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THE REVOCATION OF TREATY PRIVILEGES TO ALIEN-SUBJECTS.

International Treaties, or Conventions, may be divided into two classes. One class may prescribe and define the sovereign international relations, rights, duties, privileges, and obligations of the respective Treaty-contracting nations, such as relate to peace and war, contraband of war, neutrality, alliances, guarantees, or to the territorial possessions, or boundaries, of their respective nations; or such other questions of la haute politique extérieure, as may affect their sovereign relations. inter se, as members of the Society of Nations.

Another class of Treaties may concede the allowance, and prescribe the conditions, of subordinate, or "alien-subject," privileges or commercial concessions, under which the alien-subjects of another nation may be privileged to share with home-subjects of the conceding nation, in certain of their natural rights respecting the trade and commerce, territorial admission, transit, residence, privilege of coast-fisheries, or user of territorial easements to all, or to designated classes, of the subjects, or citizens, of another nation. This class of alien-subject or commercial Treaty concessions comes within the doctrine of International Law that: "A State may voluntarily subject itself to obligations to another State, both with respect to persons and things, which would not naturally be binding upon her. These are servitutes juris gentium voluntariæ."[1] Other classifications of Treaties have been made by various authorities on International Law, which divide them into more classes than those suggested above.[2]

The generally assumed doctrin of International Law on the question of the prerogative power of nations to vary, or abro-

[1] Phillimore's International Law (3rd ed.), vol. 1, p. 391.

[2] Hall's International Law (5th ed.), p. 360.

gate, Treaties has been thus stated: "Private contracts may be set aside on the ground of what is technically called in English law the want of consideration, and the inference arising from manifest injustice, and want of mutual advantage. But no inequality of advantage, no lésion, can invalidate a Treaty."[3] Further, as Vattel says: "An injury cannot render a Treaty invalid. If we might recede from a Treaty because we found ourselves injured, there would be no stability in the contracts of nations."[4] But without impeaching this assumed doctrine as applicable to Treaties which deal with the higher international rights and responsibilities of nations, as sovereignties, it will be found that it has not been universally accepted by other authorities on International Law as applicable to, gratuitous, or reciprocal, commercial or residential privileges, or territorial easements, conceded to the subjects or citizens of foreign nations; nor by some nations in the higher relations of sovereignties inter se; as when Russia in 1871 sought to revoke the provision in the Treaty of 1856, which "in perpetuity interdicted to the flag of war" the Black Sea and its coasts. The protocol of the signatory Powers to the original Treaty declared that "it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers, by means of an amicable arrangement."[5] To apply such an absolute doctrine to Treaty concessions respecting trade and commerce, coast fisheries, transit of persons or goods, residential, or other privileges in certain natural rights of the home-subjects of a conceding nation, to the alien-subjects of another nation, would involve the unconditional surrender of an inherent and inalienable prerogative of territorial sovereignty; in other words a perpetual national servitude to the alien-subjects of another nation, which would be an international degradation of its amour propre as a nation,—not sovereign independence and international equality.

[3] Phillimore's International Law (3rd ed.), vol. 2, p. 76.

[4] Vattel's Law of Nations, p. 194.

[5] Wheaton's International Law (1878), p. 712.

Of the nations which have not accepted the above in its entirety as a recognized doctrine of International Law, the United States has been the most pronounced, for it has furnished the largest number of modern instances of the exercise of the legislative and prerogative powers of variation, or abrogation, of Treaties entered into by it with foreign nations. And respecting the second, or "alien-subject," or commercial, class of Treaties, its Supreme Court has said: "A Treaty may also contain provisions which confer certain rights upon the citizens, or subjects of one of the nations within the territorial limits of the other, which partake of the nature of local municipal law, and which are capable of inforcement as between private parties in the courts of the country. The Constitution of the United States places such provisions as these in the same category as other laws of Congress, and they may be repealed, or modified, by an Act of a later date,"[1] without the assent of the foreign nation with which the Treaty had been made.

By the Constitution of the United States, its legislative powers are vested in two departments of the Supreme Government: (*a*) by Article I., which provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives;" and (*b*) by Article II., which provides that "the President shall have power, by and with the consent of the Senate, to make Treaties, provided that two-thirds of the Senators present concur."

Then Article VI. declares that three instruments, viz.:—

"(*a*) This Constitution and (*b*) the laws of the United States which shall be made in pursuance thereof, and (*c*) all Treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

These articles of the Constitution received an early interpretation by Chief Justice Marshall their Supreme Court:

[1] Head Money Cases (1884), 112 U.S. 580.

"Where a Treaty is the law of the land, and as such affects the rights of parties litigating in court, that Treaty as much binds those rights, and is as much to be regarded by the court, as an Act of Congress."[7] And the repealing effect of a Treaty over the previous legislative Acts of State Legislatures had been earlier declared by the same Supreme Court, that "a Treaty, as the supreme law, overrules all State laws on the same subject, to all intents and purposes."[8]

It may be conceded generally that whenever, under a constitutional government, a Treaty becomes operative by itself, its confirmation by a legislative act is not necessary. But where it imports a contract, or where money is required to be appropriated, or fiscal revenue affected, or territory to be ceded, in each of such cases a legislative act becomes necessary before the Treaty can be given the force of law; for the public money cannot be appropriated, nor fiscal charges be varied, nor national territory be ceded, (except as a result of war), by the Treaty-making power of a Government.[9]

By the exercise of the legislative and judicial process of constitution-making assumed by the Congress and courts of the United States, it has been legislatively and judicially determined that Treaties made by the United States with foreign nations are subject to the same Congressional power of variation, or abrogation, as are the ordinary legislative Acts of Congress.

