.

In theory all treaties entered into on behalf of the British Commonwealth of Nations or its members are made between His Majesty by virtue of prerogative right and the sovereign power of another state. Thus a treaty of peace must be ratified by His Majesty even although it has been signed by fully accredited plenipotentiaries. *The Eliya Ann.*¹ When so ratified it becomes in law effective as a declaration of peace so as to restrain His Majesty's subjects from further acts of war, although actual hostilities have probably ceased by agreement some time before. A treaty of peace which has been ratified is therefore sufficient to restore peace without legislative sanction, but its provisions are not made part of the municipal law of the country until declared to be such by Parliament. *Stoeck v. Public Trustee.*² *In re Employment of Aliens.*^{2a}

It has also been definitely established by a decision of the Judicial Committee that His Majesty, by treaty only, cannot interfere with the private rights of his subjects, except possibly in the case of treaties of peace. *Walker v. Baird et al.*³

In Great Britain, where all legislative power is centred in Parliament, the enactment of legislation for the purpose of making the provisions of a treaty part of the law of the land, presents no great difficulty, but in Canada, where legislative power is divided between the Dominion and Provincial legislatures, the problem is not so easy of solution. This is particularly so because under sub-head 13 of section 92 of the British North America Act there is given to Provincial Legislatures the exclusive right to make laws with regard to "property and civil rights in the Province." It would be inconceivable, however, that the right to make a treaty a part of the law

¹ (1813) 1 Dods. 244.

² (1921) 2 Ch. 67 at 71.

^{2a} (1922) 62 S.C.R. 293 at 304.

³ (1892) A.C. 491.

of the land should be given to the Provinces, with their sectional points of view, even although an effect of so legislating might be to infringe upon the private rights of citizens. The power rests, as it should, in the Parliament of Canada, but it is not comprehended within the provisions of section 91 of the Act. It is contained in a separate section and is worded as follows:

"132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries."

That this power is contained in a section apart altogether from sections 91 and 92 of the Act might give rise to an argument somewhat analogous to that used by the Judicial Committee recently in the decision that property of the Crown in the right of a Province, was subject to taxation, notwithstanding the express provisions of section 125 that "no lands or property belonging to Canada or any Province shall be liable to taxation." *Attorney-General of British Columbia v. Attorney-General of Canada*.⁴ Lord Buckmaster at page 225 stated that section 125 taken alone and read without consideration of the scheme of the Act would undoubtedly create a formidable argument for the contention that Provincial liquor was not subject to customs duty or sales tax. But, he stated, this section did not exclude the operation of Dominion laws made under the Dominion's exclusive legislative authority to regulate trade and commerce and to raise money by any mode or system of taxation.

Similarly it might be contended that the Dominion right to legislate with regard to treaty obligations under section 132 must be subject to the scheme of the Act as set forth in sections 91 and 92, and that the former section should be read as *not* enabling the Dominion in so legislating to trench upon "property and civil rights in the Province," a subject-matter which is expressly and exclusively allocated to the Provincial legislatures. Dominion enactments which purport to deal with property and civil rights can only be valid if "necessarily incidental" or "truly ancillary" to a subject-matter exclusively within the sub-heads of section 91. *Attorney-General for Ontario v. Attorney-General for the Dominion, et al.*⁵ A Dominion Act which makes a treaty a part of our municipal law and which contains provisions which affect the property and civil rights of citizens of the Provinces would not, ordinarily be sanctioned

⁴ (1924) A.C. 222.

⁵ (1896) A.C. 348 at 359-360.

by a sub-head of section 91, and therefore would not be competent nor prevail against conflicting provincial laws, if any, if the foregoing argument were well founded.

It is probable, however, that the Judicial Committee would find a way of reconciling the reasoning in the above decision with the situation which has just been suggested. It might be that their Lordships would say that as the right to legislate with regard to treaties is not contained in section 92, it must rest in the residuary power which is vested in the Dominion to "make laws for the peace, order and good government of Canada" and that section 132 must be read with and as amplifying this power. But it has been held again and again that Dominion laws passed under this general power will not prevail over conflicting provincial laws nor enable the Dominion to trench upon a field which is exclusively provincial, such as "property and civil rights." *Attorney-General for Ontario and Attorney-General for Canada*.⁶ *Montreal v. Montreal Street Railway*.⁷ *Citizens Insurance Co. of Canada v. Parsons*.⁸ *Cushing v. Dupuy*.⁹ *Tennant v. Union Bank of Canada*.¹⁰ *In re the Board of Commerce Act*.¹¹

In another British Columbia case in which judgment was delivered on the same day as that in the "provincial property taxation" case, *supra*, the Judicial Committee apparently considered section 132 as being the sole authority under which the provisions of the Japanese Treaty were made effective as part of the law of Canada, although "civil rights" were thereby affected. *Attorney-General of British Columbia v. Attorney-General of Canada*.¹² A possible obverse application of the reasoning in the above taxation case does not appear to have been presented to their Lordships.

