

I cannot better conclude this brief sketch than by quoting and applying to himself Blake's own words in the appreciation he wrote some two or three years ago of our mutual friend Jack Moss.

"Some faint memory have I of an old writer who pictures the children of men as little images hanging some high, some low, above a sullen pool. A thread is cut, an image falls, the ripple spreads; or high or low it soon dies upon the face of the unrecording water. Ay, but here it has touched many lives—touched and brought them that with which they will not readily part."

Surely the memory of "Billy Blake" and all he was shall long endure.

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DIPLOMACY AND INTERNATIONAL STATUS.

No man can spend even a few years in the law school of any Canadian university without becoming painfully conscious of the difficulty of interesting more than a small handful of students in such subjects as constitutional law and public international law. Their down-town advisers warn them solemnly against spending too much time upon subjects which are "not practical," by which is meant that they are not a direct source of income in the office. Even using the word in this narrow sense it may well be doubted whether these old-fashioned practitioners are right, since the experience of countries other than Canada has by now proved fairly clearly that the most successful practitioners are usually also the best educated men. If we give to the word "practical" a broader and a truer meaning, it is manifest that the intelligent study of these subjects has a most direct practical bearing upon the "peace, order, and good government of Canada." Furthermore, the rapid international development of this country has now disclosed to us another practical result of our long continued neglect of cultural legal study. We are venturing into the difficult field of diplomacy, and we find that we are almost wholly lacking in that class of specially qualified lawyers who in all older countries are deemed indispensable to the intelligent handling of international business.

The public discussion of the treaty-making power in the popular press has become involved in such confusion, and has been clouded with so much political and sentimental irrelevance, that it seems permissible to use the pages of a learned review for an effort to set

down a rational statement of the main legal questions involved, without any reference either to sentiment or to politics.

The treatment of this question in the press has been very largely marked by a persistent confusion between the constitutional and the international aspects of the problem, although the difference between them is really simple and obvious. In so far as the treaty-making power of the Empire is a matter for discussion and agreement between Great Britain and the Dominions the question is purely one of the constitutional law and practice of the British Empire. It is only in so far as the results reached by such agreements are recognized and accepted by other nations that the question becomes one of international law or international status. International law is wholly a matter of the actual practice of states, and no adjustments of any kind effected between Great Britain and the Dominions can either diminish or increase the international status of Canada unless and until they are recognized by the other nations of the world.

Let us then begin by examining the constitutional aspect of the problem. How do matters stand at present between Canada and Great Britain?

It may be said at once that the right of Canada to negotiate her own treaties has become an accepted and established part of constitutional practice. Perhaps I should say "agreements" rather than "treaties," since such conventions as the trade agreement negotiated with Germany in 1910 through the agency of the German Consul-General at Montreal were not cast in proper diplomatic form and never required formal ratification. The distinction, however, is one rather of form than of substance, and in recent years even the British government itself has shewn a remarkable disposition to conclude agreements of the highest importance without observing the traditional forms of diplomacy.¹ What is really important is the course of practice. Without going into details it may be stated broadly that in the early days of diplomacy relating to Canada the negotiations were usually dominated by the British representatives. As time went on the position of the Canadian representatives on these occasions was gradually improved. From the status of mere advisers definitely subordinate to the British diplomatists they came in course of time to acquire the actual control of the negotiations, and therefore they naturally became the proper persons to sign the final instru-

¹ For example, the San Remo oil agreement of 1920 was described as a "Memorandum of Agreement between M. Philippe Berthelot, Directeur, etc. . . and Professor Sir John Cadman, K.C.M.G., etc. . ." Instead of being ratified by the King, it is described as having been "confirmed" by Mr. Lloyd George and M. Millerand. It is much to be hoped that this irregular method of contracting international obligations will not become permanent.

