LEGISLATIVE JURISDICTION OVER FLYING.

Two points of general public interest are dealt with in the judgments delivered in the Supreme Court on the reference by the Governor General in Council of questions relating to the respective legislative powers of the Dominion Parliament and the provincial Legislatures on a subject rather unhappily described as "Aeronautics." In the unanimous opinion of the members of the Court, the Dominion Parliament has, independently of treaty, no jurisdiction to legislate on the subject of air navigation generally (the word "generally" being construed as equivalent to "in every respect"), but it has on the other hand power to pass such legislation as is necessary for the purpose of carrying out Canada's obligations under the international "Convention Relating to the Regulation of Aerial Navigation," to which Canada is a party.

Four questions were submitted for hearing and determination by the Court. Of these the third and most general was directed to the authority of Parliament to enact the *Air Board Act*,[1] now consolidated as the *Aeronautics Act*,[2] and the fourth related to the validity of the *Air Regulations*, 1920, approved under the former statute on December 31st, 1919. The first and second questions had to do with the effect on the distribution of legislative authority of the provisions of section 132 of the *British North America Act*[3] and of the International Convention. On these questions separate judgments were delivered by the Chief Justice and by Duff, Newcombe, Smith and Cannon, JJ.; Rinfret and Lamont, JJ., concurred in the answers given by Duff, J., to the questions submitted.

Newcombe, J., raised a preliminary question as to the propriety of answering the questions relating to the effect of the International Convention without the Court's having had the benefit of argument on behalf of the foreign governments whose interests might be supposed to be affected. He considered that one of the questions directed to this point should not be dealt with without these inter-

[1] 1919, c. 11.
[2] R.S.C. 1927, c. 3.
[3] Sec. 132 of the British North America Act is in the following terms: "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.

ested parties having been heard and that the inadvisability of its being answered should be called to the attention of the Governor General. Cannon, J., does not deal specifically with this point, but the remaining members of the Court considered that they were bound by the *Supreme Court Act* to answer the questions submitted as fully as the circumstances permitted, and this in their judgments they respectively do, the Chief Justice saying:

> While I agree with Mr. Justice Newcombe that the advisability of propounding for the consideration of the Court abstract questions, or questions involving considerations of debatable fact, is, to say the least, doubtful, and that it is undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it, or touching matters of such a nature that its answers must be wholly ineffectual in regard to parties that are not and cannot be brought before it (e.g. foreign governments), and that when the Court is asked to hear and determine any such question, it is entirely proper for it to represent to the Governor in Council the undesirability of its being called upon to do so . . . in the present instance I do not find in the questions submitted enough that is objectionable to justify the adoption of that course.

All the members of the Court were of the opinion that, apart from the existence of the Convention, the powers of Parliament in relation to aeronautics must be restricted to legislation under specific heads of section 91, such as "The Regulation of Trade and Commerce," "Postal Service," "Militia, Military and Naval Service and Defence," and "Naturalization and Aliens," and that Parliament acquired no general legislative jurisdiction under the head "Navigation and Shipping." Duff, J., dismisses the argument that this head extends to air navigation and aircraft with the remark that he is "unable to agree that navigation and shipping would 'according to the common understanding of men,' embrace the subject of aeronautics." Smith, J., says that the expression refers only to the navigation of the water and shipping plying on the water, referring in support of this interpretation of it to the New English Dictionary, and Cannon, J., briefly states the conclusion that "aviation, even if designated as aerial navigation, is not a subject enumerated in section 91." Newcombe, J., deals with the point a little more fully, expressing the view that

> "Navigation and Shipping" are words inapt and unauthorized to connote flight or the utilization of atmospheric resistance or buoyancy for the carriage of craft or traffic. Flight is one thing and navigation another. The way of a flying machine may in some respects be assimilated to the way of an eagle in the air, but not to that of a ship in the midst of the sea, which has been recognized as something different. Navigation consists in the exercise of a right of way, which may be enjoyed in the sea, in tidal and in

non-tidal water . . . This meaning is emphasized for the purposes of section 91, where the word is associated with "shipping."

