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FISHERY CONCESSIONS TO THE UNITED STATES IN CANADA AND NEWFOUNDLAND.

Great Britain is the only great modern colonizing power which has, by several treaties with Foreign Nations, conceded to their alien citizens the free privilege of sharing in competition with her own Colonial subjects, the national and productive fishery wealth of the marine belt of territorial coast waters of Canada and Newfoundland, without requiring any financial recompense, or reciprocal privilege. These colonial fisheries are part of the national assets of the local Governments; and if this national asset of fish can be so conceded to alien fishermen, so may their colonial mineral, or timber, assets be conceded, on similar terms, to the alien traders of foreign nations.

These exceptional privileges must be classed as derogations from the universally recognized principle of International Law, which assures to every independent nation the right of territorial inviolability and sovereignty, exclusive, and free of all interference by the alien subjects of other nations. Being exceptional, and in derogation of the territorial sovereignty of the ceding nation, they are classed as Servitudes Voluntariæ, or voluntary national easements to aliens; and are therefore to be construed strictly, both as to property and territorial conditions of user; so that the privilege-ceding nation shall not be held to have conceded to the privileged alien citizens of the other nation more than the strictest construction of the treaty will warrant; for sovereignty over its own national property cannot be impaired upon implication; and also that the concession, or easement, shall not be held to have relieved such privileged alien citizens from their subordination to such public laws, or municipal or police regulations, as bind the home or colonial subjects of the privilege-ceding nation, and which are not e

pressly annulled by the treaty and are sanctioned by, or reasonably deducible from, International Law.

The doctrine of International Law defining the construction of treaties of cession between nations, was considered by the Supreme Court of the United States, when Chief Justice Marshall and Mr. Justice Story were among its members; and it was held that even where the expressions used in any such treaty were capable of two constructions, the construction which was most favourable to the ceding nation, should govern; and it was further held that public grants were to be construed strictly, and in favour of the sovereign power, and to be held to convey nothing by implication to the grantee; and that, in all cases a King's grant should never be construed to deprive him of a greater source of revenue than he intended to grant, nor be deemed to be prejudicial to the Commonwealth.[1] And British law concurs as to home rights, that if the Crown's grant, when reasonably construed, would be injurious to the vested interests of other subjects, the grant should be restrained according to circumstances.[2]

International Law summarises the doctrine thus: "Whenever or in so far as a State does not contract itself out of its fundamental sovereign rights by express language, a treaty must be construed so as to give effect to these rights. Thus, for example no treaty can be taken to restrict, by implication, the rights of sovereignty, or property, or self preservation."[3]

The earliest British treaty-concession in the nature of Servitudes Voluntariæ, will be found in the fishery article (13) of the Treaty of Utrecht of 1713, between Great Britain and France, by which Great Britain "allowed" fishery privileges to French fishermen on certain coasts of Newfoundland, afterwards changed to other coasts by the treaty of 1783.

By the Anglo-French Treaty of 1904, which forms the basis

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[1] *United States* v. *Arredondo*, 7 Peters (U.S.) 691.

[2] *Rex* v. *Butler*, 3 Levinz, 220.

[3] Hall's International Law (5th ed.), p. 339.

of the present entente cordiale between France and Great Britain, France renounced "the privileges established to her advantage by article 13 of the Treaty of Utrecht, and confirmed or modified by subsequent provisions." But Article 2 declares that "France retains for her citizens, on the footing of equality with British subjects, the right of fishing in the territorial waters," along certain described portions of the coast of Newfoundland, subject to the laws and regulations now in force, or which may hereafter be passed, for the establishment of a close time in regard to any particular kind of fish, or for the improvement of the fisheries.[4]

The wording of the second article that "France retains for her citizens, on the footing of equality with British subjects, the right of fishing in the territorial waters" of Newfoundland, would seem to be a diplomatic mis-script of the expression "allowed" in the treaty of 1713.

National and civil rights within a sovereignty are the birthright privileges of its subjects. And as every sovereign may forbid the entrance into his territory either of foreigners in general, or of certain classes of foreigners, he can annex to the permission to enter, whatever conditions he considers to be advantageous to the state: and therefore the permission to enter cannot be construed as conferring upon the admitted foreigners a "right," but only a "liberty" or "privilege." The words "retain the right" used in the treaty must be construed as diplomatically condoning the assertion of a foreign trespass on the sovereign prerogatives and territorial inviolability inherent in national sovereignty.[5]

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[4]The treaty of 1904 provided that the British Government should pay a pecuniary indemnity to the French citizens who had to abandon their establishments, or give up their occupation, in consequence of the modifications introduced by the treaty,—which indemnity amounted to £54,683, or $273,415.

[5]In 1888, France formulated a claim that: "The right of France to the coast of Newfoundland reserved to her fishermen, is only a part of her ancient sovereignty over the island, which she retained in ceding the soil to England, and which she has never weakened or alienated." Prowse's History of Newfoundland, page 541. But the Treaty of Utrecht—which ceded Newfoundland with the adjacent islands "to belong of right wholly

The second of these Servitudes Voluntariæ was conceded to the United States by the Treaty of Independence of 1783; but as its fishery article was abrogated by the War of 1812; it will only be necessary to quote the construction given to it by Lord Bathurst, the British Foreign Secretary, in a despatch dated 30th October, 1815, addressed to Mr. J.Q. Adams, then American Minister in London; in which, after enforcing the British declaration that the War of 1812 had abrogated the fishery article of the Treaty of 1783, he said: "The undersigned begs to call the attention of the American Minister to the wording of the third article.....In the third article Great Britain acknowledges the right of the United States to take fish on the banks of New foundland, and other places in the Sea, from which Great Britain had no right to exclude any independent nation. But they were to have the liberty to cure and dry fish on certain unsettled places within His Majesty's territory, dependent on the will of British subjects in their character of inhabitants, proprietors, or possessors of the soil, to prohibit its exercise altogether."

Mr. Adams while conceding this latter right, argued that the War of 1812 had not abrogated the fishery article, claiming that, "The treaty was not simply a treaty of peace; it was a treaty of partition between two parts of one nation agreeing thenceforth to be separated into two distinct sovereignties;" and was a partition of "rights and liberties enjoyed before the separation of the two countries;"[6] and which he claimed, "were in no respect grants from the King of Great Britain to the United States," and, therefore, "the Government of the United

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to Britain,"—contained the following renunciation of French sovereignty: "Nor shall the most Christian King, His Heirs and Successors, or any of their subjects, at any time hereafter, lay claim to any right to the said island or islands, or to any part of it, or them." (Hartslet's Treaties, vol. 1, p. 237.

[6]"The analogy suggested between the treaty of 1783 and a partition among co-owners of their lands, and the rights issuing therefrom, is more fanciful than sound. That treaty created and conferred a liberty, and did not merely recognize a subsisting right to fish in the Canadian territorial waters:" American Law Review, 1870-1, vol. 5, page 421.

States consider the people thereof as fully entitled, of right, to all the liberties in the North American fisheries which have always belonged to them, and which they never have, by any act of theirs, consented to renounce."[7]

Lord Bathurst's answer was that: "As to the origin of these privileges, the undersigned is ready to admit that so long as the United States constituted a part of the dominions of His Majesty, their inhabitants had the enjoyment of them, as they had of other political and commercial advantages, in common with His Majesty's subjects. But they had, at the same time, in common with His Majesty's other subjects, duties to perform; and when the United States, by their separation from Great Britain, became released from these duties, they became excluded from the advantages of British subjects." And he summarised the Minister's contention thus: "The United States conceive themselves, at the present time, to be entitled to prosecute their fisheries within the limits of the British sovereignty, and to use British colonial territories for the purposes connected with their fisheries;"—"a claim by an independent State to occupy and use, at its discretion, any portion of the territory of another State, without compensation, or some corresponding indulgence."[8]

And, in stating the colonial experience of how the American fishermen had misused the fishery privileges conceded to them, he added: "It was not of fair competition that His Majesty's Government had reason to complain; but of the pre-occupation of British harbours and creeks in North America by the fishing vessels of the United States; and the forcible expulsion of British vessels from places where their fisheries might be advantageously conducted. They had likewise reason to complain

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[7]American State Papers, Foreign Relations, vol. 4, pages 351, 352, 353 and 355. While American writers on International Law still cling to the view that the War of 1812 did not abrogate the fishery article of 1783, President Polk in his message to Congress in 1847, declared that "a state of war abrogated treaties previously existing between the belligerents." Spain in 1898 took the same ground: See Foreign Relations (U.S.), 1898, page 973.

[8]American State Papers, Foreign Relations, vol. 4, pages 354, 356.

of the clandestine introduction of prohibited goods into the British Colonies, by American vessels ostenibly engaged in the fishing trade to the great injury of the British revenue." And in suggesting a "modified renewal" of the fishery privileges, he added: "But Great Britain can only offer the concession in a way which shall effectually protect her own subjects from such obstructions to their lawful enterprises, as they too frequently experienced immediately previous to the late war, and which are, from their very nature, calculated to produce collision and disunion between the two states."

Another contention of the Minister was that fishermen had, by common and universal usage, been "entitled to a more than ordinary share of protection, and that it was usual to spare and exempt them even from the most exasperated conflicts of national hostility." And he objected that the original grant should be ascribed to "the improvident grant of an unrequited privilege, or to a concession extorted from the humiliating compliance of necessity."[9]

Lord Bathurst declined to admit that the claim of the American fishermen to fish within British waters, and to use British territory for purposes connected with their fishery, "was analagous to the indulgence which had been granted to an enemy's subjects engaged in fishing on the high seas."[10]

Lord Stowell, in a judgment delivered by him in 1798, had declared what was the law of Great Britain on this question: "In former wars it had not been usual to make captures of those small fishing vessels. But this rule was a rule of comity only, and not of legal decision. In the present war there has, I presume, been sufficient reason for changing this mode of treatment. They fall under the character and description of ships constantly, and exclusively, employed in the enemy's trade."[11]

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[9]Ibid., page 353. Congress had originally made the fisheries one of the points in its ultimatum for peace; but in June, 1781, it directed its Commissioners that "a desire of terminating the war has induced us not to make the acquisition of the North American fisheries an ultimatum on the present occasion:" Secret Journals of Congress, vol. 2, page 228.

