The Case of the Missing Constitution

Or, You Have Been Conned, Pal

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1. How it All Began

(This is a crime story so settle in for a wee read.)

Once upon a time there was a great and powerful Empire, the largest empire in the history of the world. It was the British Empire. It started at the end of the 1500's (Actually this is the *English* Empire we're talking about because Scotland was a separate nation and state for a good century after the English began their Empire 'project'.)

At its height, it ruled over India, Australia, New Zealand, Canada, most of southern Africa, parts of Western Africa, British Guiana, British Honduras, the West Indies and countless other smaller areas and islands. It controlled almost a quarter of the world's population and a quarter of the world's land mass and practically *all* the world's trade. And it only began breaking up after WWII.

2. The Chief Suspects (Who Benefits and Why?)

Because it was so powerful, the rulers of this empire and their officials could do pretty much whatever they liked. And they did. They made laws and enforced rules according to their own interests, with little or no concern for the rights of the people whose lands they controlled or for what, today, we would call justice or humanity.

And a lot of people at the top got very, very rich and very, very powerful. So when the unimportant people whose lands and wealth the British controlled decided that they would quite like their countries, (and languages, and history and culture and, of course their *resources*), back, the people at the top took 'stern measures' to 'suppress' these 'uprising'.

The last major uprisings by nationals against British colonial rule took place in Malaya (1948 – 1960) and Kenya (1952 – 1960). In Malaya, the British burned crops, starved local villagers, sprayed Agent Orange, killed unarmed, non-combatant villagers and 'relocated' half a million people from their homes to 'new villages'. In Kenya, they killed some 20,000 people, 1,090 by hanging, and the deliberate starvation policies killed around 50,000, half of whom were children under ten.

This was known as the Pax Britannica, or British Peace.

In other words, this English Empire, (the British Empire after the Union), did what it liked, killed whom it liked, when it liked and how it liked and it called this peace.

Soon, many wealthy Scots had joined the 'gravy train', and were allowed to become part of the British establishment, members of the 'Empire Club'. They saw themselves as British first and Scottish second. They became the 'establishment-in-Scotland, and benefited from the power, the wealth, the status and the privilege that came from being a member of the Empire club.

And the chief concern of people who enjoy the power and wealth and status and privilege that come from being club members, is usually to keep the club going.

And as the practice exploiting resources and labour without the slightest concern for peoples' welfare actually began right at home, Scots too lost their lands, their rights and their traditional livings. They were removed and starved and suffered and worked to death for the benefit of those at the top.

And this suited those at the top just fine.

3. Meanwhile...

The Irish 'home rule' movement came along in the 1880's, soon followed by a home rule movement in Scotland. The British establishment drew in its breath, Queen Victoria glowered and the Empire recoiled at the idea of giving away any of the power of the English dominated parliament and government in Westminster.

One man, in particular, an influential anti-devolutionist, jurist and constitutionalist called Albert Venn Dicey, argued that British/English sovereignty, (absolute rule over the people), would be threatened by devolution. When Prime Minister, Gladstone actually promised home rule to Ireland, Dicey was horrified. He warned that it could lead to the separation of Ireland and the breakup of the Union.

And that was when Dicey began to look again at the Treaty of Union. What he saw was a serious threat to the absolute sovereignty of Parliament (and therefore the British establishment) over the people and the affairs of Scotland.

So, along with some legal pals, he developed a very peculiar and complicated argument. But although this *looked* exactly like a legal argument, in reality, it was a very clever conjuring trick. The clever trick was, in reality, a fraud and the fraud was the cleverest thing about it.

It was brilliant in fact, because when people eventually noticed the fraud (and they did), they were so busy with *that* they didn't bother with the disappearance of a tiny, teeny little 'religious condition' to the Treaty, one which no one cared about any more anyway. By the time they noticed it had gone, they had been distracted by the performance of an unscrupulous conjurer and his most famous trick - the 'disappearing treaty'.

