MINUTES OF A MEETING OF A GROUP ON CANADIAN CONSTITUTIONAL PROBLEMS, HELD AT THE HOME OF T. H. SHEARD, on TUESDAY, February 11, 1936, at 8.15 p.m.

Present:

John Bird
A. S. Brunneau
C. S. Challies
Brooke Claxton
Monteath Douglas
P. S. Fisher
H. R. McCrudden
F. R. Scott
T. H. Sheard

In introducing the discussion Brooke Claxton said that the only statute bearing on this question is the War Measures Act R.S.C. Ch.206 sec.2, enacted first in 1914. This gives the Governor General in Council wide general powers in the event of war but does not deal specifically with the implementing of International obligations. It gives no power to impose sanctions. There is also Section 132 of the B.N.A. Act which reads 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."

Strictly speaking the section only expressly covers the obligations of Canada under treaties made as part of the British Empire, and if the present tendency of the Privy Council to interpret this section liberally is not continued it may require to be amended to cover the obligations of Canada with the rest of the world.

There is also a residue of power contained in the Royal Prerogative; and the King, that is the Government of the day, can, without consulting Parliament, declare war and make peace. But whether or not the Royal Prerogative could be exercised with respect to war and peace by the Governor General was at least doubtful. It was moreover doubtful if the government had power to impose sanctions.

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The speaker then briefly discussed the international constitutional position of Canada from 1867, to date, making the observation that, if a book on the subject were contemplated, this historical side of the question would require fairly complete treatment as it was quite impossible to understand the present position without this background.

Up to the outbreak of the War Dominion participation in foreign affairs was almost limited to the Dominion Ministers at Imperial Conferences being given by the British Foreign Secretary a polite account of English foreign policy. There was, however, no intention that the Dominion Ministers should take any active part inthe formulation of policy. In 1916-17 the Imperial War Cabinet was formed in which Borden, Smuts, Botha and Hughes sat in with Lloyd George and the other British Ministers. Borden, as much as Laurier, stood stoutly for Dominion rights; and, thanks to his efforts the Imperial War Cabinet passed a resolution that after the War an Imperial Conference should consider the changes in Dominion status.

After the Armistice Borden's claim to equal representation as the small countries at Versailles was granted and it was agreed that one out of five British delegates was to come from the Dominions. Canada was one of the signatories of the Versailles Treaty and of the Covenant of the League of Nations. This had generally been taken to set the seal on her nationhood.

Before the treaty was signed Sir George Foster announced in the House of Commons that the British government had agreed to the appointment of a seperate Canadian Minister to Washington, but this post was not filled until 1926.

In 1922 on the occasion of the Chanak incident, Lloyd George and Churchill sent the famous telegram asking Canadian assistance in case of war but Mackenzie King refused to commit Canada before Parliament had assembled and discussed the matter.

In 1923 the Halibut Treaty with the U.S. was signed by a Canadian alone, but under the usual powers.

At the Imperial Conference of 1926 Balfour made his famous declaration that "the Dominions were autonomous communities within the British Empire in no way subordinate one to another", etc. etc. Hertzog in South Africa, Cosgrave in Ireland and Mackenzie King in Canada interpreted the declaration as meaning the equality of the Dominions with Great Britain, and Hertzog claimed this gave South Africa the right to remain neutral if

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Great Britain were at war. But during the boom period in Canada constitutional questions were more or less forgotten.

In 1931 the Statute of Westminster was enacted with a restatement of the phrase of the Balfour declaration re autonomous communities etc. in its preamble.

Australia and New Zealand had not yet passed statutes to bring into force in these Dominions the Statute of Westminster.

In South Africa in 1933 Smuts and Hertzog formed a union government. In 1934 they introduced the Status of the Union and the Royal Executive Functions Acts which are unique. The minister moving first reading of the bill stated that it did not go further than the actual constitutional position.

The preamble calls South Africa a sovereign state as defined in the preamble of the Westminster Statute. The executive government, as to any aspect of internal or domestic affairs, is vested in the King, or rather his representative the Governor General as advised by his South African ministers. Here we see for the first time the Governor General given by Statute the same powers as the King. South Africa also was given her own seal. The Statute of Westminster was re-enacted in toto in the Status of the Union Act.

Since this legislation the South African government can pass orders-in-council authorising the execution of an instrument by the Governor General in South Africa with full international legal effect - even though neither the King nor any Imperial minister had intervened.

The Bill was opposed by reactionaries as a virtual declaration of independence, and by the Nationalists because it did not go far enough. Smuts and Hertzog had hoped that the Act would settle for all time the question of South Africa's status. However, as it turned out Dr Malan and his Nationalists criticised and still criticise the act.

After this historical introduction, Mr Clarton then treated the three main problems, namely:

1. Has Canada power to discharge all her international obligations?

2. Can Canada preserve her neutrality even in the event of Great Britain going to war?

3. What statutory changes are necessary to preserve this neutrality or discharge her obligations?

1. Canada can make treaties herself and these will be recognized by other states as being treaties of a separate state. There is no doubt on this question.

Section 132 of the B.N.A. Act is archaic in its present form. Under British constitutional law no treaty binds subjects until it has been implemented by legislation but s.132 only deals with the obligations of Canada as part of the British Empire. In 1867 no one foresaw that Canada would ever make a treaty that concerned only Canada and a foreign country.

Professor N. A. MacKenzie had suggested that in order to bring s.132 up to date that it be amended as follows:

> "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof towards foreign countries arising under treaties, conventions and agreements with such foreign countries."

Mr Claxton felt that such amendment was desirable but not absolutely necessary since the judgments of the Privy Council in the Radio and Aeronautics cases.