[10]American State Papers, Foreign Relations, vol. 4, page 356.

[11]The Young Jacob and Johanna, 1 C. Robinson, 20.

This decision of Lord Stowell's gave legal ground for Lord Bathurst's declaration that "Great Britain knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same powers;" for Lord Stowell, in the case referred to, defined fishing as a "trade," and therefore any exercise during the war, of the special privileges conceded to American fishermen to make "agreements" with British proprietors for places to dry and cure fish, for the repair of damages, and for the purchase of wood, and to obtain water, within the bays and harbours of the British Colonies, would necessarily bring the American fishermen within the prohibition of "trading with the enemy," and make them, and their vessels, liable to the penalties prescribed by the municipal laws of the United States and Great Britain.

And the Supreme Court of the United States also declared that "No principle of international, or municipal, law is better settled than that all contracts and commercial intercourse, between the citizens of hostile states, during a state of hostility, are utterly void; and that this doctrine could not at that date (1833) be questioned, for it had been the acknowledged and settled doctrine of the Supreme Court for nearly twenty years; that shipments made by citizens of the United States from an enemy's country during the war, were subject to condemnation as quasi enemy's property; and that if, after a knowledge of the war, an American vessel should go to an enemy's port and take in a cargo there, the vessel and cargo were liable to confiscation as prize of war, for trading with the enemy."[12] To which may be added the doctrine of the United States that: "Property on an enemy's territorial waters rests, on principle, on the same basis as property on his land."[13]

Lord Castlereagh succeeded Lord Bathurst as Foreign Secretary in 1816, and under his instructions, Mr. Bagot, then

[12]*Scholfield* v. *Eichelberger*, 7 Peters (U.S.) 586; and 3 Condensed Reports of the U.S. Supreme Court, 147.

[13]Wharton's Digest of the International Law of the United States, vol. 3, s. 341.

British Minister at Washington, offered to the United States the coast fisheries "on the Labrador shore between Mount Joli, on the Esquimaux shore, near the Straits of Belle Isle," but these were declined by the United States on the ground that, "it would be more for our advantage to commence at the last mentioned point, and to extend the right eastward through the Strait of Belle Isle as far along the Labrador coast as possible."[14]

Mr. Bagot then offered, as an alternative, "the shore of Newfoundland to commence at Cape Ray, and to extend east to the Rameau Islands," adding that "in estimating the value of the proposal, the American Government will not fail to recollect that it is offered without any equivalent;"[15] an offer intimating an abandonment of the British protocol in the negotiations for the Treaty of Ghent of 1814, that "the privileges formerly granted to the United States of fishing within the limits of British sovereignty, and of landing and drying fish on the shores of the British colonial territories, would not be renewed gratuitiously, or without an equivalent."[16]

Mr. Secretary Munroe's reply sustained the historic policy of the United States: "I have made every inquiry that circumstances permitted respecting both these coasts, and find that neither would afford to the citizens of the United States the essential accommodation which is desired, neither having been much frequented by them heretofore, nor likely to be in future. I am compelled therefore to decline both propositions."[17]

The British Government, submitting to this uncomplaisant rebuff, intimated that it was "willing that the citizens of the United States should have the full benefit of both of them, and that, under the conditions already stated, they should be also admitted to each of the shores."

But Mr. Secretary Munroe's appetite for Canadian fish being still unsatisfied, he "asked for more:" "Having stated in

[14]American State Papers, Foreign Relations, vol. 4, page 361.

[15]Ibid., page 365.

[16]American State Papers, Foreign Relations, vol. 3, pages 705 and 708.

[17]Ibid., vol. 4, page 361.

my former letter that according to the best information which I have been able to obtain, neither of those coasts have been much frequented by our fishermen, or were likely to be so in future; I am led to believe that they would not, when taken conjointly, as proposed in your last letter, afford the accommodation which is so important to them." And he thereupon added the hope that "an arrangement on a scale more accommodating to the expectations of the United States, would not be inconsistent with the interests of Great Britain."[18]

Ultimately Great Britain, not forecasting the future, and presumably influenced by the persistently aggressive attitude of the United States, agreed that American fishermen should have the right to share in the local fishery asset of its colonial subjects in their territorial coast-waters without any financial compensation, or reciprocal equivalent; and the American Plenpotentiaries had the satisfaction of reporting to their Government the fullest extension of the free fishing area desired by their instructions. "We have succeeded in securing, besides the right of taking and curing fish within the limits designated by our instructions, as a sine qua non, the liberty of fishing on the coasts of the Magdalen Islands, and on the western coast of Newfoundland, and the privilege of entering for shelter, wood and water in all the British harbours of North America."[19] These gratuitous concessions of valuable colonial fisheries to the alien-citizens of another nation may test whether as asserted by a British authority: "Great Britain has never been remiss in maintaining the rights of the fisheries."[20]

The first article of the treaty, and the third Servitudes Voluntariæ, apparently ignoring Lord Bathurst's declaration that the fishery article in the Treaty of 1783, had been abrogated by the War of 1812, and supporting the contention of the United States that "the fisheries secured by us were not a new grant," provided:

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[18]Ibid., page 366.

[19]Ibid., page 380.

[20]Phillimore's International Law (3rd ed.), vol. 1, page 270.

"Whereas differences having arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, and creeks of His Britannic Majesty's dominions in America, it is agreed between the High Contracting Parties that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands; on the western and northern coast of Newfoundland from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours and creeks, from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company. And that the American fishermen shall also have the liberty forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks, on the southern part of the Coast of Newfoundland hereabove described;[21] and of the coast of Labrador; but, so soon as the same or any portion thereof shall be settled, it shall not be lawful for the said fishermen to dry, or cure, fish at such portions so settled, without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground. And the United States hereby renounce, forever, any liberty, heretofore enjoyed, or claimed, by the inhabitants thereof, to take, dry, or cure, fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above mentioned limits.[22]

"Provided, however, that the American fishermen shall be at liberty to enter such bays, or harbours, for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such Restrictions as may be necessary

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[21]By the treaty of 1783, American fishermen had been expressly prohibited from drying or curing fish on the coasts of Newfoundland.

[22]This renunciation excludes American fishermen from fishing within the three marine mile belt of territorial waters along the eastern and south-eastern coasts of Newfoundland and along the coasts of Nova Scotia, New Brunswick, Prince Edward Island, Quebec, west of Mount Joli, and also British Columbia; subject to the treaty proviso as to shelter, repairing damages, and obtaining wood and water, within their bays and harbours.

to prevent their taking, drying, or curing, fish therein, or, in any other manner whatever abusing the privileges hereby reserved to them."

The British Act of 1819, 59 Geo. III. chapter 38, giving effect to the treaty, authorized the Crown "to make such Regulations, and to give such Directions, Orders and Instructions to the Governor of Newfoundland, or to any officer or officers on that station, or to any other person or persons whomsoever, as shall or may be deemed proper and necessary for the carrying into effect the purposes of the said Convention, with relation to the taking, drying, or curing, of fish by the inhabitants of the United States of America, in common with the British subjects within the limits set forth in the said Article of the said Convention hereinbefore recited."

Another section provided that such Restrictions or Regulations as may be necessary to prevent American fishermen from taking, drying, or curing, fish in the renounced bays and harbours; or, in any other manner whatever, abusing the said privileges conceded to them by the said Treaty, and the Act, should be made by Order-in-Council, or by the Governor of such parts of His Majesty's dominions. And the last section provided that any person, or persons, refusing to depart from such bays, or harbours, or refusing or neglecting to conform to any such Regulations or Directions, were to be liable to a penalty of £200.

By the latter proviso of the Fishery Article, the United States expressly acknowledged the sovereignty of Great Britain in the words that American fishermen "shall be under such Restrictions as may be necessary" to regulate the concession, and to prevent the abuse, of the fishery privileges conceded to them within the British territorial coast-waters described in the Article. And the British Act, as the exercise of that sovereignty, authorized the Crown, by Order-in-Council, to prescribe, or to vest authority in Newfoundland to prescribe, such Restrictions or Regulations as should be deemed proper and necessary for carrying into effect the purposes of the treaty; which authority

was subsequently vested in Newfoundland by the grant from the Crown of a Constitution conferring upon the British subjects within the Colony, legislative and executive powers of Government.

The Reciprocity Treaty of 1854, and the Washington Treaty of 1871, conceded further fishery privileges to American fishermen within the territorial coast-waters of Canada and Newfoundland, with reciprocal fishery privileges to British colonial fishermen within the territorial coast-waters of the United States on the Atlantic coast; but as the former treaty was terminated by the United States in 1866, and as the fishery articles in the latter were revoked by the United States in 1885, it will only be necessary to refer to the diplomatic discussions between the two Governments respecting their provisions.

Owing to the diplomatic controversy over the Fortune Bay disturbances of 1878, the British Government appointed Captain Sulivan, R.N., senior naval officer at Newfoundland, to investigate the facts of the disturbances; and his report was furnished to the Government of the United States with the following observations by Lord Salisbury:

"You will perceive that the report in question appears to demonstrate conclusively that the United States fishermen on this occasion, had committed three distinct breaches of the law; and that no violence was used by the Newfoundland fishermen, except in the case of a vessel whose master refused to comply with the request which was made to him that he should desist from fishing on Sunday, in violation of the law of the colony, and of the local custom, and who threatened the Newfoundland fisherman with a revolver."[23]

The three distinct breaches of law, so found by the investigating British Naval Officer were: (1) Fishing on Sunday—forbidden by an Act of 1876. (2) Fishing during the close season for fish—forbidden by an Act of 1862; (3) Fishing by seines—forbidden by an Act of 1862. The Naval Officer fur-

[23]Foreign Relations (U.S.), 1878-9, page 284.

ther reported that, contrary to the terms of the treaty, the American fishermen were fishing illegally, interfering with the rights of British fishermen and their peaceful use of that part of the coast then occupied by them, and of which they were in actual possession by their seines and boats, their huts and gardens and lands granted by Government."[24]

This report of the illegal proceedings of American fishermen under the Treaty of 1815, and Lord Bathurst's statement of the colonial experience of Canada and Newfoundland under the Treaty of 1783, shew how the concessions of free fishery privileges in the colonial territorial coast-waters under both treaties, had been aggressively abused by American fishermen.