This Congressional power of abrogation was first exercised by the United States in 1798, by "An Act to declare the Treaties heretofore concluded with France no longer obligatory on the United States." After a preamble reciting, among other grounds, that the Treaties with France had been "repeatedly violated on behalf of the French Government," it enacted "that

[7] *United States* v. *Schooner Peggy* (1801), 1 Cranch (U.S.), 103.

[8] *Ware* v. *Hylton* (1796), 3 Dallas (U.S.), 199; Passenger Tax Cases (1849), 7 Howard, 283; Moore's Digest of International Law, vol. 5, ss. 777 and 778.

[9] American and English Encyclopædia of Law (2nd ed.), vol. 28, p. 480; *Damodhar Gordham* v. *Deoram Kanji* (1876), 1, Appeal Cases, 332.

th me shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States."[10]

The alleged cause was a decree, or legislative act, of the French Directory of 1796 which declared that "every vessel found at sea, loaded in whole or in part with merchandise the production of England, or of her dependencies, shall be declared good prize, whoever the owner of the goods or merchandise may be," thereby abrogating the Treaty of 1778, which provided that "free ships shall give freedom to goods on board of the ships of the subjects of either nation, contraband goods excepted."[11]

A case with Russia affecting this subordinate class of trade and commerce, under a Treaty of 1832, under which it was claimed that no higher duty than 25 dollars per ton should be chargeable on Russian hemp, raised a similar question. By a subsequent Act of Congress the duty was raised to 40 dollars per ton. An action was brought in a United States court for a refund of the extra duty; but the court said: "To refuse to execute a Treaty for reasons which approve themselves to the conscientious judgment of a nation is a matter of the utmost gravity and delicacy, but the power to do so is prerogative, of which no nation can be deprived without deeply affecting its independence."[12] In a later case, involving the same question, the court said: "Congress may render a Treaty inoperative by legislation in contradiction of its terms without formal allusion at all to the Treaty; thus modifying the law of the land without denying the existence of the Treaty or the obligations thereof between the two Governments as a contract."[13]

This latter mode has been applied to Canada on more than one occasion by the United States. Shortly after Jay's Treaty of 1794, the Executive of the United States nullified the 3rd Article of that Treaty, which provided that "it shall at all times be free to the subjects and citizens of both nations freely to pass

[10] Statutes at Large (U.S.), vol. 1., p. 578, c. 67.

[11] American State Papers, Foreign Relations, vol. 2, pp. 169-182.

[12] *Taylor* v. *Morton* (1855), 2 Curtis (U.S.), 454.

[13] *Ropes* v. *Clinch* (1871), 8 Blachford (U.S.), 304.

and repass, by land or internal navigation, into the respective territories of the two nations, and freely to carry on trade with each other." It further provided that all goods and merchandise (not prohibited by law) should "freely, for the purposes of commerce, be carried into the United States by His Majesty's subjects; and such goods or merchandise shall be subject to no higher duties than those payable by the citizens of the United States on importations of the same on American vessels into the Atlantic ports of the said States." The duty payable on such importations at the Atlantic ports was 16½ per cent., but the United States enforced the payment by Canadians of a duty of 22 per cent. at the inland ports along the Canadian boundary line; and also a fee of 6 dollars for a license to trade with the Indians, not chargeable against American traders;[14] and so turned into diplomatic irony the closing words of the Article:—

"As this Article is intended to render in a great degree the local advantage of each party common to both, and thereby to promote a disposition favourable to friendship, and good neighbourhood, it is agreed that the respective Governments will mutually promote this amicable intercourse, by causing speedy and impartial justice to be done, and necessary protection to be extended to all concerned therein."[15]

A similar policy was adopted in 1875 by Congress imposing a customs duty on the tin cans in which Canadian fish and fish oil were entitled by Article 21 of the Treaty of Washington of 1871 to be imported into the United States "free of duty." The Act of Congress enacted: "That cans or packages made of tin or other material, containing fish of any kind admitted free of duty under any law or Treaty,"[16] shall be subject to a specific duty, though the tin cans when opened were necessarily destroyed, as unsaleable and useless. The effect of this legislation was declared by the British Minister to "prohibit entirely the importation of fish from Canada into the United States, and to render the stipu-

[14] American State Papers, Foreign Relations, vol. 3, p. 152.

[15] Treaties and Conventions between the United States and Other Powers, p. 319.

[16] Statutes at Large (U.S.), vol. 18, p. 308, c. 36.

lation of the Treaty illusory."[17] Canada imposed no retaliatory duty on American tin cans containing fish or fish oil imported into Canada under the same Article.

The diplomatic relations between the United States and China furnish several illustrations of the Congressional revocation of Treaties conceding municipal and reciprocal international privileges, or concessions, to the subjects of that Empire.

By what is known as the Burlinghame Treaty with China of 1868, it was provided that citizens of the United States visiting, or residing, in China, and Chinese subjects visiting, or residing, in the United States, should reciprocally enjoy the same privileges, immunities and exemptions in respect to travel or residence as may then be enjoyed "by the citizens or subjects of the most favoured nation;" and that they should also reciprocally enjoy all the privileges and immunities of the public educational institutions under the control of either nation "as are enjoyed in the respective countries by the citizens or subjects of the most favoured nation."

The first Congressional variation of the provisions of this Treaty was made in 1875, by which contracts of service with Chinese subjects were declared void within the United States.[18]

In 1880, another Treaty with China provided that the Government of the United States might regulate, limit, or suspend the coming or residence, of Chinese labourers in the United States, "but may not absolutely prohibit it."[19]

Notwithstanding the Treaty concession of such reciprocal residential, educational, and trade privileges "as were accorded to the citizens, or subjects, of the most-favoured nation," Congress passed an Exclusion Act in 1888, depriving Chinese subjects of certain Treaty privileges.[20] On appeal, the Supreme Court held that "the Exclusion Act of 1888 was in contravention of the express stipulations of the Treaty of 1868 and of the Sup-

[17] Canada Sessional Papers (1877), vol. 10, No. 14, p. 6.