Now has Canada the power to implement International Labor Conventions by Dominion legislation? Mr Bennett did so in 1935 and the Supreme Court and Privy Council will soon decide the validity of his action. If the decision is against the Dominion Section 132 should be amended.

2. Canada could at any time secede from the British Commonwealth of Nations. A refusal to aid Great Britain in a vital war would really amount to secession. Whether or not Canada could remain neutral was a question of fact or policy not of Constitutional law. It would almost wholly depend on what the enemy did. Besides as had been pointed out by the D.C.R. Conference of 1933 and by Mr Stevenson neutrality was out of date - statements difficult to reconcile with current feeling in the U.S. and elsewhere. In any event the main effect of status legislation was political. It might be a bond of union, but it could only be passed by a united country.

3. Neutrality legislation like the recent U.S. legislation or the 1931 Spanish Constitution might be introduced in Canada. In Spain the League Covenant was enacted as part of the law of

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the landthereby subjecting all citizens to the obligation of supporting the covenant. There was no statutory authority for the Dominion Orders in Council passed in November last to impose sanctions against Italy. They were passed as an exercise of the royal prerogative, a method much more supple and therefore better than hard and fast neutrality legislation if they were legal, but might be necessary to pass legislation to give the power to the government.

Mr Claxton summed up his remarks by making the following recommendations:-

1. Amendment to S.132 B.N.A. Act to make clear Canada's powers.

2. At least a general public discussion either working towards a development as in South Africa, or rendering the same unnecessary. Legislation as in South Africa is undesirable at present as it would create too much difficulty and ill-feeling.

3. There is probably no need of "neutrality" legislation for we can act effectively without it.

SHEARD: One can divide the subjects into two parts:

1. Is Canada a sovereign State in the sense that it could remain neutral when Great Britain was at war?

2. What effect has the developement of Dominion status had upon the internal structure of Confederation?

He also referred to the attempt to restrict the prerogative in the matter of titles.

SCOTT: We must consider the question of neutrality and clearly define our position to the rest of the world otherwise we will find that some incident has precipitated us into war.

SHEARD: The mere passage of statutes would not itself suffice to ensure our neutrality. Moreover we cannot decide in advance if we wish to remain neutral in a particular case.

McCRUDDEN: Neutrality legislation in the U.S. has been a failure as present interminable arguments in Congress indicate.

SHEARD: In the U.S. the raison d'etre of neutrality legislation is to take from the executive this discretionary power and restore the control of the legislative branch of the government.

SCOTT: At present under the War Measures Act the Government can, by order in Council, cut off exports to any country in the event of war.

SCOTT and CLAXTON: questioned the legality of the Order in Council re sanctions as they interfere with private rights and international treaties can only interfere with such rights when legislation has been passed implementing such treaties.

SHEARD: This is scarcely a constitutional problem as there is no doubt the Dominion Parliament can legally pass any necessary legislation.

SCOTT: The B.N.A. Act vested the command of the armed forces of Canada in the Queen. Now how does this fact affect the constitutional position of Canada ? It is also to be observed that there is nothing to indicate that the King has delegated powers to the Governor General in any particular case.

CLAXTON: In South Africa opponents of the Union Acts asked what would happen if the South African ministers advised the King to go to war and British ministers advised peace. There was some suggestion that in such an eventuality the King would have a personal discretion to decide for himself.

SCOTT: We must clear up the vagueness of Canada's power to sign treaties. Why should treaties be signed and sealed by the King on the recommendation of British ministers? Canada should have a seal and sign manual of her own.

SHEARD: Practically speaking we must await the decision of the Supreme Court (and possibly the Privy Council) upon the recent references re Dominion power under s.132, before we can decide to what extent this section requires amendment. We should fight shy of any action which would precipitate a controversy re personal union.

FISHER: Could one not divide amendments into two types (1) those that are urgently needed; (2) those of mere theoretical value and less pressing importance?

For instance it took one month to get Hon. Charles Stewart appointed to the International Joint Commission. It is ridiculous that we cannot do this ourselves.

SCOTT: The purpose of this Group to prepare a program of amendments for public information. For this reason we can discuss theoretical questions.

SHEARD

SHEARD: Asked if the Group could agree on two points:

(1) There are certain gaps in our international constitutional arrangements that should be cleared up by statute. Such statutes should make it clear that all prerogative acts relating to Canada would be capable of being done by the Governor General on the advice of Canadian Ministers quite independently of the British Government.

(2) If the Supreme Court holds that the Dominion Parliament has not the power to implement foreign treaties then it should be given such power.

FISHER: In 1867 international treaties were not contemplated as being negotiated by the Dominion itself. The Fisheries Conventions were really not treaties. The provincial rights people will argue that anything could be slipped through by the Dominion under the guise of implementing a treaty.

CLAXTON: But if Canada is a nation she must have power to negotiate and ratify treaties. It is one of the risks or costs of association in a Confederation.

SCOTT: As the Privy Council pointed out in Bank of Toronto v. Lambe, the fact that a power may be abused is no indication that the power does not exist.

CLAXTON: There is a practical political check on the government for the premier who went too far would have to meet his electors and answer to them.

McCRUDDEN: Did Quebec before 1867 have the power to pass legislation to ratify and implement treaties entered into by the provinces?

CLAXTON: No! Imperial treaties applied to Canada.

McCRUDDEN: Wording of Resolution 30 of Quebec Resolutions indicates intention of Imperial government that Dominion should itself have power to implement and ratify treaties. But in later redrafts of this clause in the London resolutions and s.132 of B.N.A. Act this power became watered down or at least less clear.

SHEARD: The Privy Council might control the abuse by the Dominion of its powers.

Mr P. S. Fisher offered to provide the locale for the next meeting which, it was tentatively decided would take place on Tuesday, February 25th, 1936 at 8.15 at his home.