Mr. Secretary Evarts, in discussing these Fortune Bay disturbances, maintained the "broad doctrine" that no British authority had a right to pass any kind of laws binding on American fishermen while fishing in British waters, saying: "If our fishing fleet is subject to the Sunday laws of Newfoundland, made for the coast population; if it is excluded from the fishing grounds from October to April (by the close season law), if our seines and other contrivances for catching fish are subject to the Regulation of the Legislature of Newfoundland, it is not easy to see what firm or valuable measure for the privilege of Article 18 of the Treaty of 1871, as conceded to the United States, this Government can promise to its citizens under the guaranty of the treaty." And as a corollary he claimed: "If there are to be Regulations of a common enjoyment, they must be authenticated by a common or joint authority;"[25] a doctrine of joint sovereignty over British territorial waters and coasts, which must have given a startling surprise to both British and International Law.

And Mr. Evarts further argued: "Manifestly the subject of the Regulation of the enjoyment of the in-shore fishery by the resident Provincial population, and of the in-shore fishery by our fleet of fishing cruisers, does not tolerate the control of

[24] Ibid., page 285.

[25] Ibid., page 310.

so divergent, and competing, interest by the domestic legislation of the Provinces. Protecting and nursing the domestic interest, at the expence of the foreign interest, on the ordinary motives of human conduct, necessarily shape and animate the local legislation." And he asked from Her Majesty's Government "a frank avowal, or disavowal, of the paramount authority of Provincial legislation to regulate the enjoyment by our people of the in-shore fishery."[26]

Lord Salisbury's reply was that if Mr. Evarts' contention that no British Authority has a right to pass any kind of laws binding on Americans while fishing in British waters, be just, the same disability would apply a fortiori to any other power; and "the treaty waters must be delivered over to anarchy."[27] He subsequently shewed that the Newfoundland regulations, then complained of, were in force at the date of the Treaty of Washington, and were not abolished, but were confirmed by subsequent statutes, and were therefore "binding under the Treaty upon the citizens of the United States, in common with British subjects." And he added that "Her Majesty's Government feel bound to point to the fact that the United States fishermen were the first and real cause of the mischief by overstepping the limits of the privileges secured to them, in a manner gravely prejudicial to the rights of the British fishermen," and he closed by refusing on behalf of the British Government, to acknowledge any liability for the claims of the American fishermen.[28]

Hall's International Law, commenting on this Fortune Bay incident, says: "It was argued by the United States that the fishery rights conceded by the treaty were absolute, and were to be 'exercised wholly free from the regulations of the Statutes of Newfoundland, set up as an authority over our fishermen, and from any other Regulations of fishing now in force, or that may hereafter be enacted by that Government.' In other

[26]Ibid., pages 310-11.

[27]Ibid., page 323.

[28]Ibid, 1880-1, page 572.

words, it was contended that the simple grant to foreign subjects of a right to enjoy certain national property, in common with subjects of the State, carried with it, by implication, an entire surrender, in so far as such national property was concerned, of one of the highest rights of sovereignty, viz.: the right of legislation. That the American Government should have put forward such a claim is scarcely intelligible."[29]

The damages claimed by the United States Government amounted to $105,305. But the succeeding Government, through Lord Granville, while insisting that the Treaty of 1871 meant that "the American and British fishermen shall fish in the Newfoundland waters within the limits of British sovereignty upon terms of equality, and not that there shall be an exemption of American fishermen from any reasonable regulations to which British fishermen are subject,"[30] and rejecting claims for fish caught "by means of strand fishing, a mode of fishing to which under the Treaty of Washington, they were not entitled to resort," agreed, contrary to Lord Salisbury's decision, to pay $75,000 to the United States in June 1881.

And while willing to confer respecting Regulations for the reciprocal fishery privileges of each nation in the territorial coast-waters of either country, under the then existing Treaty of Washington, Lord Granville expressly indicated the legislative authority to prescribe such Regulations: "The duty of enacting and enforcing such Regulations when agreed upon, would, of course, rest with the Power having the sovereignty of the shore and waters in each case."

But in the present diplomatic complaints against the fishery regulations of Newfoundland, Mr. Secretary Root, in his despatch dated the 19th October, 1905, to the British Minister at Washington, revives Mr. Evart's contentions against the subordination of American fishermen to the laws of Great Britain or Newfoundland, and which contentions were negatived by the British Government in 1863, 1878, 1880, 1886 and 1887.

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[29] Ed., page 340.

[30] Foreign Relations (U.S.), 1880-1, page 589.

Mr. Secretary Root makes the admission that there are two classes of American vessels (1) "vessels which are registered and (2) vessels which are licensed to fish and not registered." "The vessels with a license can fish but cannot trade; the registered vessels can lawfully both fish and trade;" which latter class includes the whole mercantile marine of the United States. And he claims that: "Any American vessel is entitled to go into the waters of the treaty coast and take fish of any kind." "She derives this right from the treaty, and not from any permission or authority proceeding from the Government of Newfoundland."[31]

A Foreign Office Memorandum published by the Imperial Parliament in 1906, affectively answers this contention by shewing that Mr. Root misquotes the treaty: "The privilege of fishing, conceded by Article 1, of the Convention of 1818, is conceded—not to American vessels, but—to the 'inhabitants of the United States' and to 'American fishermen.' His Majesty's Government are unable to agree to this contention or any of the subsequent propositions, if they are meant to assert any right of American vessels to prosecute the fishery under the Convention of 1818, except when the fishery is carried on by the inhabitants of the United States. The Convention confers no right on American vessels as such."[32]

As supplementary to the answer given above, it may be added that the treaty, by the use of the expression "American fishermen," and of the trade-work terms "take, dry, and cure, fish," has designated the special trade-class of the privileged "inhabitants of the United States," and their special marine class of vessels employed therefor, and to whom the treaty privileges of fishing in the British territorial coast-waters of Canada and Newfoundland, and of using their unsettled coasts for the trade-work purposes of drying and curing their fish, are conceded; and assuming that the maxim expressio unius est exclusio alterius, and that the doctrine as to strict treaty-cession

[31]Correspondence respecting the Newfoundland Fisheries, 1906, page 2.
[32]Ibid., page 6.

construction, apply, it would follow that the treaty privileges are conceded only to those American vessels whose crews are American fishermen, and experts in the trade-business of fishing, and in the trade-work of drying and curing fish.

Another contention of the Secretary is that "When a vessel had produced papers shewing that she is an American vessel, the officials of Newfoundland have no concern with the character or extent of the privileges accorded to such vessel by the Government of the United States. No question, as between a registry and a license, is a proper subject for their consideration. They are not charged with enforcing any laws or regulations of the United States. As to them if the vessel is American, she has the treaty right, and they are not at liberty to deny it."[33]

This contention is also fully answered by the Foreign Office Memorandum, which—in entire harmony with the previous decisions of Lord Salisbury in 1878, 1880 and 1881. Lord Granville, in 1880, Lord Rosebery and Lord Iddesleigh in 1886,—says:[34] "In the opinion of His Majesty's Government, American fishermen are bound to comply with all Colonial Laws and Regulations, including any touching the conduct of the Fishery, so long as these are not in their nature unreasonable, and are applicable to all fishermen alike."[35]

The Foreign Office Memorandum is sustained by the following opinion given by the Law Officers of the Crown, Sir W. Atherton and Sir Roundell Palmer, on the 6th January, 1863, on the fishery clauses in the Treaties of 1818 and 1854:

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[33]An American law writer says: "There seem to be special reasons why the Dominion authorities may inhibit general commerce by Americans engaged in fishing. Their vessels clear for no particular port; they are accustomed to enter one bay or harbour after another as their needs demand, they might thus carry on a coasting trade; they would certainly have every opportunity for successful smuggling. Indeed this whole subject legitimately belongs to a local customs and revenue system, and not to the fisheries." American Law Review, 1870-1, vol. 5, page 414.

[34]Foreign Relations (U.S.), 1878-9, pages 284 and 323; 1880-1, pages 572 and 589; 1886, page 398; 1887, pages 447 and 469.

[35]Correspondence, page 7.

"That in our opinion, the inhabitants of the United States fishing within waters in the territorial jurisdiction of the Legislature of Newfoundland, or of any other of the British Colonies, are bound to obey, and are legally punishable for disregarding, the laws and regulations of the fisheries enacted by or under the authority of the respective Provincial Legislatures. The plain object of the treaties was to put the inhabitants of the United States as regards the 'liberty to take fish' within the parts of the British Dominions described, on the same footing as 'subjects of His Britannic Majesty,' 'in common with' whom, under the terms of the treaty, such liberty was to be enjoyed. The enactments subsequently passed did but confirm the treaties, and provide for the suspension, during the operation of those treaties, of such laws, etc., as were or would be inconsistent with the terms and spirit of the treaties, which 'terms and spirit' are, it appears to us, in no respect violated by the Regulations bona fide made for the government of those engaged in the fishery, and equally applicable to British subjects so employed."

This opinion was sent by the Colonial Secretary to the Governor of Newfoundland in a despatch dated the 2nd February, 1863, in which he said: I have only to add my desire that, while asserting the authority of Colonial Law in colonial waters within the limits of existing treaties, you will take care to do so in the manner which is likely to be least offensive to the foreigners who may fall within its scope." And in a despatch dated the 3rd August, 1863, in commenting on a Draft Colonial Bill for regulating the fisheries of Newfoundland, he said: "I apprehend that it is not your expectation that I should express an opinion respecting the practical modes of conducting these fisheries; it being plain that the inhabitants of Newfoundland are, or ought to be, best capable of judging what regulations are calculated to increase the productiveness of their own seas. And with respect to Imperial interests, I do not think it desirable to anticipate that close inquiry to which any Act passed upon this matter must be subjected to in order to ascertain that it does not

infringe upon the right guaranteed to foreigners, or run counter to any principle of Imperial policy."[36]

But Mr. Secretary Root further contends that: "The Government fails to find in the treaty any grant of right to the makers of colonial law, to interfere at all, whether reasonably, or unreasonably, with the exercise of the American rights of fishery, or any right to determine what would be a reasonable interference with the exercise of that American right." "The treaty of 1818 either declared or granted, a perpetpal right to the inhabitants of the United States, which is beyond the sovereign power of England to destroy, or change. It is considered that this right is, and forever must be, superior to any inconsistent exercise of sovereignty within the territory." "This Government cannot permit the exercise of these rights to be subject to the will of the Colony of Newfoundland. The Government of the United States cannot recognize the authority of Great Britain to determine whether American citizens shall fish on Sunday." And he adds: "An appeal to the general jurisdiction of Great Britain over the territory is, therefore, a complete begging the question."[37] Surely Lord Salisbury was justified in saying that "if such contentions were just, the Newfoundland territorial waters must be delivered over to anarchy."