[18] Statutes at Large (U.S.), vol. 18, p. 477, c. 141.

[19] Compilation of Treaties in Force (U.S.), 1899, p. 118.

[20] Statutes at Large (U.S.), vol. 25, pp. 476 and 504, cc. 1015 and 1064.

plementary Treaty of 1880;" and that it was "a constitutional abrogation of the existing Treaties with China;" adding:—

"The power of the exclusion of foreigners, being an incident of sovereignty belonging to the Government as part of the sovereign powers delegated by the Constitution, the right to its exercise at any time, when, in the judgment of the Government, the interests of the country require it, cannot be granted away, or restrained, on behalf of anyone. The powers of Government are delegated in trust and are incapable of transfer to other parties. Nor can their exercise be hampered when needed for the public good. The exercise of these public trusts is not the subject of barter or contract. Whatever license Chinese labourers may have obtained is held at the will of the Government, revocable at any time at its pleasure. Unexpected events may call for a change in the policy of the country. . . But far different is the case where a continued suspension of the exercise of a prerogative power of abrogation is insisted upon as a right, because by the favour and consent of the Government of the nation it has not heretofore been exercised. The rights and interests created by a Treaty which have become so vested that its expiration, or abrogation, will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer, or other disposition; not such as are personal and intransferable in their character. . . . Between property rights not affected by the termination, or abrogation, of a Treaty, and expectations of personal benefits from the continuance of existing Treaty legislation, there is as wide a difference as between realization and hopes."[n]

And the Supreme Court also held that the sovereign and legislative powers of the Government to exclude aliens from the territory of the United States, who claimed the Treaty privilege of entering its territory, was incident to the inherent and inalienable prerogatives and sovereignty of the nation, which could not be surrendered in perpetuity to the subjects of foreign nations by the Treaty-making power of that Government; and that such Treaty privilege of entering the territory of the United States was "during pleasure," and was revocable at any time whenever the sovereign interests of the Government demanded it, or when-

[n] Chinese Exclusion Cases (1889), 130 U.S. 581.

ever the natural rights of its citizens were injuriously affected. This inherent prerogative of sovereignty to exclude aliens from British territory, and to prescribe what conditions it pleases to the permission to enter and reside in it, has been approved by the Judicial Committee of the Privy Council, and is therefore equally the law of the British Empire.[22] And the doctrine of International Law concurs that: "no stranger is entitled to enter the boundaries of a State without its permission, much less to interfere with its full exercise of supreme dominion."[23]

The Supreme Court's decision as to "intransferable privileges" harmonizes with the Roman Law which declares: "Servitutes personales include usufructus, and are enjoyable by sufferance, or forbearance, and so are subject to the jure dominii. The usufructuarius cannot alter the form of the grant of the thing which the dominus utilis can. The first cannot grant away his right, the latter can. Such rights as these are for mutual accommodation, and are consequently of a private nature; but they will not be valid where they perniciously affect the public good."[24]

The fishery privileges conceded to the "inhabitants of the United States" of the trade class of "American fishermen" by the Treaty of 1818, are within this rule as being privileges intransferable to other trade classes in the United States.

These decisions have now become incorporated into the International Law of the United States; and have attained the authority of precedents controlling the Treaty-making power of that Government respecting the class of Treaties conceding alien-subject, or commercial, privileges in what are defined as "the natural rights of home-subjects;" and must therefore be accepted as exceptions to the generally assumed doctrine of International Law, quoted in the beginning of this article; and as establishing a distinction in the applicability of that assumed doctrine between Treaties respecting the higher international

[22] *In re Adam* (1837), 1 Moore, P.C. 460; *Attorney-General of Canada* v. *Cain* (1906), Appeal Cases 542.

[23] Phillimore's International Law (3rd ed.), vol. 1, p. 221.

[24] Colquhoun's Roman Civil Law, vol. 2, pp. 17 and 93.

right and relations which affect nations, as sovereignties inter se, and Treaties which concede alien-subject, or commercial, privileges in the natural rights of the home-subjects, or citizens, of the conceding nation. For a consistent succession of precedents have an authentic force in International Law, and are also invaluable in diplomacy. And if accepted as authoritative precedents by other nations, governing their Treaty-making powers with the United States, their international force cannot fairly be repudiated by its Government, as not being equally within the inherent prerogative powers of such other nations; nor questioned on the ground that such nations are not entitled to recognize and apply them as reciprocal and authoritative precedents in their international relations with the United States.

The ratio suasoria of these precedents seems to lead to this conclusion: The prerogatives of sovereignty are regal trusts vested in the sovereign as the executive authority of the nation, for the protection of the natural rights and property of his subjects, and for the promotion of their welfare and good government; and that in the execution of the regal trust of the maintenance of the territorial inviolability and sovereignty of the nation, it is not unlimitedly within the treaty-making power of such executive authority as the temporary trustee of the national sovereignty, to concede to a foreign nation for the benefit of the commerce, or municipal purposes or privileges, of its subjects, or citizens, either for a limited time, or in perpetuity, or "in common with the home-subjects," any interest, easement, or privilege; in the natural, or public property, rights to which the home-subjects are entitled. But wherever such executive authority concedes gratutiously, or reciprocally, either by Treaty, or by what is known as Comity,[28] any such interest or easement, or privilege, in the natural rights or the public property of the home-subjects, to the alien-subjects or citizens of a foreign nation, such concessions are "during pleasure," and are always subject to

[28] "Comity extended to other nations is no impeachment of sovereignty. It is the voluntary act of a nation by which it is offered; and it is inadmissible when contrary to its policy, or prejudicial to its interests." *Bank of Augusta* v. *Earle* (1839), 13 Peters (U.S.), p. 589.

the inherent prerogative right of revocation at any time, whenever the natural rights in the public property, or the welfare, of the home-subjects, or the interests of state policy, or the maintenance of the territorial inviolability and sovereignty of the conceding nation, require such revocation.