ments in which the agreements were recorded. The usual practice of associating the British representatives with the signature of the treaty or agreement was not followed in the case of the "Halibut Treaty" signed at Washington in 1923, but this variation in a point of form is without constitutional significance and does not merit the attention which it excited in the press at the time. A treaty can always be signed by any duly accredited agent, whether or not he be a citizen of the contracting power, and the individuality of the agent is wholly immaterial. What is of real importance is to fix the identity of the contracting party—to decide whether it is Canada or Great Britain.²

In general terms we may therefore say that in the year 1923 the control of treaty negotiations by the Dominions through representatives of their own choosing had become an accepted rule of the constitutional practice of the British Empire. That being so, it was obviously quite proper for the Imperial Conference of last year to place on record its approval of the existing practice. It would be contrary to the precedents of that dignified assembly to pass resolutions that made any practical difference to anyone concerned, and in recording its views upon the treaty-making power it proceeded, as usual, upon eminently safe lines. The resolution says in effect that the Dominions are quite at liberty to negotiate through their own representatives whatever treaties they please, but it is hoped that no member of the Empire will enter into relations affecting the other members without letting them know. I believe it is true to say that for many years past these obvious rules of good feeling and fellowship had been generally observed both by the British and by the Dominion governments.

This brings us to the one remaining constitutional question of real difficulty and importance that still awaits final solution. The very nature of the Imperial Conference precludes that body from attempting to pronounce authoritative decisions upon questions of real difficulty, and the ultimate settlement in this, as in many other cases of constitutional conventions, will probably be found in the gradual development of a uniform constitutional practice.

Upon whose authority is a treaty to be ratified? Every treaty, before it can become binding, passes through three distinct stages—negotiation, signature, and ratification. Over the first two of these stages it is now generally agreed that the Dominion concerned has in each case undisputed and undivided control, subject to a moral

² Since the signature of Sir Auckland Geddes was withheld under instructions received by him from the British Foreign Office, it is manifest that the incident throws no light at all upon the question of Great Britain's right to control the proceedings.

obligation to communicate with other members of the Empire whose interests may be affected. The question of what authority is to control the final and most important stage remains to be decided.

This question is not one of form. The form of ratification is not in dispute, and so long as we have one King for the whole of the British Empire the ratification of all treaties concerning either the whole or any part of that Empire will still be effected by His Majesty's signature. But the King takes no political action upon his own initiative or responsibility, and the substantial question therefore is whether the final responsibility for advising the royal ratification rests with the Cabinet of Great Britain or with that of the Dominion concerned. In the decision of this question political issues are involved and political arguments are put forward.

One party maintains that the unity of the Empire demands the final control of all international relations by the Cabinet in London. The other party contends that the admission of such a veto would invade the autonomy of the Dominions, and would violate the principles of democracy by making the will of the Canadian people subject to an authority beyond its control. This Review is in no way concerned with political controversies, and I shall therefore not attempt to weigh the merits of these respective arguments beyond observing that each is unquestionably valid, so long as its fundamental premise is conceded.

To us as lawyers falls the more prosaic task of studying the actual practice, and inquiring to what extent it is sufficiently uniform to justify us in concluding that there is an accepted conventional rule upon the matter. It is a commonplace of the text-books to say that our constitution is very largely conventional in its nature, and in the establishment of a conventional rule practice is everything. If the practice is so variable as to leave room for conflicting theories, then, as in the similar case of international law, we can only conclude that no rule as yet exists.