As negativing the diplomatic contentions of Secretaries Evarts and Root, may be cited the instructions given by Mr. Secretary Marcy in 1856, for the guidance of American fishermen under the extended fishery privileges conceded to them by the Reciprocity Treaty of 1854: "It is understood that there are certain Acts of the British North American Colonial Legislatures, and also, perhaps, Executive Regulations, intended to prevent the wanton destruction of the fish which frequent the coasts of the colonies, and injuries to the fishing therein. It is deemed reasonable and desirable that both the United States and

[36]U.S. Ex. Doc., No. 84 (1880), page 110; and U.S. Ex. Doc. No. 113 (1888), page 251. The Law Officers' opinion was also published, in the Newfoundland Legislative proceedings, 1863-4.

[37]Correspondence, pages 12, 13, and 14.

British fishermen should pay a like respect to such laws and regulations, which are designed to preserve and increase the productiveness of the fisheries on these coasts. Such being the object of these laws and regulations, the observance of them is enforced upon the citizens of the United States, in the like manner as they are observed by British subjects." And as to reciprocal fishery privileges in the respective British and United States territorial coast waters, he added: "By granting the mutual use of their in-shore fisheries, neither party has yielded its rights to civic jurisdiction over a marine league along its coasts. Its laws are as obligatory upon the citizens or subjects of the other, as upon its own."[38]

And in 1870, after the Government of the United States had been notified that "the Canadian Government with the concurrence of Her Majesty's Ministers, had determined to increase the stringency of the existing practice of dispensing with warnings hitherto given" to American fishermen; and after the Parliament of Canada had passed the Foreign Fishing Acts of 1868 and 1870, authorizing certain Imperial and Colonial officers to go on board any foreign vessel within any Canadian harbour, or hovering in British waters, and examine the master on oath, etc., Mr. Secretary Boutwell, of the Treasury, issued a circular instructing his officers to notify all masters of American fishing vessels of the provisions of the Canadian Statutes.[39] And on the 9th June, he issued another circular advising that "fishermen of the United States are bound to respect the British laws for the regulation and preservation of the fisheries to the same extent to which they are applicable to British and Canadian fishermen."

These instructions are supported by the just position taken by Mr. Secretary Bayard. 1886, during the embittered diplomatic discussions consequent upon the seizure of American vessels after the abrogation by the United States in 1885, of the fishery articles in the Washington Treaty of 1871, in which,

[38]Foreign Relations (U.S.), 1880-1, page 572.

[39]Ibid., 1870, page 411.

after disclaiming "any desire to shield any American vessel from the consequences of a violation of international obligations," he assured the British Government that: "Everything will be done by the United States to cause their citizens, engaged in fishing, to conform to the obligations of the treaty (of 1818) and to prevent an infraction of the fishery laws of the British Provinces."[40] And he also warned a complainant that "it is the duty and manifest interest of all American citizens entering Canadian jurisdiction to ascertain and obey the laws and regulations there in force."[41] And these executive instructions furnish a complete and effective answer to Mr. Secretary Root's novel contentions.

A learned American law writer, while advocating the claims of the United States, has also admitted that: "The provision of the Canadian Statute[42] than an officer may board an American vessel as soon as she comes into a bay, or harbour, and may remain during her stay therein, is plainly reasonable and proper; it would only be a 'restriction necessary' to prevent the crew taking, curing or drying fish in the territorial waters 'or from in any other manner abusing the privileges reserved to them.' To this extent the Canadian Parliament had a right to go. The claim to lie at anchor in the bays and harbours, and other territorial waters, for the purpose of cleaning and packing fish, or to procure bait therein, by purchase or barter, or to prepare to fish while therein, or to land and tranship cargoes of fish; all of these acts are plainly unlawful, and would be good grounds for the confiscation of the offending vessel, or the infliction of pecuniary penalties."

"Where, from considerations of public policy, statutes are made to declare some final result illegal, the legislature uniformly forbids the preliminary steps which are directly connected with that result and lead up to it, and facilitate its accomplishment."[43]

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[40]Ibid., 1886, page 377.

[41]The Fisheries Question, U.S. Ex. Doc., 1887-8, vol. 9, page 467.

[42]Revised Statutes of Canada (1886), c. 93; now (1906), c. 47.

[43]American Law Review, 1870-1, vol. 5, pages 408 and 410.

The true doctrine on this question is fairly stated in Phillimore's International Law: "With respect to merchant and private vessels, the general rule of law is that, except under the provisions of an express stipulation, such vessels have no exemption from the territorial jurisdiction of the harbour or port, or, so to speak, territorial waters (mer litorale) in which they lie."[44] And he supports this by citing the doctrine so clearly expounded by Chief Justice Marshall in the following judgment: "When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continued infraction, and the Government to degradation, if such individuals or merchants, did not owe temporary and local allegiance, and were not amenable, to the jurisdiction of the country. Nor can any foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him; nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption." "One sovereign being in no respect amenable to another, is bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself, or its sovereign territorial rights, within the jurisdiction of another."[45]

British law is to the same effect. In the Franconia case, the judges generally concurred with Mr. Justice Lindley, when he said: "It is conceded that even in time of peace, the territoriality of a foreign merchant-ship within three miles of the coast of any state, does not exempt that ship, or its crew, from

[44]Vol. 1, page 483.

[45]*Schooner Exchange* v. *McFadden*, 7 Cranch (U.S.) 144.

the operation of those laws which relate to its revenues, or fisheries."[46] And Sir Travers Twiss tersely states that "Treaty engagements in such matters (fisheries in common) do not give any other right than that which is expressed in the specific terms."[47]

The ancient Anglo-Danish Treaty of 1670-1 (renewed after the War of 1814) early affirmed the doctrine of the subordination of foreign subjects to local laws, while availing themselves of the reciprocal privileges of fishing and trading within the territory of the other sovereign. It provided that the people and subjects of either sovereign "as well in going, returning and staying, as also in fishing and trading," should enjoy the same liberties, immunities, and privileges, which the people of any foreign nation whatsoever, abiding and trading thither, do or shall enjoy. "But so that the sovereign power of both Kings in their Kingdoms and ports, respectively to appoint and change customs, or any other matters, according to occasion, be preserved, and remain inviolate."[48] And by an Anglo-French Treaty of 1814, French subjects were permitted "to continue their residence and commerce in India, so long as they shall conduct themselves peaceable, and shall do nothing contrary to the laws and regulations of the Government."[49]

Another view may also be suggested. The treaty, by granting to American fishermen the liberty of fishing in the Canada and Newfoundland territorial coast-waters, "in common with the subjects of His Britannic Majesty"—which subjects had a national title to the fishery within the marine belt of their territorial coast-waters—granted that which had some incidents of a tenacy-in-common; and therefore both such tenants-in-common,—subjects and aliens,—deriving their "common" titles from the same sovereignty, must logically be held to take and

[46] *Regina* v. *Keyn*, 2 Exch. Div. 93.

[47] Twiss on the Law of Nations in Time of Peace, page 265.

[48] Hertslet's Treaties, vol. 1, page 181.

[49] Ibid., page 271.

enjoy them subject to the laws of the sovereignty, within which such tenancy-in-common had been granted.

The Anglo-American Treaties of 1854 and 1871, and the signed, though unratified, Treaties of 1874 and 1888, furnish another effective argument. None of them required the assent of any of the State Legislatures of the United States; while in each of them there is an acknowledgement by the United States that the British Colonies had a co-ordinate legislative sovereignty with Great Britain in assenting to the fishery articles, in the words that the fishery articles "shall take effect so soon as the laws to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Newfoundland."

But these Anglo-American treaties are also unchallengable authorities supporting the Foreign Office Memorandum of 1906, for they conceded to colonial fishermen the reciprocal privilege of free fishing in certain "bays, harbours, and creeks, on the sea-coasts and shores of the United States, and of its said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States, and of the islands aforesaid, for the purpose of drying their nets, and curing their fish." If the recent diplomatic repudiation of the obligatory force of British and colonial laws on American fishermen within British territorial coast-waters, as formulated by Secretaries Evarts and Root, is part of the Law of Nations, then it logically follows that, while such reciprocal fishery privileges were in force, colonial fishermen, exercising their treaty-privileges of fishing within the marine belt of territorial coast-waters of the several States of the Union, along the Atlantic, and of landing on the State coasts for their trade purposes, were not subject to any of the Federal or State Fishery Laws. And the Government of Great Britain might have similarly contended that it could not recognize the authority of the United States to determine under what laws, or on what days, Canadian fishermen could fish; nor permit their treaty fishery rights, in the territorial

coast-waters of the several States, to be "subject to the authority or will" of the United States or of any of the States of the Union, or "to be interfered with at all, whether reasonably or unreasonably."

And if the argument of "long-continued acquiescence," so strenuously claimed against Great Britain by the United States in the Alaska boundary case, and sustained by the American jurists on that tribunal, is a doctrine of International Law affecting national sovereignties, it must be held to be more forceful when claimed against the United States in these fishery disputes. In the Alaska case "the long-continued acquiescence of Great Britain" consisted chiefly of boundary lines on maps, published by subjects, and some officials, not representatives of the British Government in its relations with foreign powers. In these fishery cases, however, "the long-continued acquiescence of the United States" is evidenced by the executive actions of its Government, in agreeing to a succession of treaties conceding fishery privileges to American fishermen within the territorial coast-waters of Canada and Newfoundland, from 1818 to the signed, but Senate-unratified, Treaty of 1888,—the later ones recognizing the Colonial Sovereignty of legislative ratification,—and to the modus vivendi of 1888, operative in Newfoundland until lately, and still operative in Canada.[50] The fishery laws of Newfoundland, now objected to, had been passed prior to the Washington Treaty, as stated by Lord Salisbury; and as there is nothing in any of the protocols, or treaties, nor in the modus vivendi of 1888, objecting to the now impeached fishery laws, it is therefore reasonable to claim that by the legislative ratification clauses in these treaties, and the modus vivendi, and the official admissions of Secretaries Marcy, Bayard and Boutwell, quoted above, there has been "a long continued acquiescence" by the United

[50]The modus vivendi provides in clause 4: "Forfeiture to be exacted only for the offences of fishing, or preparing to fish, in territorial waters." which imports into the modus vivendi the statutory penalties for such offences. See Statutes of Canada, 1888, 51 Vict. c. 30. The previous Canadian Fishing Acts are recited in 31 Vict. c. 60, s. 20.