And, sustaining this reasoning, and also the claim of the natural rights of subjects in the public property of their nation, of which the coast fisheries form a part, Vattel is equally explicit:

"It is very just to say that the nation ought carefully to preserve her public property and not to dispose of it without good reason, nor to alienate, or charge it but only for a manifest public advantage, or in case of a pressing necessity. The public property is extremely useful, and even necessary to the nation; and she cannot squander it improperly without injuring herself, and shamefully neglecting the duty of self-preservation. As to the property common to all the citizens, the nation does an injury to those who derive advantage from it, if she alienates it without necessity, or without cogent reasons. . . . The prince, or the superior of the society, being naturally no more than the administrator, and not the proprietor, of the State, his authority as sovereign, or head of the nation, does not of itself give him a right to alienate, or charge, the public property. The right to do this is reserved to the proprietor alone, since proprietorship is defined to be the right to dispose of a thing substantially. If he exceeds his powers with respect to this property, the alienation he makes of it will be invalid; and may at any time be revoked by his successor, or by the nation." . . . "The rules we have just established relate to alienations of public property in favour of alien individuals."[28]

Respecting Treaties which concede voluntary, or unequal, servitutes, without reciprocal privileges, or concessions, Hautefeuille sustains the exception to the generally assumed doctrine of International Law, quoted above, and says:—

"Treaties are in general obligatory on the nations which have consented to them; however they have not this quality in an absolute manner, (cependant ils n'ont pas cette qualité d'une manière absolue). The unequal Treaty, or even the equal, con-

[28] Vattel's Law of Nations, pp. 116-7.

ceding the gratuitous, or free, cession, or surrender, of an essential natural right,—that is to say, without that which a nation cannot be considered as existing still as a nation, such for example with even partial independence, [these Treaties] are not binding, (ne sont pas obligatoires). They exist as long as the two nations persist in desiring their existence. But each of the two nations had always the right to discontinue, (le droit de les rompre), that which affects the cession of an important natural right by anticipating the other party in denouncing the Treaty. The reason of the invalidity of transactions of this nature is that these natural rights of this quality are inalienable; and to make use of an expression of the civil law, they are "out of commerce," ("hors le commerce"). It is so of Conventions alike equal in which essential natural rights are affected, which operate only on the private, and secondary, interests of the people. But even if they have been declared perpetual, they have no existence but by the continuation of the two wills which have created them. The stipulation of perpetuity has no other effect than to avoid the necessity of renewing the Convention."[27]

Other authorities express similar views. Heffter says that a State may repudiate a Treaty when it conflicts with "the rights and welfare of its people." Bluntschli says that while a State may be required to perform the onerous engagements it has contracted, it may not be asked to sacrifice, in the execution of Treaties, that which is incompatible with its potentiality, or the development of its resources; or to perform acts which have become greatly modified by time, and their execution has become incompatible with present affairs; and it may consider such Treaties null.[28] Fiore says that "Treaties are to be looked upon as null which are in any way opposed to the development of the free activity of a nation, or which hinder the exercise of its natural rights." Vattel concurs that "A Treaty pernicious to the State is null, and not at all obligatory. The nation itself being necessarily obliged to perform everything required for its

[27] Hautefeuille's Des Droits et Des Devoirs des Nations Neutres (3me ed.), vol. 1, p. xiii. "Hautefeuille is the author of the ablest Treatises on the science of International Law that have appeared in France." Wheaton on International Law, by Lawrence, p. 21n.

[28] Bluentschli's Droit International Codifié (5me ed.), pp. 224 and 263.

preservation and safety, cannot enter into engagements contrary to its indispensable obligations." And he cites, as an illustration, that "in the year 1506 the States-General of the Kingdom of France engaged Louis XII. to break the Treaty he had concluded with the Emperor Maxmillian and the Arch-Duke Philip, his son, because that Treaty was pernicious to the kingdom. They also decided that neither the Treaty, nor the oath that had accompanied it, could be binding on the King, who had no right to alienate the property of the Crown."[29]

But, while these authorities are not entirely concurred with by some English writers, one writer, however, who does not concur, admits that internationally, as no superior coercive power exists, and as enforcement is not always convenient, or practical, to the injured party, the individual State must be allowed in all cases to enforce, or annul, for itself as it may choose.[30]

It was well said by Chief Justice Jay, of the Supreme Court of the United States, that "the contracts of sovereigns are made for the benefit of all their own subjects; and therefore every sovereign is interested in every Act which necessarily limits, impairs, or destroys that benefit. Whatever injuries result to the subjects run back from them to their sovereign." And he further said that a voluntary validity of a Treaty is that validity by which a Treaty that has become voidable by reason of violations, afterwards continues to retain validity by the silent volition and acquiescence of the nations concerned;[31] or, in other words, "during pleasure."

It would seem, therefore, to be reasonable in the international and diplomatic interests of other nation sovereignties that the doctrine which those precedents sanction, and which the United States has heretofore enforced, and has thereby incorporated into its administration of International Law, should be recognized as an authoritative doctrine of general International Law,

[29] Vattel's Law of Nations, p. 194.

[30] Hall's International Law (5th ed.), 352 and 358.

[31] *Jones* v. *Walker*, 2 Paine (U.S.), 688.

governing the class of Treaties which concede to the alien-subjects of a privileged nation, commercial and residential privileges, or territorial easements, or privileges of sharing in the natural rights and public property of the home-subjects of the conceding nation.