Let us begin by admitting that in the older theory of colonial relations it was accepted by all parties that the Cabinet in London should have the ultimate control of all international business affecting the Empire or any part of it. Anyone who cares to refer to the controversies over the grant of "responsible government" in the days of Lord Durham and Lord John Russell will see that the principle of colonial subordination in foreign affairs was fully admitted by the most stalwart champions of local autonomy. Perhaps we may even go so far as to say that the principle of the Imperial veto upon all formal treaties negotiated by the Dominions was fairly generally

admitted down to the outbreak of the European war. At the same time it is material to observe that the admission of this principle led to one important innovation in practice, that is to say, the negotiation of agreements which were not treaties in form, but which produced the same practical consequences. Let me here refer again to the case of the tariff agreement negotiated with Germany in 1910. This agreement was negotiated between Mr. Fielding and the German Consul-General in Montreal, who was specially authorized by his government to act in the matter. On the Canadian side it was carried into effect by means of an order-in-council made under statutory powers. No ratification was necessary, and except for the formal act of the Governor-General in signing the order-in-council the British Cabinet was given no opportunity of exercising any control over the transaction. The moral to be drawn from this and some other agreements of a similar character is that the assertion of a right of control over diplomacy which follows the regular channels acts as a natural incentive to the Dominion governments to employ informal methods.

Admitting then that the British right of veto over formal treaties negotiated by the Dominions was fairly generally conceded up to 1914, we have next to inquire how far the precedents established since the war have modified the older doctrine. In this connection we may disregard the association of Dominion representatives with the signature of the peace treaties and the ingenious diplomatic formula by means of which their names were introduced into those documents. Nor would it be safe to attach any general significance to the scheme by which the Dominions have been given a standing in the League of Nations, for the League of Nations is an entirely abnormal and unique institution, the precedents of which have no bearing upon the general principles of either constitutional or international law.

The participation accorded to the British and the Dominion parliaments in the ratification of the peace treaties of 1919 requires to be noticed, but it has no direct bearing upon the question of the imperial veto over treaties negotiated by the Dominions. Let me here say again that it is an inaccurate use of language, in view of our actual constitutional law, to speak of a treaty being "ratified" either by the British or by any other parliament. In the United States ratification is a joint act of the President and the Senate, but with us the only ratification which is effective to make a treaty binding is the King's signature. All that the various legislatures can do is to pass resolutions empowering the ministers to advise the

King to ratify the treaty. Furthermore since important treaties frequently affect the municipal law of the countries concerned, it is often necessary to invoke the assistance of the legislatures to enact the consequential changes in municipal law which the terms of the treaty require. These incidents, however, are all matters of internal government, and nothing that is done or left undone by our legislatures can effect the validity of the treaty as an international obligation, except in those cases where the actual terms of the treaty make its effectiveness conditional upon legislative action.

What happened in 1919 may be briefly stated. The Dominion governments pressed upon Lord Milner the view that the King's signature should be withheld until the assent of the Dominion parliaments had been obtained. Lord Milner contented himself with reminding them that no parliamentary action was legally necessary for ratification, and the British government, having thus asserted its legal position, deferred to the wishes of the Dominions, and the King did not ratify the treaties until the approval of all the parliaments had been received. On the 2nd September, 1919, the Canadian Parliament, having been summoned for the purpose in special session, passed a resolution "that it is expedient that Parliament do approve of the Treaty" [of Versailles] . . . and that this House do approve of the same." In the debate the significance of the action that was being taken was fully explained to the House of Commons by the Prime Minister, Sir Robert Borden.

This solemn proceeding either meant something or it meant nothing. If it meant nothing, if it had no constitutional value or significance, then the whole business was an abuse of Parliamentary forms and the special summoning of Parliament was an indefensible waste of public money. Such a hypothesis cannot be entertained for a moment. If on the other hand the proceedings had a real meaning, then the only inference we can draw is, that by the new development of our constitutional practice the King is not conventionally justified in ratifying a treaty affecting Canada except upon the advice of the Canadian ministers supported by the Canadian Parliament. Since the British government in this matter concurred in the course of action proposed by the Dominions, and since the precedent of the Treaty of Versailles has now been followed in other cases, it follows that we are now justified in saying that the new practice has taken its place among the accepted conventional rules of the constitution.