Whether the foregoing difficulties be more imaginary than real, or otherwise, section 132 was undoubtedly intended to vest the sole power to deal with treaty obligations in the Parliament of Canada whether such obligations be those of the Province or of the Dominion, and this should be so. It would not be satisfactory to leave such matters to Provincial legislatures which would almost certainly be affected by regional points of view and which were intended to confine their legislative activities to "matters of a merely local

⁶ (*Supra*).

⁶ (*Supra*).

⁷ (1912) A.C. 333.

⁸ (1882) 7 A.C. 96.

⁹ (1880) 5 A.C. 409.

¹⁰ (1894) A.C. 31.

¹¹ (1922), 1 A.C. 191 at 197.

¹² (1924) A.C. 203.

or private nature." Concerted action would be almost impossible. Apart altogether from that, foreign affairs should be dealt with by the federal authority, and arrangements with other states should be given legislative effect which will be uniform throughout the Dominion. Under any other system the hands of the Dominion representatives would be greatly weakened in negotiating agreements with other countries. It is certain therefore that the Judicial Committee would feel it incumbent upon them to hold that section 132 does vest in the Dominion Parliament the sole right to legislate with regard to treaty obligations.

A rather interesting case recently came before the Supreme Court of Canada in which the line of demarcation between the fields open to Federal and Provincial legislatures in relation to treaty legislation was rather finely drawn. *In re Legislative Jurisdiction over Hours of Labour Reference*.¹³ The International Labour Conference of the League of Nations, of which Canada is a member, had adopted a draft convention limiting the hours of labour in industrial undertakings. Under Article 405 of Part XIII. of the Treaty of Versailles, the Dominion assumed certain obligations as a member of the Labour Conference with respect to draft conventions adopted by it. The Minister of Justice took the view that the sole obligation of Canada was to bring the draft convention before the authorities or authority within whose competence the matter lay, for the enactment of legislation or other action. As there appeared to be some doubt as to which or what authorities were competent to enact legislation along the lines agreed to in the draft convention, the Governor-in-Council referred the question to the Supreme Court. It was held that Canada's only obligation was that conceived by the Minister of Justice, and that the Provincial legislatures were generally competent to enact legislation of this nature, except with respect to Dominion Government employees, and those parts of Canada not within provincial boundaries.

It happened that the draft convention had not been ratified, and a careful reading of Article 405 would appear to indicate that Canada's primary obligation in respect of the draft convention would be to submit it for ratification to the authority competent to consent to ratification. That authority would be the Parliament of Canada.^{13a} If such consent were withheld, well and good, Parliament is not obliged to consent and the obligation having been fulfilled no fur-

¹³ (1925) S.C.R. 505.

^{13a} See the Act authorizing the ratification and carrying into effect the Protocol accepting the Statute for the Permanent Court of International Justice, 11-12 Geo. V. (Dom.) c. 46.

ther responsibility would rest upon the Dominion. In such a case the legislative authority would be as indicated in the above decision.

If, however, consent to ratification were given, and the draft convention were subsequently ratified, the obligation of the Dominion would be to "take such action as may be necessary to make effective the provisions of such convention." Article 405, paragraph 7. That would have constituted a binding obligation upon the Dominion to make the convention effective. The obligation certainly would arise "under a treaty between the Empire and . . . foreign countries" within the meaning of section 132 of the British North America Act, and the Parliament of Canada would therefore have "all powers necessary or proper for performing the obligations of Canada." The words "all powers" would necessarily include all legislative power, and the result would be that the Provincial legislatures would be denuded of jurisdiction to legislate with regard to matters dealt with in the convention. That would be as it should be, for the federal power ought to be in a position to implement its treaty obligations without being subject to the vacillations or regional differences of the Provinces. But it is a strange transposition of legislative power to arise from the mere ratification of a treaty which has already been entered into.

The foregoing possibilities illustrate the extent to which section 132 may be applied. The section was recently considered by the Manitoba Court of Appeal in *The King v. Stuart*.¹⁴ It was there held that as the object of The Migratory Birds Convention Act, 1917, (Dom.) chap. 18, was to implement a treaty obligation, it was competent to the Parliament of Canada to enact it, even although it trenchd upon the right of the Provincial Legislature to legislate with regard to property and civil rights. The court held that any inconsistent provisions in The Game Protection Act, 1916 (Man.), chap. 44, were suspended while the Dominion Act was in force.

It is clear that under section 132 the Parliament and Government of Canada are omnipotent with respect to obligations arising out of treaties. By entering into a treaty the Government of Canada can clothe Parliament with authority to legislate upon any matter dealt with in the treaty, although in so doing, an invasion of an otherwise exclusively provincial field may be sanctioned. Thus by entering into and ratifying a convention with a foreign country embodying a reciprocal arrangement permitting the registration here upon certain formalities, of judgments obtained in the foreign country, and the issuance of executions here under such judgments, the

¹⁴ (1925) 1 D.L.R. 12.

Dominion may accord to the residents of that country more ample privileges than the Provinces now extend to residents of the other Provinces.

Instances need not be multiplied. Suffice it to say that the powers given by section 132 are tremendous and should never be invoked except for the genuine purpose of making the provisions of a treaty or convention a part of the municipal law of the land, in order to implement international obligations entered into for our national well-being alone.

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