Of the many Treaties between Great Britain and Foreign Nations, few appear to have caused so much international friction and diplomatic controversy as those which deal with the Treaty relations between Great Britain, on behalf of Canada and Newfoundland, and the United States; especially the gratuitous concession of the trade privileges set out in the Fishery Article of the Anglo-American Treaty of 1818, by which Great Britain generously conceded to "the inhabitants of the United States," of the trade of "American fishermen," to have "forever, in common with the subjects of His Britannic Majesty," (1) the liberty to take fish of every kind in the Canadian coast-waters along the shores of the Magdalen Islands, and from Mount Joli to Blanc Sablon, on the Quebec Labrador coast of Canada; and in the Newfoundland coast-waters from the Rameau Islands to Cape Ray and round to the Quirpon Islands along the southern, western and northern coasts of Newfoundland; and from Blanc Sablon, along the southern and eastern coasts of Labrador to and through the Straits of Belle Isle, and thence northwardly, indefinitely, along the said Labrador coast of Newfoundland;" with (2) the "liberty for ever" to dry and cure fish "in any of the unsettled bays, harbours and creeks" on the southern coast of Newfoundland from the Rameau Islands to Cape Ray; and (3) the further liberty to enter all British Colonial bays, or harbours, "for shelter, or repairing damages, or procuring wood and water."[35] And the Treaty then declares that these three fishery privileges to American fishermen shall be subject to "such Restrictions as may be necessary to prevent their taking, drying, or curing fish (in certain bays or harbours), or in any other manner whatever abusing the privileges reserved to them."

[35] Treaties and Conventions between the United States and Other Powers, p. 350.

As stated by Hautefeuille, the stipulation "for ever" in this class of Treaties, is to avoid the necessity of renewals, and is not therefore, indefinitely, or in perpetuity, binding on the conceding nation.

And here it may be claimed that, in any event, this "liberty to take fish," in common with British subjects, cannot be construed to permit the assertion of any jarring claim on the part of American fishermen of an immunity from British and Colonial laws regulating fishing within the Treaty coast-waters, or of any claim of right, or privilege, which could in any way limit, or prejudice, the earlier, or pre-treaty, natural right, or privilege, of the colonial subjects of the Crown to fish in their own coast-waters.

The War of 1812-14 abrogated the previous fishing privileges conceded to American fishermen by the Treaty of Independence of 1783; and during the negotiations for the Treaty of Ghent of 1814, the British Plenipotentiaries informed the American Commissioners that "the privileges formerly granted to the United States of fishing within the limits of British coast-waters, and of landing and drying fish on British-Colonial coasts, would not be renewed gratuitously, or without an equivalent,"[83] But in 1818, the British Government gratuitously reversed this policy by intimating to the American Secretary of State that "in estimating the value of these proposals" (of fishery privileges in the coast-waters of Canada and Newfoundland), "the American Government will not fail to recollect that they are offered without any equivalent," of either a financial consideration, or of a reciprocal privilege of fishing within United States coast-waters;[84] a proposal which may bring this gratuitous concession of a colonial natural right of property within Hautefeuille's class of "unequal Treaties," which he says "are not binding;" and which Bluntschli and Fiore class as "null."

The territorial coast mileage of these gratuitous fishing privileges to American fishermen extends along about 870 miles of the

[83] American State Papers, Foreign Relations, vol. 3, pp. 705 and 708.
[84] Ibid., vol. 4, p. 365.

Canadian coast-waters, and about 1,790 miles of the Newfoundland coast-waters, or about 2,660 miles of the teeming fish-wealth of these British-American waters.

Furthermore, this concession has long been an "entangling alliance," which has been productive of much international friction with the United States, chiefly caused by the assertion by its Government of untenable claims of the immunity of American fishermen from the British and Colonial fishery and customs laws, which are binding on the Colonial subjects of the Crown; and also caused by some grave instances of the misuse by American fishermen, of the fishery privileges within the Colonial coast-waters.

The earliest misuse of these fishery privileges by American was not of fair competition that His Majesty's Government have fishermen was thus summarized by Lord Bathurst in 1816: "It reason to complain, but of the pre-occupation of British harbours by the fishery vessels of the United States, and the forcible expulsion of British vessels from places where their fisheries might be advantageously conducted."[35] And later by Lord Salisbury, forwarding to the United States Government the report of the Naval Officer at Newfoundland in 1878: "The report appears to demonstrate conclusively that the United States fishermen committed three distinct breaches of the law; and that in the case of a vessel whose master refused to desist from fishing on Sunday, in violation of the law of the colony, threatened the Newfoundland fishermen with a revolver." The breaches of the law were: (1) fishing with purse-seines; (2) fishing during the close season; and (3) fishing on Sunday. The Naval Officer further reported that the American fishermen were interfering with the rights of British fishermen, and their peaceful use of the coast occupied by them, and of their huts, gardens, and lands granted them by their Government.[36]

The reply of the United States to this was the assertion of the immunity of American fishermen from British laws, which

[35] Ibid., vol. 4, p. 356.

[36] Foreign Relations (U.S.), 1878-9, p. 265.

was thus met by Lord Salisbury in 1878: "I hardly believe that Mr. Evarts would, in discussion, adhere to the broad doctrine which some portion of his language would appear to convey, that no British authority has a right to pass any kind of laws binding on Americans who are fishing in British waters; for if that contention be just, the Treaty waters must be delivered over to anarchy."[37]

The same immunity from British laws has been more recently asserted by Mr. Secretary Root in 1906: "Great Britain has asserted a claim of right to regulate the action of American fishermen in the Treaty waters, upon the ground that these waters are within the territorial jurisdiction of the Colony of Newfoundland. This Government is constrained to repeat emphatically its dissent from any such view. An appeal to the general jurisdiction of Great Britain over the territory is, therefore, a complete begging of the question, which always must be, not whether the jurisdiction of the colony authorizes a law limiting the exercise of the Treaty right, but whether the terms of the grant authorize it."[38]

In making this broad statement, the Secretary of State appears to be unacquainted with the doctrines of British law which govern all parts of the Empire. It is a doctrine of that law,—affirmed many years ago by the Judicial Committee of the Privy Council, and in later years by the Imperial Parliament,—that, under the British system of Constitutional Government, a Treaty between Great Britain and a Foreign Power which provides for the exclusion of such territory from the British jurisdiction and laws, theretofore established therein; or for the application of any extraordinary, or foreign, jurisdiction over foreigners, or former subjects, within such territory, can only become legally operative therein in the time of peace, when specially confirmed by an Act of the Imperial Parliament."[39]

[37] Ibid., p. 323.

