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CANADA AND THE TREATY-MAKING POWER.

By THOMAS HODGINS, M.A., Judge of the Admiralty Court.

THE claim advanced on behalf of Canada for enlarged treaty-making powers has been criticised and excepted to by several English periodicals. One says that "the granting of authority—even by Act of Parliament, which is, of course, liable to repeal—to a colony of unrestrained power of making treaties with foreign countries, is incompatible with the principles on which the union of England with her dependencies, as an Empire, is based." Another says that for the Crown to confer the treaty-making power upon Canada "would mean the dissolution of the integrity of the Empire." The claim, as formulated by the Premier of Canada, is that the enlarged treaty-making power shall be subject to the same regal assent, or veto, as is Canada's law-making power; for, as Mr. Lucy in his interview reports, the Premier "was careful to point out that it was not an absolute power of treaty-making that the Dominion demands. Treaties will be subject to the veto of the Sovereign; and if such veto is decreed, that will be an end of the matter."

Neither this colonial treating-making power, nor the colonial veto on Imperial treaties affecting the colonies, are such constitutional novelties in the government of British dependencies as has been assumed by the periodicals referred to.

The East India Company, by virtue of their Royal Charter, often exercised an independent treaty-making power. In 1791-3, a treaty between the Nabob of Arcot in the Carnatic and the East India Company came before the English Courts; and it was held that, although the Company were mere subjects with relation to Great Britain, their political treaties, under their delegated sovereignty, with a foreign sovereign state, were the same as treaties between two independent sovereignties, and were not reviewable by the Courts of the Empire. Lord Chancellor Thurlow, during the opening argument, intimated that the Company, being merchants and sovereigns at the same time, and without inquiring whether they were independent sovereigns, or executing a delegated sovereignty, had to show that "their territorial possessions qualified them as a realm in a separate capacity;" and he added—what is germane to the present discussion:—"If the point were recent, a nation would be bound effectually by the signing of a plenipotentiary; but that is certainly not now understood to be so till the ratification of the treaty, for that is one of the terms contracted for in those treaties." (3 Brown's Ch. Cases, 292; 2 Vesey, Jr., 56). And the Judicial Committee of the Privy Council, in 1880, held that an arrangement made between a former King of Oudh and the East India Company, took effect as a treaty between two sovereign powers. (16 Indian Appeals, 175).

India has its Foreign Office, which conducts British-Indian foreign relations with Afghanistan, Nepal, Bhutan, and other conterminous countries; and its diplomatic agents in the Persian Gulf, Muscat, and Turkish Arabia, deal directly with their local sovereignties respecting matters affecting the foreign and commercial interests of India in those countries.

The Diplomatic Records of the United States furnish abundant precedents of non-ratified treaties after their signature by the accredited plenipotentiaries of their own and other nations, whereby, after their "customary disfigurement by the Senate," as Ex-President Cleveland has termed it, they become ineffectual and inoper-

ative. And a Presidential veto may be found in the case of the Anglo-American treaty signed in London in 1806, by Mr. Munroe (afterwards President) and Lord Auckland, and others. President Jefferson refused to assent to it, or to submit it to the Senate for ratification, because it did not contain an Article abandoning Great Britain's claim to the impressment of British seamen found on foreign ships on the high seas.

Mr. Justice Story in his work on Constitutional Law thus defined the status of the former American colonies: "The Colonial Legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were *sovereign* within the limits of their respective territories." And the Judicial Committee has lately held that the present Canadian legislative bodies are in no sense the delegates or agents of the Imperial Parliament, but have, within the limits prescribed by their Constitutional Act, legislative authority as plenary and ample as the Imperial Parliament, in the plenitude of its power, possessed and could bestow.

And that Act has also conferred this treaty power on Canada: "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."

If then, the East India Company (composed of subjects of the Crown), and the former American proprietary and charter colonies, exercised the powers of sovereignty as above defined, by what constitutional or revolutionary process could "the dissolution of the integrity of the Empire" be accomplished, if Canada, with her larger executive and legislative powers, which by her Constitutional Act are declared to be "vested in the King," should be endowed with the treaty-making powers of the former East India Company?