4. The Trick of the Disappearing Treaty

Dicey began by tearing up the Treaty of Union without even touching it physically, then pulling several items out of his legal sleeves to replace it. He took centre stage before the British establishment, and particularly the Houses of Parliament, raised his pen and began:

> "Over here", said A. V. Dicey, "I have in my hand a Treaty, the Treaty of Union, signed by Queen Anne herself and ratified by the parliaments of England and Scotland. Now this Treaty is more than a piece of paper. It is a piece of magic! It has made a whole nation and a parliament, (and if I might add, a political and social history), just, 'poof!' ... disappear! In its place, it has brought into being an entirely new state, the glorious 'United Kingdom of Great Britain.
>
> But wait! Look again! The glorious United Kingdom stands solid and real before us, as you see. And watch ...*now*, the Treaty isn't really there at all! Poof – and its gone! And *how* have I made it disappear?
>
> Pay close attention! Here, I have two acts of two parliaments which we will call the Acts of Union. (That is what they are called after all). Now, remember where they are, see them, two acts of Union? We'll come back to them in a moment.
>
> (Getting confused? Good, good!)
>
> Now, look instead, over *here*, at this other act, the English Bill of Rights. Passed in 1689 it actually gave the English parliament the sovereign powers, and I do mean sovereign, the absolutely, completely beyond mortal challenge powers, of the monarch. Yes, yes, I know that may not be obvious to you from what it actually *says*, (or to anyone else, come to that), but if you look very, very closely, (and maybe squint a bit), you will see that this *is*, definitely what it did.
>
> In fact, you will see that absolute authority, the full, ultimate and never to be challenged power of the old feudal kings and queens is now what defines the Westminster Parliament. I give you, ladies and gentlemen, the doctrine of parliamentary sovereignty. Ta-ra!"
>
> (There was a big round of applause at this point and quite a lot of clapping from the Lords.)
>
> "Now, folks", Dicey went on, "Back to the Treaty!
>
> What we really have here is not *really* a Treaty at all. Why? Because the Acts of the parliaments of England and Scotland, (remember those Acts of Union I asked you to keep in mind), *those Acts have completely replaced the Treaty*! How, you ask. Well, since the Parliament at Westminster is sovereign, the Act of Union passed by the Parliament in England must be superior to the agreement, or treaty, made by the commissioners and the monarch. It is, in fact, the Act of Union (along with the Scottish one), which actually created - and is even now creating - the United Kingdom of Great Britain. With me so far?

"Ah, you will say, but the Scottish parliament was *not* sovereign in that country. And you will be right. Indeed it was not. That primitive little backwater had no sophisticated political principles *what*- soever. It had a lot of twaddle in its ridiculous Claim of Right Act about the parliament having even more powers than our own, English mother of Parliaments* but that does not matter. Because...

When the Scottish parliament signed the Act of Union, it signed itself – and the nation of Scotland - OUT OF EXISTENCE!!!"

There was a bit of a gasp at this and A. V. raised his hands in a gesture of appeasement and conceded:

"Oh, of course *Scotland* still exists as a *country*, a nation of people with impossible accents, even a sovereign nation, if you must. But as a political and legal entity Scotland ceased to exist. And when the legal and political nation of Scotland popped out of existence, *so did the Scottish Act of Union*. Where did it go? Who knows! Now you see it. Now you...don't! "

He gave a slight bow. And went on:

"So that left just the English Act of Union passed by an English Parliament which, of course, is sovereign over the sovereign and so anything it does is sovereign over anything the sovereign does.

And *this* means that the English Act replaced the Treaty and that Westminster has absolute power over the terms of the Union. We OWN Scotland. Ta-ra!

Thank you! Thank you! Thank you so much!"

There was real admiration, now, in the applause from the establishment seats in the house. But an annoying murmur had begun and was accompanied by a few boos and some shouting from the cheap seats. Dicey was only slightly irritated ... at first:

"What's that? What are you Scots shouting? What do you mean, the English Parliament abolished itself as well? Don't be ridiculous! Oh that. Yes, well whatever the Act of Union *appears* to say about the new state and a new parliament, it doesn't mean that at all. Just ignore it, OK? **For once and for all**, Westminster is just the English parliament with the addition of the Scots and that's the end of it. "

Someone standing at the back shouted, "But why?"

"Why? *Why*? What do you mean, 'why'? Because I say so that's why! Because 'Land of Hope and Glory', that's why! Because the 'mother of parliaments' and the fount of democracy and the bringer of civilization, that's why!