[38] Correspondence respecting the Newfoundland Fisheries (Imp.), 1906, p. 13.

[39] *Damodar Gordhan* v. *Deoram Kanzi* (1875-6), 1 Appeal Cases, 332; the Anglo-German Agreement Act (Heligoland), 1890 (Imp.), c. 32; and the Anglo-French Convention Act (Africa and Newfoundland), 1904 (Imp.), c. 33.

In asserting this repudiation of the binding force of British and Colonial Laws on American fishermen exercising the privilege of fishing within British jurisdiction, Mr. Secretary Root also negatives the prior acknowledgments of the American Government made through Mr. Secretary Marcy in 1856, Mr. Secretary Boutwell in 1870, and Mr. Secretary Bayard in 1886, that "the 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."[40]

The disturbing misuse of the Treaty privileges of fishing, and the frequent repudiation of British and Colonial Laws, violate a doctrine of International Law long recognized and enforced by the United States: "Aliens while within our jurisdiction, and enjoying the protection of our laws, are bound to obedience to them, and to avoid disturbances of our peace within, or acts which would compromise it without, equally as citizens are."[41]

And the British doctrine concurs: "Every individual on entering a foreign country, binds himself by a tacit contract to obey the laws enacted in it for the maintenance of the good order and tranquillity of the realm."[42]

And now that the questions affecting these gratuitous fishery privileges to American fishermen are about to be submitted to the Hague Tribunal, it is hoped by the Colonial subjects of the Crown who are to be affected by its decision, that Great Britain will raise for discussion or adjudication, the claim of an inherent prerogative revocation-power, similar to that exercised by the United States, as illustrated by the precedents cited in this article, so as to enable her to relieve her colonies from the coast burthen, or any future misuse, of these gratuitous fishery privileges; and from repetitions of the disturbing misuse, and

[40] Foreign Relations (U.S.), 1870, p. 411; 1880, p. 572; 1886, p. 377.

[41] Moore's Digest of International Law of the United States, vol. 4, p. 10.

[42] Phillimore's International Law (3rd ed.), vol. 1, p. 454.

aggressive claims, which have caused so much international friction between herself and her colonies, and between them and the United States, in past years. For it should be seriously and nationally realized by Great Britain that the fish-wealth of these Colonial coast-waters is the natural property of the Colonial subjects of the Crown, as part of their food supply, and also as being valuable to them as one of their commercial assets for Colonial trade and revenue purposes.

The doctrines of jus inter gentes as to national territorial sovereignty, which appear to govern the decision of this question; the experience of disturbing misuse; of international friction and breaches of local law; the repudiation of British and Colonial Laws, thereby "delivering the Treaty waters over to anarchy," and the consequent urgent necessity for the relief of her Colonial subjects, aided by the supporting force of the American precedents given above, should guide Great Britain in presenting their case before the Hague Tribunal, and in seeking to have those precedents authoritatively recognized as formulating a universal doctrine of International Law applicable to the class of Treaties which concede to the alien-subjects of another sovereignty a share in the commercial privileges or national rights of property of the home-subjects of the conceding sovereignty.

THOMAS HODGINS.

LAW REFORM.

As there have been many discussions lately upon the above subject, I ask the consideration of your readers to some suggestions which perhaps have more than once been made, but which may bear repetition.

It has occurred to me that this expression has been made to cover, during the existing discussion, not so much any broad or general scheme of improvement, such as was involved in the consideration of the Common Law Procedure Act, the Administration of Justice Act or the Judicature Act, but rather a considera-

tion of one aspect of the matter, namely, the cheapening of litigation and that (so far as the Government proposals are chiefly concerned) by reducing and regulating the number of appeals.

It will be observed that out of eleven items appearing in the Attorney-General's resolution, seven deal exclusively with appeals while one (that of examination for discovery) deals with a minor matter of practice under the rules which has already been considered by the judges and upon which they have full power to legislate.

On the question of appeals, there are no data so far as I know, to shew what injustice now exists or how far it can be remedied. We have in Ontario at present two sets of Appellate Courts: the first, being the Divisional Court in which appeals are cheaply and very economically disposed of; and it seems difficult to believe that the procedure could be altered so as to make an appeal to this forum cheaper or more expeditious unless the Government would abolish the stamps and fees for the evidence at present paid and would furnish the evidence for nothing. If this were done the litigant would have his appeal for almost nothing, except a counsel fee on the argument and in most cases such counsel fee between party and party is not more than $40 or $50. If reform at present means cheapening litigation and if that is desirable, I respectfully suggest the introduction of some legislation looking to the abolition of stenographers' fees for evidence, so that the Government would pay its stenographers as it does its other officials.