At the same time it must be remembered that all this throws no direct light upon the problem of the veto. It does not establish a

rule that the London cabinet has no right to interpose between the Ottawa cabinet and the King, when Ottawa demands the ratification of a treaty negotiated and signed by Canadian representatives. Upon this vital point we have as yet no conclusive agreement, and it is only by clear agreement that the conventional rules of our constitution can be established. Whether such a rule should or should not be made is a question of policy with which this article is not concerned. As things stand at present, we have upon this question a great mass of unofficial controversial opinions, and one unilateral official pronouncement of great importance. When the matter of the "Halibut Treaty" came up for discussion in the Canadian House of Commons on the 20th March, 1923, the Prime Minister, in reply to a question, expressed it as his opinion that the King, in ratifying the treaty, should be guided by the advice of his Canadian ministers exactly as he would be guided by the advice of his British ministers, if the matter were one of purely British concern.³ I venture to think that this is perhaps the most important constitutional pronouncement which has been made by any Canadian statesman since confederation, and it is amusing to think that it attracted hardly any attention in the press, while a prolonged discussion took place about the comparatively trivial matter of Sir Auckland Geddes' signature. Being an entirely unilateral statement it is in no way binding upon the British government, which has been extremely careful not to express any official opinion upon the question involved. At the same time the history of our constitutional development shews us clearly that a claim which is not actively disputed may in the course of time pass, by a kind of prescription, into the category of propositions which are agreed. If Mr. King's theory is in practice accepted without protest, it will gradually establish itself as a conventional rule of the constitution. That is the way in which our constitutional law is built up.

To sum up the discussion of the constitutional question I will suggest that the following propositions can now be accepted as established:

(1) Canada has acquired by conventional practice the right to initiate, negotiate, and sign international agreements, both formal and informal, through her own representatives, subject to the moral obligation to keep the other members of the British Empire fully informed of any developments or proposals which may affect their interests.

³ Mr. King's words are reported as follows:—"I presume in regard to the treaty that His Majesty will act upon the advice of his government in this country, and such advice as the government will give His Majesty will be based upon approval by this Parliament of the legislation that is brought down."

(2) Canada has the right to demand that no treaty directly affecting her international obligations shall be ratified on her behalf and made binding upon her without the approval of the Canadian ministers supported by the Canadian Parliament.

(3) Canada has expressed an official opinion that the King should ratify any treaty solely affecting Canada upon the advice of his Canadian ministers, it being understood that this claim does not deny to the British or other cabinets the right of friendly representation and remonstrance. Should this opinion be acted upon without protest, it will gradually develop into an accepted rule.

It is well to repeat here that the significance of the events hitherto noticed is entirely constitutional and in no way international. Great Britain and the Dominions may make what arrangements they please among themselves concerning the transaction of their international affairs without infringing upon the principle that the Empire is one unit of international law, and not seven or eight. International status depends wholly upon international recognition. If other countries take notice of the new arrangements so far as to modify their own diplomatic practice and treat Canada as a distinct international unit, such action will constitute recognition.

In examining this question it is necessary to be more than usually accurate as to the use of our terms. For example, we should, as lawyers, entirely decline to discuss whether Canada is or is not a "nation." That word has no legal value, and is sufficiently ambiguous to make it the proper material of the newspaper writer and the platform orator. What we have got to ask is whether or not Canada is a recognized unit of international law.

Note further that the solution of this problem does not depend upon the question of political, military, or economic independence. The word "independence" is so difficult to define that it is better to eliminate it from the discussion. For example, such republics as Cuba, Haiti, and Panama have expressly placed their foreign relations under the control of the United States. They are in point of fact much more dependent upon the United States than Canada is upon Great Britain, nevertheless they are unquestionably distinct units in the eye of international law. From 1884 to 1899 Great Britain exercised a similar control over the foreign policy of the South African Republic and the Orange Free State, yet Portugal accredited a regular diplomatic envoy to Pretoria, and the South African Republic granted its *exequatur* to a consul-general of the United States. Other states, such as Belgium and Switzerland, have at various times limited their freedom of political action by neutrality