States in those colonial fishery laws; and that they are therefore binding on American fishermen, as they are on British fishermen, when fishing within such territorial coast-waters, even should "one of the highest rights of sovereignty, viz., right of legislation," over such waters be further arraig under any possible doctrine of International Law.

It is regrettable that Mr. Secretary Root, should have violated international comity when he urged Great Britain to discipline one of her sovereign self-governing colonies, and to control colonial ministerial responsibility to its legislature—using the following language: "I feel bound to urge that the Government of Great Britain shall advise the Government of Newfoundland that the provisions of the law, which I have quoted, are inconsistent with the rights of the United States under the Treaty of 1818, and ought to be repealed. And, that, in the meantime, and without any unavoidable delay, the Governor-in-Council shall be requested, by a proclamation which he is authorized to issue under the Act respecting Foreign Fishing vessels, to suspend the operation of the Act."[51]

Lord Clarendon once commented in the House of Lords on "the extraordinary tone of the President's message, and the apparently studied neglect of that courtesy and deferential language which the Governments of different countries are wont to observe when publicly treating of international questions;" adding, "that if the British Government accordingly did negotiate it would seem that it could only be upon the basis that England was unconditionally to surrender her pretentions to whatever might be claimed by the United States."[52]

The Secretary apparently has not studied the home-rule system of Responsible Government conceded to the self-governing colonies of the British Crown, or he would not have thus urged an unconstitutional interference with that home-rule government, and the resulting Parliamentary responsibility of

[51]Foreign Relations (U.S.), 1905, page 493; Correspondence, page 4.

[52]Hansard (3rd series), page 117.

the Colonial Ministers of the Crown, to the Legislature of Newfoundland. The Constitution it enjoys confers legislative power on the Governor, by and with the advice and consent of the Legislative Council and Assembly, to "make laws for the public peace, welfare and good government of the said Colony." And under similar grants of legislative powers to Canada, and its several provinces, the Judicial Committee of the Privy Council, as the final Court of Appeal, has held that these legislatures "are not in any sense, the agents, or delegates of the Imperial Parliament, but have, and were intended to have, plenary powers of legislation as large, and of the same nature as those of the Imperial Parliament itself."[53] They have therefore, the powers and attributes of national sovereignty in determining for what causes, or wrongful acts, life, liberty, or property, shall be forfeited, and what civil and political rights shall be enjoyed, by the British subjects within the Colony; and what wrongs shall be prohibited and punished;[54] subject to the limitations that their Legislative Acts shall not be repugnant to any Imperial Act extending to the Colony,[55] or to Imperial policy affecting foreign nations.

Finally, the treaty privileges to American Fishermen to purchase certain supplies in colonial bays and harbours, contains express restrictions—the negative words "and for no other purpose whatever," make imperative[56] the treaty prohibition against all other purchasing or trading; and therefore the purchase of "bait," and whatever is lawfully within the treaty pro-

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[53]*Russell* v. *Regina*, 7 Appeal Cases 829, *Edge* v. *Regina*, 9 Appeal Cases 117.

[54]Mr. Justice Story thus defined the political status of the British Colonies: "The Colonial Legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were sovereign within the limits of their respective territories; possessing the general powers of government and rights of sovereignty, subject to the realm of England, but still exercising within their own territorial limits the general powers of legislation and taxation."

[55]7th and 8th William III. c. 22, s. 9; 6 George IV. c. 114, s. 49; 28th and 29th Victoria c. 63 (Imp.).

[56]*Rex* v. *Justices of Leicester*, 7 Barn. & Cress. 12.

hibition, is within the legislative discretion of Canada and Newfoundland to prohibit. This view of the Colonial legislative power was urged by the counsel for the United States before the Halifax Fisheries Commission in 1877.

There are English statutory precedents prohibiting British subjects selling fish to strangers (foreigners), and using certain nets in fishing, which may sustain the colonial legislative right to enact certain prohibitory laws regulating fishery rights within their territories.[87]

Shortly after the Foreign Office Memorandum had been communicated to the United States, Lord Elgin—apparently waiving it as an authoritative exposition of Imperial policy, and the Foreign Office decisions on similar contentions by Lords Salisbury, Granville, Rosebery, and Iddesleigh, thereby breaking the "continuity of British foreign policy."—intimated to the Government of Newfoundland that His Majesty's Government were of opinion "that any attempt on the part of the Colonial Government to apply to the American fishermen the Regulations to which exception was taken by the United States, while the discussion was proceeding, might give rise to a highly undesirable and even dangerous situation;" and that "If Ministers should press for the prohibition both of seines and of Sunday fishing, some concessions other than exemption from light dues and customs laws will be expected." And he intimated that the Government were informing the United States Government that they were prepared pending the discussion to negotiate a "provisional arrangement."

The Ministers of Newfoundland replied that they deprecated "any provisional arrangement that would relieve American citizens from a proper recognition of the Statute laws;" and they submitted that the interests of the Empire, and not those of the colony alone, required that the rightful sovereignty within its own dominions, should remain inviolate; and that the yielding to the claims set up, would be a "virtual surrender

[87] 31 Edward III. Stat. 2; 2 Henry VI. c. 15, and others.

of sovereignty within certain territorial waters within the colony to a foreign power.

To this the Colonial Secretary replied that the decision of the Ministers had caused "much disappointment;" and that they had "failed to appreciate the serious difficulty in which their policy had placed both them and His Majesty's Government;" and he wished "to warn Ministers that some further concessions may be necessary if a modus vivendi is to be arranged."[58]

Subsequently a modus vivendi was agreed to between the British and American Governments; and against it the Colonial Ministers again protested as follows: "They have learned with profound regret that His Majesty's Government has, without reference to this colony, proposed to the United States Ambassador, as one of the terms of a modus vivendi, the suspension of the Foreign Vessels Fishing Act of this year;" and that "they had hoped and expected that, before a modus vivendi was proposed to the United States Government the full text of the same would have been submitted to this Government, and thus have afforded them an opportunity for suggestion, or remonstrance."[59]

During the diplomatic correspondence respecting the fishing disputes of 1886, consequent upon the action of the United States in denouncing the reciprocal fishery articles of the Treaty of 1871, the United States Government proposed a modus vivendi on substantially similar terms, that in the meantime Her Majesty's Government should "instruct the proper Colonial and other British officers to abstain from seizing or molesting fishery vessels of the United States," unless they were found fishing in the then non-treaty waters. Lord Salisbury replied that, "this would suspend the operation of the statutes of Great Britain and of Canada, and of the Provinces now constituting Canada, not only as to the various offences connected with fishing, but as to

[58]Correspondence, pages 20-28.

[59]Correspondence, page 31.

customs, harbours, and shipping; and would give to the fishing vessels of the United States privileges, in Canadian ports, which are not enjoyed by vessels of any other class, or of any other nation; and would give greater privileges than are enjoyed at the present time by any vessels in any part of the world;" and he concluded by saying that the proposals were "quite inadmissible;" even though the American Government had proposed, as an article in the modus vivendi, that "the United States agrees to admonish its fishermen to comply with the Canadian customs Regulations, and to co-operate in securing their enforcements; and that obedience by American fishing vessels to Canadian laws, was believed and intended to be secured by this article."[60]

And when the United States subsequently proposed in 1886 "That some ad interim construction of the terms of the existing treaty should, if possible, be reached," Lord Iddesleigh then Foreign Secretary, expressed his disappointment at the proposal "That Her Majesty's Government, in order to allay the differences which have arisen, should temporarily abandon the exercise of the treaty rights which they claim, and which they conceive to be indisputable. Her Majesty's Government are unable to perceive any ambiguity in the terms of article 1 of the Convention of 1818." And he added that whilst Her Majesty's Government were determined to uphold the rights of Her Majesty's North American subjects, they were no less anxious to maintain in their full integrity the facilities for fishing granted to the citizens of the United States.[61]

A modus vivendi cannot operate to dispense with, or suspend, or otherwise render inoperative, or unforcible, any statute law of the Empire or of any Colony; for, as Lord Chancellor Cairns has held, that a Colonial Act is "an Act which is assented to on the part of the Crown, and to which the Crown therefore is a party."[62] And it is trite knowledge that the Bill

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[60]Foreign Relations (U.S.), 1887, pages 484 and 487.

[61]Ibid., page 447.

[62]*Theberge* v. *Landry*, 2 App. Cases, page 108. "A legal and confirmed Act of a Colonial Assembly has the same operation and force in the colony,

of Rights declares that "the pretended power of suspending of laws, or the execution of laws, by regal authority, without the consent of Parliament, is illegal."

A different Colonial Policy influenced the Imperial Government when the Anglo-French Treaty of 1857, respecting the Newfoundland Fisheries was submitted to the Legislature of Newfoundland, containing the following regal pledge to France:— "Her Britannic Majesty hereby engaging to use her best endeavours to procure the passing of such laws by the Legislature of Newfoundland as are required to carry it into effect." The Legislature declined in a series of resolutions, the last reading as follows: "We deem it our duty most respectfully, to protest in the most solemn manner, against any attempt to alienate any portion of our fisheries, or our soil, to any foreign power, without the assent of the Local Legislature." "As our fisheries and territorial rights constitute the basis of our commerce, and are the birthright and legal inheritance of our children, we cannot assent to the terms of the convention." The Colonial Secretary's reply recognized this constitutional right: "The proposals contained in the convention having been unequivocably refused by the Colony, they will of course now fall to the ground; the consent of the Legislature of Newfoundland is regarded by Her Majesty's Government as the essential preliminary to any modification of their territorial or maritime rights."[63]

Up to the present the Imperial solidarity between the Imperial and Colonial Governments in dealing with the contentions of the United States in these fishery disputes, has been fairly maintained by the British Government. In a despatch from the American Minister in London to Mr. Secretary Seward in 1866, in which he reported that Lord Clarendon had communicated to him the decision of the British Government "to send out authority to Sir F. Bruce to proceed in conjunction with you after consultation with the respective Provincial Authorities. This had been thought the better course, as the

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that an Act of Parliament has in Great Britain:" Chitty on the Prerogatives of the Crown, page 37.