He concludes that:

If the subject of "Navigation and Shipping" is to be extended to what, in the absence of a definitive name, has been described as "aerial navigation," that is a function to be discharged by the enactment of appropriate words and it belongs to the Imperial Parliament, not to this Court.

Having thus excluded the reference of the federal powers to the head "Navigation and Shipping," all the members of the Court proceed to give positive reasons for regarding the subject as falling within the legislative jurisdiction of the provinces under one or other of the heads of section 92.

Anglin, C.J., says that "legislative jurisdiction over intra-provincial flying—and there must be a great deal of it—*prima facie* belongs to the provinces under section 92 (13)" (Property and Civil Rights), and Duff, J., concludes that "primarily the matters embraced within the subject of aerial navigation fall within section 92" since

the provincial jurisdiction under heads 10 to 16 of that section extends through the air space above as well as the soil below; and the control of the province over its own property is as extensive in the case of aerodromes and air craft as in the case of garages and automobiles. The employment of aircraft for the survey, exploration, inspection and patrolling in the management of the public domain for police purposes and in the interests of public health (head 7) is as strictly a provincial matter as the employment of any other local agency for such purposes.

Smith and Cannon, JJ., refer particularly to the provincial jurisdiction as being exercisable under the head "Property and Civil Rights," the latter remarking that "the ownership of the air space is *prima facie* a subject within the exclusive jurisdiction of the provinces, and they alone can impose restrictions on the rights of owners of land and on those of owners of aircraft." Newcombe, J., quotes the maxim *Cujus est solum ejus est usque ad coelum,* and Article 414 of the Civil Code of Quebec, which declares that "ownership of the soil carries with it ownership of what is above and what is below it," expresses the view that the Courts have no authority to explain or qualify the principle thus established "so as to admit of the introduction of a public right of way for the use of flying machines consequent upon the demonstration in recent times of the practicability of artificial flight," and remarks that "the appropriate legislature may, of course, provide for airways as it has habitually done for roads and highways, notwithstanding the rights of the proprietors" from which "the right of way exercised within a province by

a flying machine must in some manner be derived." The Chief Justice concurs in the views expressed by Newcombe, Smith and Cannon, JJ.

On the question of the effect of section 132 and the International Convention on the distribution of legislative power, there are differences of opinion among the members of the Court. All of them are agreed that Parliament did not, by virtue of the International Convention, acquire, under section 132, exclusive legislative authority to legislate in such a way as to carry out the obligations the Convention imposes on Canada, but they equally agree that Parliament's jurisdiction is paramount, so far as the exercise of its authority is necessary in order that these obligations may be carried out.

Duff, J., refers to *Attorney General of British Columbia* v. *Attorney General of Canada*,[4] and says that "it is now settled, if indeed there ever was doubt upon it, that provincial legislation repugnant to legislation of the Dominion under section 132 is thereby superseded," and that the Dominion has full authority under that section "to give full effect to the rules embodied in the Convention and to take effective measures for the enforcement of them." He examines in that light the provisions of the *Aeronautics Act*, and some of those of the *Air Regulations*, 1920, upholding certain of them as valid and denying validity to others, but expressing at the same time his sympathy with the view that it is extremely difficult to make "what in practice will be regarded as a judicial pronouncement upon such a variety of questions, presenting, not in one or two cases only, but in many cases, points of no inconsiderable importance," especially "in the absence of adequate argument," of which he notes the practical impossibility.

Newcombe, J., on the other hand, says that

> The language of section 132 does not require, either expressly or by necessary implication, nor, I think, does it suggest, that a province should thereby suffer a diminution of the powers expressed in its enumerations or otherwise conferred, except to admit capacity, on the part of the Dominion, which, in relation to provincial obligations, is no more than concurrent, so long as these are not performed by the province. The case of obligations to be performed for which a province has become bound by treaty to a foreign country, though perhaps difficult to realize, is expressly provided for by section 132; and while, pending provincial non-performance, power is, by that section, conferred upon the Parliament and Government of Canada, I am unable to interpret the Dominion power as meant to deprive the province of authority to implement its obligations. If that had been the intention, I think it would have been expressed.

[4] (1923) 63 S.C.R. 293, at pp. 327-331; [1924] A.C. 203, at pp. 211-213.