treaties, without thereby forfeiting their international status. On the other hand it is equally true that a semi-sovereign state may be recognized as independent in so far as to give its ruler the usual immunities of a sovereign, but such recognition does not necessarily mean that this state constitutes a person of international law. For example, Baroda is not a member of the family of nations, although it is not part of British territory, and the Gaekwar is treated in our courts as an independent sovereign. (See *Statham v. Statham*).⁴ Political independence may be, and usually is, one of the grounds or motives for according recognition, but the two questions are essentially distinct.

Nor again must we attach undue importance to the willingness of the United States to accept a Canadian diplomatic agent at Washington. As this matter at present stands, it amounts to nothing more than an administrative agreement for the more convenient dispatch of business. There is nothing to prevent the British Empire from accrediting two or more plenipotentiaries to Washington instead of one, and the agreement of the United States government to accept this arrangement as a convenient method of handling business cannot be interpreted as a recognition of distinct international status for Canada. Bavaria maintained a separate legation in London and other capitals before the war, yet this did not involve the recognition of Bavaria as a distinct unit of international law. Similarly the fact that Great Britain maintains a diplomatic agent at the Vatican does not mean that she thereby recognizes the Holy See as an international state, since the arrangement is one made with the consent of the Italian government. Whatever procedure may be adopted for the transaction of Canadian business at Washington, it is, I believe, understood that any agent appointed to a permanent position will carry credentials granted by the King, and in that case it is obvious that the diplomatic unity of the Empire is not severed, and that there is no recognition, either by Great Britain or by the United States, of Canada as a new unit in the eyes of international law.

Furthermore it must be remembered that recognition, if it is to be effective, must be general. Special circumstances may arise making it necessary or convenient for a particular state to enter into diplomatic relations with one or two others, but these local and special relations need not involve recognition by the world at large. For example, the Kingdom of Nepal maintains formal diplomatic relations with the King of England as Emperor of India, the Nepalese

⁴ [1912] P. 92.

envoy being accredited to the Foreign Office of the Indian Government, but Nepal cannot be regarded as an international state since it has no dealings of any kind with any other power. The treatment of a state by the whole body of civilized nations is the one real test of international recognition. Wherever such treatment amounts to general recognition, then the fact that the foreign relations of a particular state, such as Cuba or Panama, may be controlled by a stronger power does not deprive the small state of its international character. Where such treatment is absent, then the importance or practical independence of the country in question, such as Canada or Ireland, cannot operate to make it a unit of international law.

The numerous historical precedents upon the question of recognition do not help us greatly in considering the case of Canada, since the modern development of the British Empire is really a thing without precedent. The peaceful and friendly emergence of new units out of old is almost a new experience for our warlike world. Such problems of recognition as have arisen in the past deal generally with two main types of cases. On the one hand we have those cases where a revolutionary government has displaced its predecessor, while the other group of cases consists of those in which a particular area has revolted and detached itself from the original state. The question of the recognition of the Soviet government falls under the first head, and the question of recognizing such units as Esthonia and Latvia falls under the second. In either case recognition by other powers can only follow upon the successful completion of a hostile movement against the original government, which has a right to take offence if the act of recognition is premature.⁵

In the case of Canada there is no question of any revolt against Great Britain, and the whole course of constitutional development has been a friendly re-adjustment of their relations by mutual agreement. That being so, for any foreign power to intervene in these discussions and say that it recognized Canada as an international state would obviously be an unfriendly act towards both countries. So long as the adjustment of the constitutional relation remains a domestic question between the various members of the Empire no foreign power can with propriety intervene. Although it may hardly seem necessary to remind lawyers of this elementary proposition, yet we may remember that annoyance was expressed in some Canadian newspapers when no invitation was extended to Canada to attend