The Canadian right to veto, or assent to, Imperial treaties with the United States was recognized in the Reciprocity Treaty of 1854—negotiated by Lord Elgin, Governor-General, on the advice of Sir F. Hincks, then Premier. That treaty was to "take effect as soon as the laws required to carry it into operation shall have been passed by the Imperial Parliament and the Provincial Parliaments of the British North American Provinces."

The Washington Treaty of 1871 recognized Canadian local and fiscal sovereignty by providing that: (*a*) "The Government of Her Britannic Majesty *engages to urge* upon the Government of the Dominion of Canada," (*a*) to secure to the citizens of the United States the use of the Canadian canals "on terms of equality with the inhabitants of the Dominion;" (*b*) not to impose any export duties on goods conveyed in transit through Canada to places in the United States; (*c*) not to levy an export duty on lumber or timber cut in the State of Maine, and floated down the St. John river to the sea. And the right of veto was conceded by providing that the Canal, Transit, and Fishery Articles "shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament and the Parliament of Canada."

The Fisheries Treaty of 1888, negotiated by Mr. Chamberlain, M.P., the British Minister, and the Canadian Minister of Finance, provided that it should be ratified by the Crown, after having received the assent of the Parliament of Canada, and of the Legislature of Newfoundland. But the United States Senate declined to ratify it.

So the French Commercial Treaty of 1893, negotiated by Lord Dufferin and Sir C. Tupper, provided that it should receive the sanction of the Parliament of Canada prior to its ratification by the Governments of Great Britain and France.

What is now claimed is the initial power of treaty-making respecting treaties with the United States which may affect Canadian commerce, carrying trade, fisheries and other international matters, and more especially

those which affect, or dismember, Canadian territory for the benefit of the United States; a right, on lines as to international boundaries, similar to that recognized in the Imperial Act of 1871: "The Parliament of Canada may, with the consent of the Legislature of any Province, increase, diminish or alter the limits of such Province, upon such terms as may be agreed to by the said Legislature."

The claim is pressed because of the many instances of how, "in by-gone days" (as an ex-Under-Secretary for Foreign Affairs has written) "British diplomacy has cost Canada dear."

British treaty gifts of Canadian territory commenced with the Treaty of Independence, 1782-3, when the Ohio and Mississippi valley of the Canada ceded by France to Britain in 1763—now comprising the States of Ohio, Indiana, Michigan, Illinois (with its Chicago), Wisconsin and Minnesota,—which had formed no part of the revolted thirteen colonies, was gratuitously ceded to the United States: "An instance," says an American author, "of the sacrifice of territory, of authority, of sovereignty, and of politicai prestige, unparalleled in the history of diplomacy."

In 1814, the British army and Canadian militia conquests of Maine and Massachusetts to Penobscot, on the Atlantic coast, and of Michigan and the western territory to Prairie-du-Chien, on the Mississippi, and part of Oregon, during the war of 1812, were restored to the United States—without insisting upon the territorial boundaries obtained for Canada by the war, and rightly claimable under the international doctrine of *uti possidetis*.

In 1818, another large territory of the French Canada of 1763, extending from Lake Superior west, and including the district about the upper waters of the Mississippi, which the American plenipotentiaries of 1782 reported to Congress "was then possessed by Great Britain," and also including the Red River valley, which the Hudson's Bay Company had granted to Lord Selkirk in 1814, and further west to the head waters of the Missouri river (now Dakota and adjoining territory), "went," as a Canadian historian has said, "to satisfy the thrifty appetite of the Republic."

In 1842, Lord Ashburton, in ignorance of the boundary lines on the Franklin "Red Line Map of 1782," ceded over 4,600,000 acres of Canadian lands; and, by extending Maine 86 miles north into Canada, placed a barrier between Montreal and the Atlantic. The map had been discovered by Dr. Sparks, of Harvard University, in the French Archives, and forwarded to Mr. Webster. In his report to the Senate Dr. Sparks stated that the red boundary line throughout the United States, "is exactly the line now contended forby Great Britain." And Greville's Memoirs record: "Lord Ashburton told me it was very fortunate that the map did not turn up in the course of the negotiations. Nothing, he said, would ever have induced the Americans to accept that line and admit our claim; and, with such evidence in our favour, it would have been impossible for us to concede what we did."