[63]Prowse's History of Newfoundland, page 474.

latter had now substantially reached such a position of independence as to make it inadvisable for the Government here to attempt to act without regard to them.'"[64]

In 1886, Lord Rosebery, in a despatch replying to Mr. Bayard's complaints against the Canadian Government's seizure of American vessels, said: "The matter is one involving the gravest interests of Canada. I now enclose a copy of an approved report of the Canadian Privy Council in which the case of Canada is fully set forth."[65] And Lord Salisbury, in 1887, was more emphatic when, after informing the Government of the United States of the agreement in views entertained by Her Majesty's Government and the Government of Canada upon the most important points of the controversy respecting the Treaty of 1818, he added that he had "thought it right, in justice to the Canadian Government, to embody almost in their own terms their repudiation of the charges brought against them by Mr. Bayard."[66]

The action of the Imperial Government in yielding to the arguments of Mr. Secretary Root, may be further tested by transferring these fishery privileges from the colonial to the home territorial coast-waters of Great Britain; and by assuming that French fishermen, within the territorial coast-waters along the south coast of England; or that German fishermen within the territorial coast-waters along the east coast of Scotland, had by treaty, a concession of competing coast fishery privileges with British fishermen similar to those conceded to American fishermen, within the colonial coast-waters of Canada and Newfoundland. Would such arguments, if advanced by the Foreign Secretaries of France or Germany, be yielded to by the Imperial Government proposing a modus vivendi suspending in the interest, and at the urgency of either nation, any of the British fishery laws, operative within such coast-waters, and equally binding upon all British fishermen exercising their trade of fishing within such coast-waters?

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[64]Foreign Relations (U.S.), 1866, Part 1, page 119.

[65]Ibid., 1886, page 395.

[66]Ibid., 1887, page 469.

The question whether the local fishery laws of a nation are binding on the privileged alien citizens of a foreign nation, exercising fishery privileges conceded to them by treaty within the territorial coast-waters of the conceding nation, on conditions similar to those of the Treaty of 1818, as on its own subjects, is, when disputed, peculiarly one to be settled according to the doctrines of International Law, and more especially in view of recent contentions; or by a reference to the Hague Tribunal, and not as desired by an interested Foreign Government.

And if International Law is the final appellate authority, then the disciplinary censure administered by the British Government, at the urgency of the United States Government, to the Responsible Government of Newfoundland because it declined to waive or suspend its fishery laws, is rather a constitutional and diplomatic surprise,—more especially in view of the many previous diplomatic decisions of the British Government on substantially similar contentions, quoted above; and after their affirmance in the Foreign Office Memorandum just issued; for neither the national sovereignty, nor justice, of the Crown, nor appellate legal jurisprudence, permits a re-argument of a final diplomatic or constitutional decision, for the purposes of review, or reversal.

Furthermore the publication of this disciplinary censure has intensified the difficulties of the international situation; and it seems to be a violation of that confidential and reticent policy which is universally recognized as governing incomplete diplomatic discussions; and especially those between a foreign sovereignty and the British Imperial power—composed as it is of a home sovereignty and several colonial self-governing sovereignties, each constitutionally exercising the regal and legislative powers of the Crown; and in which incomplete diplomatic discussions the administration by one of its colonial self-governing sovereignties of such regal and legislative powers respecting the treaty privileges of the alien citizens of such foreign sovereignty, within its colonial territory, is impeached.

THOMAS HODGINS.

REVIEW OF CURRENT ENGLISH CASES.

NEGOTIABLE INSTRUMENT—PROMISSORY NOTE—SIGNATURE IN BLANK—AUTHORITY TO FILL UP NOTE TO LIMITED AMOUNT—EXCEEDING AUTHORITY—NEGOTIATION OF PROMISSORY NOTE—"HOLDER IN DUE COURSE"—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. C. 61) S. 20—(R.S.C. C. 49, S. 32).

Lloyds Bank v. *Cooke* (1907) 1 K.B. 794 was an action on a promissory note. The defence set up the defendant Sanbrook was that this defendant had signed the note in blank and given it to one Cooke with authority to fill it up for £250, and that he, in fraud of the defendant Sanbrook, had filled it up for £1000. The plaintiffs claimed to have in good faith advanced £1000 to Cooke on the note, and to be holders in due course for value. At the trial Lawrance, J., on the authority of *Herdman* v. *Wheeler* (1902) 1 K.B. 361 (noted ante, vol. 38, p. 339) gave judgment in favour of Sanbrook. The Court of Appeal (Collins, M.R., and Cozens-Hardy and Moulton, L.JJ.,) without expressly overruling *Herdman* v. *Wheeler*, the correctness of which however they do not admit, considered that that case was decided under the Bills of Exchange Act, s. 20 (R.S.C. c. 119, s. 32) and that the present case was governed by the common law doctrine of estoppel, and that there was nothing in the Bills of Exchange Act to prevent the application of that doctrine and that the defendant Sanbrook was estopped as against the plaintiff from disputing the validity of the note in question. The decision of Lawrance, J., was accordingly reversed and judgment awarded in favour of the plaintiffs against the defendant Sanbrook.

SHIP—CHARTERER—BILL OF LADING INCREASING LIABILITY OF SHIPOWNER—INDEMNITY BY CHARTERER.

In *Moel Tryvan Ship Co.* v. *Kruger* (1907) 1 K.B. 809 the Court of Appeal (Barnes, P.P.D., and Farwell and Buckley, L. JJ.,) have affirmed the judgment of Phillimore, J., (1906) 2 K.B. 792 (noted ante, p. 245).

SHIP—CHARTER-PARTY—CHARTER OF SHIP FOR VOYAGE—IMPLIED CONDITION THAT SHIPOWNER WILL NOT USE SHIP TO PREJUDICE OF CHARTERER—CARRIAGE OF BUNKER COAL FOR USE ON A FUTURE VOYAGE.

In *Darling* v. *Raeburn* (1907) 1 K.B. 846 the plaintiff had chartered the defendants' vessel for carriage of a cargo to two or three ports of discharge. On arrival of the ship at the first port of discharge the master took on board a large quantity of bunker coal for use on a future voyage of the ship, and in consequence the ship had to be lightened to enable her to get over the bar at the next port of discharge, whereby the plaintiff was put to expense, and but for the loading of the coal she would have been able to enter the port without lightening. Kennedy, J., who tried the case held that the plaintiffs were entitled to the expense to which they had been thus put, (1906) 1 K.B. 572 (noted ante, vol. 42, p. 501) and the Court of Appeal Lord Alverstone, C.J., and Farwell and Buckley, L.JJ.,) have affirmed his decision.

PRACTICE—WRIT—SERVICE OUT OF JURISDICTION—LIBEL IN NEWSPAPER PUBLISHED OUT OF, BUT CIRCULATING WITHIN, JURISDICTION — INJUNCTION — DISCRETION—RULE 64 F—(ONT. RULE 162 F.)

Watson v. *Daily Record* (1907) 1 K.B. 853. Action to restrain the further publication of a libel, and to recover damages for its publication. The libel in question had been published in Glasgow in the defendants' newspaper a few copies of which had been circulated also in England. Leave had been granted to issue the writ for service in Scotland, and the defendants now applied to set aside the order. Lawrance, J., refused to set aside the order, but the Court of Appeal (Collins, M.R., and Cozens-Hardy, L.J.,) considered that, in the proper exercise of discretion, the order should not have been granted to serve the writ out of the jurisdiction, and that notwithstanding an injunction was claimed, the facts seemed sufficiently to shew that no repetition of the alleged libel was reasonably to be apprehended.

PRACTICE—STRIKING OUT DEFENCE—ABUSE OF PROCESS OF COURT.

In *Critchell* v. *London & S. W. Ry.* (1907) 1 K.B. 860 the defendants paid money into Court, with a defence denying liability, with the defence the defendants' solicitors wrote and

sent a letter stating that the traverse of liability was a technical plea merely to secure that the money paid into Court should remain there till the trial unless taken out by the plaintiff in satisfaction, and they unreservedly undertook on behalf of the defendants not to contest liability at the trial. The plaintiff applied to strike out the defence as an abuse of the process of the Court. Walton, J., refused the application, but the Court of Appeal (Cozens-Hardy and Moulton, L.JJ.,) held that he was wrong and granted the application but they granted the defendants leave to take the money out of Court and plead afresh.

MORTGAGE OF LIFE POLICY—VOLUNTARY PAYMENT OF PREMIUMS BY THIRD PARTY—DEATH OF MORTGAGOR—LIEN FOR PREMIUMS —DUTY OF TRUSTEE.

In *Re Tyler* (1907) 1 K.B. 865. The Court of Appeal (Williams, Farwell and Buckley, L.JJ.,) hold that the principle established by *Ex parte James* (1874) L.R. 9 Ch. 609 that the Court of Chancery will not allow its officer, a trustee in bankruptcy, to retain moneys for distribution among creditors, where it would be contrary to fair dealing to do so, is of general application and is not limited to the case of money paid under mistake of law. In the present case a husband mortgaged a policy on his life, and requested his wife on the eve of his bankruptcy to pay the premiums to keep the policy alive. She paid one premium before his bankruptcy, and after his bankruptcy she continued to pay them until his death. There being a surplus after the payment of the mortgage debt, the question arose whether the wife as against the trustee in bankruptcy was entitled to be recouped the premiums paid by her, and the Court of Appeal held that she was.

INDIA STOCK—FRAUDULENT TRANSFER—PERSONATION—IDENTIFICATION OF TRANSFERROR BY BROKER—LIABILITY OF BROKER.