⁵ In the case of new governments or states formed as the result of war, there is a further important distinction between recognition *de facto* and recognition *de jure*, but I do not dwell upon these refinements, since they cannot affect the case of Canada.

the Washington Conference in 1922. In this matter the United States government acted with its usual scrupulous regard for correct diplomatic usage. As things stood, the composition of the British delegation to Washington was entirely a matter for domestic arrangement between the constituent members of the Empire. If President Harding had sent a direct invitation to Ottawa, that invitation would have been an act as definitely unfriendly as would have been the premature recognition by Great Britain of the Confederate States during the American Civil War. In fact it would have been much less excusable, since in the earlier case it would at least have been reasonable for Great Britain to argue that the authority of the United States had been forcibly excluded from the area under Confederate control. For a premature recognition of Canadian independence there could be no possible excuse, and such an act would be a serious violation of the rules of international comity.

Apart from the curious position accorded to the Dominions as voting members of the League of Nations I cannot see a single instance of diplomatic action which justifies us in saying that Canada has obtained recognition as a unit of international law. Since the League of Nations is not itself an international state, it is obvious that arguments based upon its peculiar organization can have no bearing upon the question under discussion. Furthermore it must be remembered that three of the most important nations in the world are not yet members of the League, and therefore have no responsibility for any arrangements which it may make.

Whether or not the recognition of Canada as an international state is desirable is a question of policy wholly beyond the scope of this article. Assuming it to be desirable we can all agree that it ought only to be carried through by regular diplomatic process and in complete harmony with the views of the British government. If that is so, then the first step must obviously be negotiation and agreement between Great Britain and Canada. When agreement is reached, other nations might then be invited to take notice of the fact and to modify their diplomatic practice accordingly. Everything subsequent to that would necessarily be a matter for the discretion of the various powers concerned. Recognition would presumably take effect through the organization of complete diplomatic and consular services, which would in each case be accredited by and to the Canadian government. Such a development would not prevent Canada and Great Britain from sharing a common King or a common court of appeal. In other words it would be entirely compatible with the continuance of the present constitution of the British Empire.

So far no proposals of this kind have been made, nor have we been given any reason to believe that they are being considered in official quarters. Until such action is taken we have no ground whatever for saying that Canada has obtained any recognized status as a unit of international law, even though the control of London over Canadian foreign policy may have dwindled to little more than a right of consultation and remonstrance.

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Note:—The discussion provoked by the Treaty of Lausanne has arisen too late for treatment in this article. I venture to submit that the questions involved should be approached in the light of the precedents already established.—H. A. S.

"CARE" IN THE LAW OF NEGLIGENCE.

There is no branch of the law with which our courts are so frequently called upon to deal, and none which presents such difficulty in presentation and determination, as that relating to injury to person or property incurred through negligence; and there is none which has been subjected to so much variety, in jurisprudence and terminology, in the course of judicial development.

When the student examines the many decisions from *Coggs v. Bernard*¹ in 1703 to the present time, and tries to follow the reasoning by which cases are followed, disapproved, distinguished, overruled, and when he encounters in this pursuit expressions such as "Contributory negligence," "Ultimate negligence," "Proximate cause," "Causa causans," "Causa sine qua non" *et hoc genus omne*, he must be inclined to exclaim with Lord Dundreary that "this is one of the things no fellow can understand."

Care, or the precautions which should have been taken to avoid causing the injury complained of, is an essential feature of every case of negligence, and the following views are presented in the belief that it has been dealt with by writers and referred to by judges in a way calculated to perplex rather than enlighten the student, and in the hope that to some slight extent this confusion may be lessened.

Of our writers on the Law of Negligence, while Addison and Pollock have dealt with it somewhat fully in their works on the generic subject of Torts, the late Mr. Beven is the only modern author who deals with it exclusively, and it is certain views of his which will constitute the text of this article.

¹ 2 Ld. Raym. 909; 1 Smith, L. C., 12th ed., 191.