Then as to the Court of Appeal. This forum furnishes an opportunity to litigants to present their more important cases to a court which is equipped for considering and has the time to devote to the patient consideration of larger matters. There are again no exact data to enable us to say what proportion of cases it hears and what the cost of such litigation is. Three items make up almost the whole of the expense attendant on such appeals: (1) the evidence, (2) the printing, (3) the counsel fee. The first would disappear if the country would pay its cost; the

second is almost essential to the due consideration of important matters, but its cost might be much lessened by a stricter scrutiny of what goes into the appeal book, and by the Government arranging to contract for all printing at a specified rate so that every appellant might get the benefit of the Government's terms and have his work done for a specified sum per page by some officially appointed printer. Such a course would ensure uniformity in the work, would permit the transfer of the proof-reading from the law offices to the printers at probably a great saving of expense and would greatly improve the appearance of the book. As for the counsel fee, that is a matter that scarcely permits of regulation except on taxation between party and party, because a man will pay all he can afford for the services of the man who, in his opinion, can best argue his case for him.

It must be remembered that this question of appeals has been frequently considered and many changes made from time to time and it may be doubtful whether the system of appeals can now be much improved upon.

In reference to appeals to the Judicial Committee of the Privy Council, it might be worth while to ask that body to accept as the record in the appeal the printed appeal book already prepared for the lower courts, with such slight additions as are necessary to bring the proceedings to date. There seems to be no valid reason why proceedings should be reprinted merely because the Rules of the Judicial Committee differ from those in Ontario as to the appearance of the record.

The real hardship in litigation lies in the protracted and unnecessary proceedings indulged in before a trial is reached. It should not be necessary to incur much expense or have much delay in getting to trial in most cases, and many practitioners, including the best lawyers in the country, rarely, if ever, launch an interlocutory motion. In most cases a short statement of claim setting out the nature of the claim in law with its attendant facts, a short reply on the law and facts, a notice to produce documents (which might readily be incorporated in the pleadings) an inspection of those documents before examination for

discovery and an examination for discovery limited to one hour, are all that is required and the limitation of time for examination might be readily achieved by prohibiting without an order of the judge at the trial, the recovery of any fee on examination, even from the client, for any greater length of time except under special circumstances. In this way, and with the abolition of stamps, the cost of litigation could be very greatly lessened and the necessary flexibility could be given to proceedings by reserving power to apply to a judge for directions where more might be required. After all, the conscientious lawyer rarely requires to take more steps now than those here outlined and whatever other steps the Rules compel him to take he generally looks upon as mere surplusage.

The expense of a trial also could be much lessened by some legislative recognition of the fact that a case is best handled where the evidence is rapidly brought out, where cross-examinations are generally short, and where but little time is spent in the discussion of minute questions of procedure arising during the trial. At the trial one of the greatest expenses is frequently the payment of expert witnesses. Such witnesses are sought for their eminence in their calling. Their time being valuable they naturally demand large fees; their evidence being technical, much time is taken up in examining and cross-examining them, and their special knowledge frequently serves rather to confuse the court or the jury than to assist it or them. It would probably be much cheaper and more satisfactory if each party should, if possible, agree on and nominate one expert to assist the court in technical matters, who would occupy rather the position of an assessor than a witness, and who, giving his statement judicially, would not require the lengthy confusing examination and cross-examination that is now such a prominent feature of our trials. Even if the parties could not agree on an expert they might submit names to the trial judge who could make his choice from the two lists furnished him.

There is one other important matter connected with litigation which, while fortunately most usual in the profession, has received little, if any, legislative or judicial consideration. I

refer to the subject of settlements. There is probably scarcely an exception to the general rule that no matter what sacrifices he makes each party to a dispute is better off for having early in the proceedings effected a compromise. If, by teaching in the Law School—by the allowance of somewhat more liberal fees for making settlements—by the judges offering facilities for the friendly discussion before them of disputed points, or by any other means, the desirability and usefulness of settlements could be enforced or demonstrated, a long step would be taken in removing hardship or scandal from litigation. In many law suits, especially over estates or between relatives or former friends, the feelings of the litigants and even of their respective advocates are so strongly enlisted for their own views that success becomes desirable more for the sake of victory than for any substantial advantage to be derived, and, if legislation could be enacted which would permit the intervention of some independent third person rather as mediator than as judge, it might serve to remove from our courts a class of cases which probably gives rise to most of the criticism we hear, namely, lawsuits where the costs exceed by many times the amount in dispute.

While not aware of the extent to which this subject is discussed in the Law School, one can hardly think of any place where the methods of making a settlement could be more usefully examined. The qualities required are so largely ethical, such as fairness, conscience, good feeling, good temper and common sense, that without departing from the existing curriculum, time might well be employed in pointing out and ascertaining general classes of cases in which settlements are particularly desirable or attainable.

SHIRLEY DENISON.

UNIFORMITY OF DECISION.

The Ontario Legislature as is well known made an attempt to compel judges to follow the decisions of courts of higher or co-ordinate jurisdiction: see Ont. Jud. Act, s. 81. This provision was no doubt legislatively intended to do away with the

embarrassment arising from their being conflicting decisions on the same question; but in this matter like many others, a well-known maxim may be applied with a variation, "the Legislature propose, but the judges dispose."

We have an illustration in a recent case of the utter futility of such legislation. In some of the recent local option by-law cases, as is well known, attempts have been made to question the finality of the voters' lists as regards the qualification of voters. *In re Cleary* v. *Nepean*, 14 O.L.R. 392, Mabee, J., determined that the lists were not conclusive as to the right of a person named therein to vote; but *In re Mitchell* v. *Campbellford*, 16 O.L.R. 578, Clute, J., came to the conclusion that prior decisions to that of Mabee, J., had determined that the voters' list was final and conclusive as to the right of a voter named therein to vote and he therefore refused to follow Mabee, J.