Bank of England v. *Cutler* (1907) 1 K.B. 889 was an action brought by the plaintiffs to recover the loss which the plaintiffs had been put to, by reason of their having transferred certain India stock upon a fraudulent transfer, the person executing the same having been identified to the plaintiffs by the defendant a broker as the true owner of the shares. According to the custom of the plaintiffs they refused to enter transfers on their books,

which are invalid until so entered and registered, without first receiving from a broker an identification of the transferror as the owner of the stock sought to be transferred. The defendant identified the transferror, but it afterwards turned out that she was fraudulently personating the real owner, and upon the faith of the transfer the plaintiffs made the entry. Subsequently on the application of the true owner the plaintiffs were compelled to purchase new stock to replace that so transferred, and claimed to recover from the defendant the loss thus sustained. Lawrence, J., held that the defendant was liable and gave judgment for the plaintiffs for the amount claimed.

MASTER AND SERVANT—DRIVER OF MOTOR OMNIBUS—"WORKMAN" —EMPLOYERS LIABILITY ACT, 1880 (43-44 VICT. C. 42) S. 8 —EMPLOYERS AND WORKMEN ACT, 1875, (38, 39 VICT. C. 90, S. 10—(R.S.O. C. 160, S. 1 (3)).

In *Smith* v. *Associated Omnibus Co.* (1907) 1 K.B. 916 a Divisional Court (Darling and Lawrence, JJ.,) held that the driver of a motor omnibus who has, when out with the omnibus, to do such necessary repairs as he is able to do, is a "workman" within the meaning of the Employers Liability Act, 1880, and Employers and Workmen Act, 1875 (see R.S.O. c. 160, s. 1 (3)).

PAUPER—POOR LAW GUARDIANS—INMATE OF WORKHOUSE—LIABILITY OF GUARDIANS—MASTER AND SERVANT—COMMON EMPLOYMENT.

Tozeland v. *West Ham* (1907) 1 K.B. 920 was an action of tort brought by a pauper inmate of a workhouse against the guardians of the poor, to recover damages in the following circumstances. The defendants were carrying out an enlargement of electric light installation in the workhouse of which the plaintiff was a pauper inmate, by means of their own servants, the work being under the supervision of a permanent official of the workhouse. The plaintiff with other inmates was ordered to assist and was put to work on a staging which owing to its improper construction gave way, causing the plaintiff the injuries complained of. The defendants contended that the defendant was in the position of a servant and the doctrine of Common Employment relieved defendants from liability. The action was tried in the County Court and the plaintiff recovered

judgment for £100 which was affirmed by the Divisional Court (1906) 1 K.B. 538 (noted ante, vol. 42, p. 417). The Court of Appeal (Barnes, P.P.D., and Farwell and Buckley, L. JJ.,) have not been able to agree with that conclusion, and though they hold that the employment of a pauper in such circumstances is not contractual, but statutory, and therefore the defence of common employment in such a case is no answer, yet they hold, that the setting of paupers to work is part of the statutory duties imposed by statute on the guardians, and an action by the pauper for negligence of one of their officers will not lie against the guardians.

WILL—CONSTRUCTION—"BORN IN MY LIFETIME"—POSTHUMOUS CHILD—DIVESTING CLAUSE—CHILD EN VENTRE SA MERE.

In *Villar* v. *Gilbey* (1907) A.C. 139 the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, James, Robertson, and Atkinson) have reversed the decision of the Court of Appeal (1906) 1 Ch. 538 (noted ante, vol. 42, p. 422) and have restored the judgment of Eady, J. (1905) 2 Ch. 301 (noted ante, vol. 41, p. 835). The case turns on the construction of a will whereby the testator devised to his brother's first and second sons (who were alive at the date of the will) successively for life, with remainder to their first and other sons in tail, with remainder to the brother's third and other sons successively in tail; but he declared his intention to be that any third or other son "born in my life time" should not take any larger interest than an estate for life with remainder to their issue in tail. The first and second sons died without issue, the third son was en ventre sa mere at the testator's death, and the question was therefore whether he took an estate tail or merely an estate for life under the proviso regarding sons born in the testator's lifetime. Eady, J., had held that the third son though en ventre sa mere was not born in the testator's lifetime, and therefore took an estate tail, the Court of Appeal on the other hand thought there was a fixed rule that a child en ventre sa mere was to be deemed to have been born, and therefore that the third son only took an estate for life with remainder to his issue in tail. Their Lordships determine that Eady, J., was right, and that the supposed rule of construction whereby a child en ventre sa mere is to be deemed as born, is only applicable where it is necessary for the benefit of the child.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] BALDOCCHIE *v.* SPADA. [May 7.

Insolvency—Fradudulent preference—Security to creditor—Knowledge of insolvency.

G. had assisted S. with loans and also guaranteed his credit at a bank to the extent of $3,000. His own cheque at the bank was refused payment until the indebtedness of S. was settled, and the latter promised to arrange it within a month, which he did by transferring to G. a quantity of goods pledged to another bank, G. paying the amount due thereon. Shortly after S. sold out his stock in trade and absconded, owing large amounts to foreign creditors and being insolvent. In an action to set aside the transfer of goods to G. as a fraudulent preference under R.S.O. 1897, c. 147, the manager of the bank which refused G.'s cheque testified at the trial that it was not because the solvency of S. was doubted but only that he had heard that S. was dealing with another bank, and he wanted the account closed.

Held, IDINGTON and DUFF, JJ., dissenting, that under the evidence produced G. had no reason to suppose that S. was insolvent and he had satisfied the onus placed on him by the statute of shewing that he had not intended to hinder, delay or defeat creditors. Appeal dismissed with costs.

McKay and *Gideon Grant*, for appellant. *Tytler* and *R. G. Smythe*, for respondents.

Ont.] AMES *v.* CONMEE. [May 7.

Broker—Stock—Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser.

C. instructed A. & Co., brokers, to purchase for him on margin 300 shares of a certain stock paying them $3,000 leaving a balance of $6,225 according to the market price at the time. A. &

Co. instructed brokers in Philadelphia to purchase for them 600 shares of the stock, paying $9,000, nearly half the price and pledged the whole 600 for the balance. The Philadelphia brokers pledged these shares with other securities to a bank as security for indebtedness and latter drew on A. & Co. for the balance due thereon, attaching the scrip to the draft which was returned unpaid and 475 of the 600 shares were then sold and the remaining 125 returned to A. & Co. In an action by the latter to recover from C. the balance due on the advance to purchase the shares with interest and commission,

Held, reversing the judgment of the Court of Appeal (12 O.L.R. 435; 42 C.L.J. 720, Fitzpatrick, C.J., dissenting, that A. & Co. never had the shares for delivery to C. on payment of the amount due by him, and therefore could not recover.

2. The broker had no right to hypothecate the shares with others for a greater sum than was due from C. unless he had an agreement with the pledgee, whereby they could be released on payment of said sum. The bought note of the transaction contained this memo.: "When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us."

3. Per DAVIES and IDINGTON, JJ., that this did not justify the brokers in pledging the shares for a sum greater than that due from the customer. Appeal allowed with costs.

Millar, for appellant. *Tilley*, for respondents.

Yukon Terr.] LAMB *v.* KINCAID. [May 7.

Placer mining—Disputed title—Trespass pending litigation—Color of right—Invasion of claim—Adverse acts—Sinister intention—Conversion—Blending materials — Accounts — Assessment of damages—Mitigating circumstances—Compensation for necessary expenses—Estoppel—Acquiescence.

After a favourable judgment by the Gold Commissioner in respect to the boundary between contiguous placer mining locations and while an appeal therefrom was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of auriferous material from the disputed and undisputed portions thereof, intermixed the pro-

ducts without keeping any account of the quantities taken from these portions respectively, intermixed the products and appropriated the gold recovered from the whole mass.

In an action for damages taken subsequently the plaintiffs recovered for the total value of the gold, estimated to have been taken from the disputed portion of the claim, without deduction of the necessary expenses of workings and winning the gold.

Held, affirming the judgment appealed from, DAVIES, J., dissenting, that a correct appreciation of the evidence disclosed a sinister intention on the part of the defendants that they had deliberately blended the materials taken from both parts of the location, converted the whole mass to their own use and thereby destroyed the means of ascertaining the respective quantities so taken and the proportionate expense of recovering the precious metal therefrom, and that, consequently, they were liable in damages for the total value of so much of the intermixed products as were not strictly proved to have come from the undisputed portion of the location.

Quære. Does the English rule governing the assessment of damages in respect of trespasses in coal mines supply a method of assessment applicable in its entirety to placer mining locations? Appeal dismissed with costs.

Ewart, K.C., for appellant. *Holman*, K.C., and *Gwillim*, for respondent.

Ex. Ct.] McLEAN *v.* THE KING. [May 7.

Subaqueous mining—Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Demurrer—Cause of action.

A statement of claim which alleges that the Crown, after granting a lease of areas for subaqueous mining and while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased areas to placer miners who were put in possession of them by the Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence

of such subsequent grants. Judgment appealed from (10 Ex. C.R. 390) reversed, DAVIES and IDINGTON, JJ., dissenting.

DAVIES, J., dissented on the ground that there was no sufficient allegation in the petition either of interference with the submerged beds or bars of the stream, which alone were included in the dredging lease, or of such active interference by the Crown as would justify an action. Appeal allowed with costs.

Shepley, K.C., for suppliant. *Chrysler*, K.C., for respondent.

Alta.] LAFFERTY *v.* LINCOLN. [May 7.

Constitutional law—Legislative jurisdiction—Con. Ord. N.W.T. c. 52—6 Edw. VII. c. 28 (Alta.)—Medical profession—Practising without license.

Prior to the erection of the Province of Alberta by the "Alberta Act," 4 & 5 Edw. VII. c. 3 (D) "The College of Physicians and Surgeons of the North-West Territories," was incorporated under the "Medical Profession Ordinance," c. 52 of the Consolidated Ordinances of the North-West Territories, and its members had the exclusive right to practice medicine and surgery for gain and reward in the North-West Territories of Canada. By the effect of s. 16 (3) of the "Alberta Act" the college was continued in existence, subject to being "dissolved and abolished by order of the Governor in Council." No Order in Council was passed to dissolve or abolish the college, but, by the "Medical Profession Act" of Alberta, c. 28 of the statutes of 1906, the "College of Physicians and Surgeons of the Province of Alberta" was incorporated, provision made for the registration of members of the "College of Physicians and Surgeons of the North-West Territories," and of other persons, as members of the "College of Physicians and Surgeons of the Province of Alberta," giving members so registered the exclusive right to practice medical-surgery, etc., for gain or reward in the Province of Alberta, and prohibiting unregistered persons from so practising under a penalty. The respondent was a duly registered member of the "College of Physicians and Surgeons of the North-West Territories," but neglected to register as a member of the "College of Physicians and Surgeons" of the Province of Alberta, and continued to practice medicine, surgery, etc., without the qualification and license

required by the "Medical Profession Act" of Alberta. He was convicted of the offence created by this Act, but, on a case stated the Supreme Court of the North-West Territories quashed the conviction and declared the Act ultra vires of the Province of Alberta.