* Dicey never did realise that he had mistaken the People's Assembly of Scotland for the Parliament

> Do you think all that could just disappear because a few poxy, hairy Scots are allowed to join the torchbearers of our proud, English – which is to say British – political tradition? Don't be ridiculous!
>
> Now, moving right along.
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> What all this means is that the Treaty doesn't matter; the Scottish Parliament is gone; Scotland as a political and legal entity is gone and the Scottish Act of Union is, therefore, gone. The English Parliament remains; the English Act of Union remains and here comes the really important bit. The authority to interpret or alter the remaining Act of Union now belongs completely and irrevocably, (that means forever and it can't be changed, ever, no matter what, so there), to Westminster which is the English parliament with some Scots in it.
>
> Thank you very much."

In the British political forum, the establishment was on its feet. The cheering and clapping was deafening.

Almost at once A. V. Dicey's 'disappearing treaty' trick was adopted as 'UK' constitutional doctrine. Parliament *is* the supreme authority of the whole UK. The Treaty is largely irrelevant. Scotland ceased and England didn't. And t he UK constitution is, therefore, just the English constitution right up to the Treaty, sorry, Act of Union.

We *all* get Magna Carta and the Bill of Rights, even though Scotland was a completely different and separate nation for thousand years before the Union. (And it really did have its own constitution which, as it turns out, was quite a lot better, quite a lot more democratic and quite a lot more fair than England's. But you'd never have convinced the English imperialist, A. V. of that, no matter how many facts you put in front of him Some people are just like that.)

Oh, how they cheered.

And the courts and the judiciary, the law schools and even the Scottish Court of Session bowed to the new, legally binding, (binding without so much as a draft bill or a debate in parliament), constitutional principle. They still do today. And since no one actually bothered to go and read the Treaty of Union, or the Act of Union and especially not the Scottish Act of Union, (at least not until the internet came along when they were all put online and by then everyone had 'moved on'), Conjurer Dicey's magical trick became 'sound constitutional principle' and the 'foundation' of UK constitutional law.

5. But how could they get away with this in plain sight?

They got away with it because they could. Remember, they made up the laws as they went along.

And now Dicey and his pals (who had helped him set up the conjuring trick), had given Westminster *the legal right to do it*! And there was no one to say, 'Hang on a minute; you can't do that!' back in the great days of Empire, when Britain was the most powerful political and military force in the world. There was no United Nations, no Vienna Convention and no International Court of Justice for Scottish MP's to appeal to.

6. But while the 'big' trick was being performed in public...

An unseen crime was being committed. But no one noticed the *other* disappearing act. This was the disappearance of something small but priceless. Something that was not part of the Treaty or the Acts of Union. It was a condition of the Treaty *and* the Union. In fact it was the *pre-condition* of the whole thing. It had been demanded by Scotland, agreed by Queen Anne and ratified by the parliaments of England and Scotland. It was a little thing known as a constitution, a set of principles explicitly described as being part of Scotland's fundamental constitution and contained in the Scottish Claim of Right Act of 1689.

Specifically, this Scottish jewel set out the right of the Scottish people to take back their rights from any monarch (or government) that tries to remove them, by deposing, (sacking), that monarch or government if necessary. It also set out some of the guaranteed rights of the people and the limits, (imposed by the *sovereign people*) of government power. The Claim of Right Act said that the people, not the government were sovereign, (the absolutely, completely beyond mortal challenge power), in Scotland. And the Claim of Right Act, it was clearly understood in 1707, would continue in Scotland after the Union - as guaranteed by parliamentary ratification, along with the articles of the Treaty of Union.

Which made the whole treaty trick irrelevant because this *pre-condition* left the people in Scotland sovereign over parliament, and so parliamentary sovereignty was a non-starter in Scotland. In fact, the Claim of Right made it unlawful to try to assert sovereignty in Scotland. But when the conjuring trick of A. V. Dicey and his helpers had been accomplished, the Claim of Right had completely disappeared.

7. And then ...

We found her. Almost lifeless, a shadow of her former self, she had been left to die in the dark place where forgotten and unwanted histories are buried. But as we pulled her out and into the light she whispered, "Save me! I am the escape route for Scotland. I am the safeguard that was built into the Treaty in case tyranny should come to replace Scottish freedom. Justice for me is justice for Scotland and the end of your oppression."

She is found and she is still alive, just barely. But whether we can save her or not, depends on you.