Later, he expresses the opinion, that

> Dominion powers derived under section 132 should . . . be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined, "the Dominion being" by that section, authorized to exercise these powers for performing its treaty obligations and equally so for performing those of a province, . . . irrespective of the question as to where the power resided if section 132 had not been enacted.

He considers, however, that "the inexpediency or liability to miscarriage of a judicial attempt exhaustively to interpret and declare the conventional obligations when practical differences have not arisen and specific cases are not formulated, rests upon grounds so impressive and obvious as to justify a representation to the Governor-in-Council against the advisability of requiring an answer" to a general question which he regards as somewhat obscure, and accordingly he does not deal in detail with specific provisions. Anglin, C.J., and Smith, J., agree that to attempt to deal with them in detail would be a course which it would be scarcely possible to adopt on a reference of questions such as those submitted, the Chief Justice expressing the opinion that "it is necessary only to envisage the Convention as a whole, to ascertain its general tenor, to discern its obvious purpose and to determine a very few of the outstanding obligations imposed by it in terms so clear that their meaning admits of no dispute, and therefore does not require interpretation." He says that if the case were otherwise, he would be disposed to accept the views of Newcombe, J., as to representing the situation to the Governor-in-Council.

Smith, J., takes the same view as Duff, J., of the effect of the judgment of the Privy Council in *Attorney General of British Columbia* v. *Attorney General of Canada*.[5] He regards this decision as affording a conclusive answer to the contention that the powers of Parliament arise only on the failure of the provinces to take the necessary measures, and concludes that the powers of the provincial Legislatures exist only while the field is unoccupied, those of Parliament being paramount. He deals accordingly with some of the more important provisions of the Convention, the enforcement of which in Canada he considers to fall within the jurisdiction of Parliament.

Anglin, C.J., concurs with Smith, J., on these points, expressly disagreeing with Cannon, J., who seems to go even farther than Newcombe, J., considering that, although the jurisdiction of Parliament may be paramount, it should be exercised only if the provinces "refuse or neglect to do their share within their legislative

[5] (1924) A.C. 203.

ambit with sufficient uniformity to honour the signature of the Dominion," and concluding that, as this situation does not appear from the data submitted, it cannot be said that Dominion legislation on the subject of aeronautics is presently necessary or proper.

Duff, J., is, moreover, of the opinion that since the provisions of the *Aeronautics Act* were enacted in 1919, before Canada became a party to the International Convention, they remain invalid, notwithstanding their subsequent re-enactment as c. 3 of the Revised Statutes of 1927. He, however, and Smith, J., regard the questions submitted as directed to determining the validity of a corresponding statute if presently enacted, a view which is not shared by Cannon, J., who says that Parliament has not yet found it necessary or proper to exercise whatever legislative authority it may possess by virtue of Canada's adherence to the Convention. Anglin, C.J., on the other hand, considers that the validity of such of the provisions of the Act as are necessary to carry out the obligations imposed by the Convention may probably be upheld under section 132 by reason of the fact that the Act as it stands became law only on February 1st, 1928, long after the date of the Convention, and notwithstanding that its provisions had been previously in force. Newcombe, J., does not deal with the point.

Notwithstanding the differences of view thus outlined, the judgments delivered, taken together, seem to go far towards establishing the international unity of the Dominion, a subject upon which, in the last number of the *Queen's Quarterly*, there is a most interesting discussion by Professor B. K. Sandwell. He points out the importance of there being, in every country with a federal constitution, some internationally recognised authority invested with adequate power to put into force, within the whole territory, the provisions of any treaty which it is considered advisable to enter into, and criticises the constitution of the United States as not meeting what is required in this respect. All the judges of the Court concede to the Dominion adequate jurisdiction to fulfill all international obligations arising under a Convention of the kind under consideration. Two of them appear to consider that this jurisdiction, so far as its exercise affects the provincial field of legislative jurisdiction, arises only if and to the extent that what is necessary is not done by the provinces, or there is at least a lack of uniformity in the action the provinces take, but in the opinion of the remaining five it arises forthwith upon the treaty being made and independently of anything the provinces may do or refrain from doing.

Ottawa.

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