Held, reversing the judgment appealed from, the Legislature of the Province of Alberta had jurisdiction to enact the statute in question without the formality of an Order in Council dissolving and abolishing the "College of Physicians and Surgeons of the North-West Territories," and that the conviction of the respondent under the "Medical Profession Act of Alberta," should be affirmed. *Dobie* v. *The Temp. Board* (7 App. Cas. 136) distinguished.

Appeal allowed with costs.

Woods, and *Young,* for appellant. *J. A. Allan,* for respondent.

Ex. Ct.] [May 1°.

PROVINCE OF ONTARIO *v.* DOMINION OF CANADA.

Constitutional law—Liabilities of province at confederation—Special funds—Rate of interest—Trust funds or debt—Award of 1870.

Among the assets of the Province of Ontario at Confederation were certain special funds, namely, U.C. Grammar School Fund, U.C. Building Fund, U.C. Improvement Fund, and the province was a debtor in respect thereto and liable for interest thereon. By B.N.A. Act, 1867, s. 111., the Dominion of Canada succeeded to such liability and paid the province interest at five per cent. up to 1904. In the award made in 1870 and finally established in 1878 on the arbitration under s. 142 of the Act to adjust the debts and assets of Upper and Lower Canada, it was adjudged that these funds were the property of Ontario. On appeal from the judgment of the Exchequer Court in an action asking for a declaration as to the rights of the province in respect to said funds,

Held, affirming said judgment (10 Ex. C.R. 292). IDINGTON, J., dissenting, that though before the said award the Dominion was obliged to hold the said funds and pay the interest thereon to Ontario, after the award the Dominion had a right to pay

over the same with any accrued interest to the province, and thereafter be free from liability, in respect thereof.

Held, also, that until the principal sum was paid over the Dominion was liable for interest thereon at the rate of five per cent. per annum. Appeal dismissed with costs.

Irving, K.C., *Ritchie*, K.C., and *Shepley*, K.C., for appellant. *Newcombe*, K.C., and *Hogg*, K.C., for respondent.

Ont.] VALIQUETTE *v.* FRASER. [May 13.

Negligence—Construction of building—Contract for construction—Collapse of wall—Building not completed—Vis major.

Held, per DAVIES and MACLENNAN, JJ., that the owner of a building in course of construction owes to those whom he invites into it or upon it the duty of using reasonable care and skill in order to have the property and appliances upon it intended for use in the work fit for the purposes they are to be put to. Such duty is not discharged by the employment of a competent architect to prepare plans for the building and a competent contractor to attend to the work of construction.

Per IDINGTON, J.:—The fact that the building is in an unfinished state may render the obligation of the owner towards a workman employed upon it less onerous in law than it would be in the case of a completed structure.

Per DUFF, J.:—Does the rule governing the duty of occupiers respecting the safe condition of the premises apply without qualification where the structure is incomplete, and the invitee is engaged in completing it or fitting it for its intended use?

Per DAVIES and MACLENNAN, JJ.:—In the present case the failure to guard against the effect of a sudden storm of so violent and extraordinary a character that it could not have been expected, was not negligence for which the owner was liable.

Judgment of the Court of Appeal, 12 O.L.R. 4, and of the Divisional Court, 9 O.L.R. 57, affirmed. Appeal dismissed with costs.

Lorne McDougall, Jr. for appellant. *Shepley*, K.C., and *John Christie*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] EMBREE *v.* MCCURDY. [June 5.

Jurisdiction—Appeal pending—Application for injunction or receiver after security for costs given.

On an application to the Court of Appeal, in a partnership action in which the plaintiff had a judgment in his favour, but an appeal to the Court of Appeal was pending, the security for costs having been given, for an order for an injunction to prevent the defendant from dealing with partnership moneys, or for a receiver. On objection taken that there was no jurisdiction in the Court to make such an order,

Held, that a single judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any party pending an appeal, and that what may be done by a single judge during vacation can be done by the Court at any other time; and that the Court of Appeal for the purposes of appeals, etc., has all the power, authority and jurisdiction by the Judicature Act vested in the High Court and the order was granted.

B. N. Davis, for the motion. *F. E. Hodgins*, K.C., contra.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., MacMahon & Teetzel, JJ.] [April 2.

CUFF *v.* FRAZEE STORAGE & CARTAGE CO.

Evidence of witness at a former trial—Reception of at subsequent trial—Absence of witness—Diligent search for.

Where a witness has given oral testimony under oath in a judicial proceeding in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself be incapable of being called, be admitted in any subsequent suit between the same parties or those claiming under

them, if such suit relate to the same subject or substantially involve the same material questions.

And in an action in which a witness had given evidence at a trial but on appeal a new trial of the action was granted for which he could not be found it was sought to have his evidence given in the first trial used on the second.

It was shewn that the witness had called at the defendant's place of business between the two trials and stated that he was going to the "other side" and that on enquiries being made a couple of weeks before the second trial at his address, where he had been stopping the persons there could not tell his address except that he had gone to the States, they thought to Cleveland,

Held, that it was not necessary to prove that he was out of the jurisdiction and that the answers to the enquiries were admissible to prove the unsuccessful search for the witness and the inability to find him and should not be treated as hearsay evidence and that sufficient diligent enquiry was shewn and the evidence of the witness should have been received.

Munro v. *Toronto Railway Co.* (1904) 9 O.L.R. 299 at p. 312 distinguished.

Held, also, that there was sufficient evidence to entitle the plaintiff to have the case left to the jury.

Judgment of ANGLIN, J., reversed.

Wm. M. Hall, for the appeal. *Godfrey* and *Phelan*, contra.

Riddell, J.] RUETSCH *v.* SPRY. [April 11.

Vendor and purchaser—Sale of house and portion of land—Fence on boundary line—Interference with enjoyment of vendee's portion—Derogation from grant—Injunction.

Defendant being the owner of certain land on the east end of which was a house which was lighted by windows on the west side, sold part of the land including the part upon which the house was built to the plaintiff. After an action to determine the boundary line which had been incorrectly defined in the deed and which was decided in the action to be very close to the house the defendant built a high close board fence entirely on his own land but up to the boundary line.

Held, in a second action that the defendant could not derogate from his own grant and as the trial judge found on the

evidence that the fence cut off the light and by excluding the air impaired the ventilation, and as the snow and ice collected in the narrow space between the fence and the house from which it could not be removed and when melting in the spring the water could not run away but soaked through the walls of the house, the plaintiff was deprived of the comfortable and reasonable enjoyment of the house, which he had a right to expect and an injunction was granted restraining the defendant from continuing the fence in such a way as to interfere with such enjoyment.

O'Connell and *Gordon*, for plaintiff. *Edminson*, K.C., for defendant.

Britton, J.] EMBREE *v.* MCCURDY. [May 10.

Action pending in Court of Appeal—Application in High Court —Further proceedings—Con. Rule 829.

In an action for a declaration that a partnership existed and for a dissolution and an account, in which judgment was obtained by the plaintiff but by leave an appeal to the Court of Appeal was pending, the security being given.

Held, that an application to a High Court judge for an injunction to restrain the defendant from dealing with partnership moneys was "a further proceeding....other than the issue of the judgment or order and the taxation of costs thereunder" under Con. Rule 829, and the High Court judge could not entertain it.

B. N. Davis, for the motion. *Middleton*, contra.

Correspondence.

THE BENCH AND THE PRESS.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—I note your criticism of the Toronto press on its abuse of the Judicial Committee of the Privy Council. I agree with you, as I believe almost everyone outside Toronto does, and I trust a good many inside it. But I think you take the Toronto press altogether too seriously—you view it at close range and it looks larger that it really is.

There is something peculiar about the greater part of the

Toronto press at the present time—it is out of touch with the trend of thought in Canada. Time was when the *Globe* was a true exponent of liberal principles. Given certain facts, you could tell just where that paper would strike and why. To-day a *Globe* editorial suggests a cross between a Sunday school teacher's address and a stump speech by a mugwump. It takes a little run at passing events, backs up a little, takes another run, butts in in another place, and then harks back again into smugness. The *Mail and Empire* has a bad liver and nothing agrees with it and nothing is bad enough for its political opponents. The *News* should head its editorial columns with the story of the old Scotchman who prayed for himself, his wife, his son Jock and Jock's wife, and suggested to an all-wise Providence that all others should be given a short shrift and no mercy. The *News* has a black list on which the editor has the name of almost everyone, including, I suppose, your own. However, you need not worry as on that list are the names of kings, lords, members of parliament, princes, popes, premiers, prophets and priests, in fact, the names of all the best people. The editor of the *News* knows everything and knows that he knows it; he also knows that nobody else knows anything. That's why he takes himself so seriously. The *Presbyterian* knows everything that took place long ago, especially things outside its proper sphere. A friend suggests it should be given a place in one of those old pictures of Pope and Pagan in Pilgrim's Progress, who are represented as toothless and impotent and that a third figure should be inserted and the picture re-named, Pope Pagan and Presbyterian. Not one of these papers has any influence outside Toronto. Men who for a generation looked for their political guidance to the *Mail* or the *Globe* do so no longer. The *News*, fallen from its high ideals, has developed into a disgruntled critic.

I do not know why the Toronto press should be so narrow, but it is unquestionable that it is not in touch with the people, both east and west of Ontario, and, I venture to say, with a large part of the denizens of Ontario. A single phase of this narrowness has struck you as a lawyer, but the montanist attitude of the Toronto press is not by any means confined to matters legal. To read the lectures which these editors give one another is an illiberal education. Each one of them is a rascal according to every other one and so is nearly every other person.

Let me commend you for bearding the lions in their own den.

Morden, Man. A. McLeod.