In 1846, Oregon, with its splendid harbours on the Pacific coast,—after many years' joint occupation by Great Britain and the United States under treaties, which were national acknowledgments of a joint sovereignty and territorial title,—was also abandoned, and ceded to the United States owing to the British yielding to the threat: "54° 40′ or fight," and apparently agreeing with Lord Ashburton that Great Britain's right to the territory was "nothing but a mere question of honour."

In 1871, Britain agreed that the Fenian Raid claims of Canada, amounting to over $1,600,000, should be made against the United States; but owing to the ambiguous wording of the Despatch proposing a treaty to settle the Alabama, Canadian and other claims, the United States rejected them, alleging that "they did not commend themselves to their favour," a denial of justice which the then Colonial Secretary acquiesced in, by say-

ing that "Canada could not reasonably expect this country should, for an indefinite period, incur the constant risk of serious misunderstanding with the United States." In Hall's International Law the accountability of the United States was thus stated: "It would be difficult to find more typical instances of national responsibility assumed by a State for such open and notorious acts as the Fenian Raids into Canada, and by way of complicity after such acts."

The miscarriage of justice in the Alaska case, and the "scant consideration" which Canada's protest against the appointment by the United States of declared partisans, as "impartial jurists of repute," to the tribunal, "received from the Colonial Office," justify Canada's demand for larger treaty-making powers. That miscarriage is, by two of the British Canadian jurists, attributed to Lord Alverstone's joining with the two American members, and when delivered and agreed British answer to the question: "What channel is Portland Channel?" by striking out words which changed the course of the boundary line from the *north* passage, and deflected it into the *south* passage, as to which the President, in each of his printed judgments, expressed "serious doubt whether Vancouver intended to name Portland Channel to include the Tongas (south) passage." In altering the original answer, and abandoning his doubt, he reversed the treaty direction that: "the line shall ascend to the *north* along Portland Channel;" and also one of his confirmatory findings of fact, that, in 1869, an island, immediately north of the entrance to the *north* passage was "on the boundary between Alaska and British Columbia"—the crucial question in controversy. By so doing he transferred to the United States two islands which were legally within the territorial sovereignty of Great Britain, as part of the Dominion of Canada.

Then as to Lynn Canal. By the law of nations it is an inland territorial water, and subject to inland sovereignty, as if it were land; the same as Bristol Channel, The Wash, Solway Frith, Southampton Water and other British territorial waters; as also Chesapeake Bay, Delaware Bay and Boston Harbour. That law declares, and the municipal laws of Great Britain and the United States recognize, that a line from headland to headland across the six-mile mouth of each of such inland territorial waters is the political and territorial continuation of the elevated coast line;—or as American law enacts, "a straight line from headland to headland is equivalent to the shore line,"—and also the dividing line between the sovereignty of the submerged land and the ocean,—which, as the common highway of all nations, is subject to no sovereign. In his published reasons, Lord Alverstone said, "No one coming from the interior and reaching Lynn Canal would describe himself as being on the Ocean." Yet by joining with the disqualified American members in holding that the inland waters of Lynn Canal were "Ocean;" —thereby negativing his own finding, and the long recognized interpretation given to that term by International Law—Canada's territorial rights on its upper shores, and her territorial access to the Pacific Ocean, by a long and narrow strip of [illegible] were effectually, and [illegible]

A [illegible] diplomatic and disastrous case, rather than a judicial [illegible] "impartial jurists of [illegible] overshadows this Alaska [illegible] award, and when added to [illegible] previous [illegible]matic and dismemberments of her original territorial heritage, emphasizes the claim now formulated for enlarged treaty-making powers subject to the veto of the Sovereign.

(Reprinted from "The Canadian Magazine," March, 1904.)