The section of the Judicature Act above referred to seems to be violated, and yet how is it to be worked out? If a judge disregards prior decisions he is violating the statute. Is it intended that if he does so, all subsequent cases must be decided according to his view? or is the remedy that the point of law in question should be referred in any subsequent case where the prior decision is regarded as erroneous to a Court of Appeal in order that such prior decision may be formally reversed? We are rather inclined to think that this is the procedure the statute contemplates and not that each judge is to assume the right "not to follow" a prior decision of a judge of co-ordinate jurisdiction because he happens to think it erroneous. It may be said that in order to do so he would still have to violate the statute whatever course he took wherever there were prior conflicting decisions; but what the Legislature was aiming at was the doing away with conflicting decisions of judges of co-ordinate jurisdiction, which leaves the law in a state of uncertainty, by enabling a judge whenever that state of things exists before him, to refer the case to a higher tribunal so that the point in question may be definitely settled, and not left as a sort of battledore and shuttlecock game in which one judge may follow A. and another follow B. according to his personal predilection.

This would seem to have been what the Legislature was trying to accomplish, but like some other legislative experiments, it seems to have been a failure.

The article which began our number for September was written for the purpose of drawing attention to what the writer considered a weak spot in our constitution, and which, it was thought, might be amended. Whether such a change as there suggested would be beneficial is a matter of opinion; but, as to the law as laid down by the Privy Council as well as in this country and emphasized in the judgment spoken of, there is no question. The learned judge whose language we quoted simply expressed in his own terse way how that law stands (see ante pp. 499, 553). The remarks of the writer of the article do not question the accuracy of his judgment, which is constitutionally correct, but draw attention to the position thus graphically portrayed, and enlarge upon the difficulty of the situation, and suggest a possible remedy; a remedy, which, by the way, could only be had by legislation and that of a character necessarily very difficult to obtain, as it would involve an amendment of the B.N.A. Act. It may be that the remark of the learned judge which has caused this discussion might, by its very terseness, and taken by itself, lead to an inference which the context shews is not warranted. It may also be noticed that he guards himself from any inference that in this particular case the legislature had violated the moral law.

A paragraph recently appeared in the daily papers to the effect that the driver of an automobile had only a second to choose between killing a young girl and a street labourer, and that he chose to kill the man. The thought in the mind of the writer of the paragraph seemed to be that much credit was due to the driver in the choice of the person whom he should murder. He had no comment whatever on his statement that the chauffeur was driving a wealthy New Yorker through the centre of the

City of Worcester, Mass., at the rate of 25 miles an hour. Whether he was going at that rate to please the fancy of his master for great speed, or with the recklessness of his class, does not appear. Are we going back to the brutal days of the gladiatorial exhibitions in the Coliseum where men and women gloated over the sight of the blood of innocent victims? Whilst we object to lynch law there are undeniably cases where nothing else seems possible as a preventive. The outraged feelings of the public would scarcely be shocked by seeing the millionaire and his chauffeur dangling from the nearest lamp-post.

The blue laws of Connecticut seem still to be in evidence if a paragraph from a newspaper there is to be credited. A man insisted on kissing his wife dramatically on a trolley car, but was stopped on the road and arrested under an old blue law that says that a man must not kiss even his wife in a public place. The judge not being clear as to whether these laws were still in force simply fined him for disorderly conduct. May we be allowed to rejoice that in a country where divorce is so common there was even this boisterous exhibition of conjugal affection. If we remember correctly the attention of the public was drawn to the horrors of the old English law which provided hanging for theft, etc., by a judge passing sentence of death on one found guilty of that offence. These laws were immediately repealed. The fine made by the magistrate in the above case may possibly result in appropriate legislation in New England.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

UPREME COURT.

Ont.] C. BECK MANUFACTURING CO. *v.* VALIN. [Oct. 6.

Mandamus—Lumber driving—Order to fix tolls—Past user of stream—Appeal—R.S.O. (1897) *c.* 142, *s.* 13.

By R.S.O. (1897) c. 142, s. 13, the owner of improvements in a river or stream used for floating down logs may obtain from a district judge an order fixing the tolls to be paid by other parties using such improvements. On application for a writ of mandamus to compel the judge to make such an order,

Held, affirming the judgment of the Court of Appeal (16 O.L.R. 21) DAVIES, J., dubitante, and IDINGTON, J., expressing no opinion, that such an order had effect only in case of logs floated down the river or stream after it was made.

Held, per IDINGTON, J., as s. 15 gives the applicant for the order an appeal from the judge's refusal to make it mandamus will not lie.

Held, per DUFF, J.—The mandamus could issue if the judge had jurisdiction to make the order though he refused to do so in the belief that a prior decision of a Divisional Court was res judicata as to his power.

Appeal dismissed with costs.

Bicknell, K.C., for appellants. *Shepley,* K.C., and *A. G. F. Lawrence,* for respondents.

N.B.] ABBOTT *v.* ST. JOHN. [Oct. 6.

Constitutional law—Municipal taxation—Official of Dominion Government—Taxation on income.

Sub-s. 2 of s. 92 B. N. A. Act 1867, giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the provinces, etc.," is not in conflict with sub-s. 8, of s. 91, which provides that Parliament shall have exclusive

legislative authority over "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." GIROUARD, J., contra.

Held, therefore, GIROUARD, J., dissenting, that a civil or other officer of the Government of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides. Appeal dismissed with costs.

Powell, K.C., for appellant. *Skinner*, K.C., for respondent.

N.S.] [Oct. 6.

UNION BANK OF HALIFAX *v.* INDIAN & GENERAL INVESTMENT TRUST.

Pleading—Purchase for value without notice—Onus—Evidence —Affirmative and negative—Telephone conversation.

The plea of purchase for value without notice must be proved in its entirety by the party offering it; it is not incumbent on the opposite party to prove notice after the purchase for value is established.

Where a conversation over the telephone was relied on as proof of notice the evidence of the party asserting that it took place and giving the substance of it in detail must prevail over that of the other party who states only that he does not recollect it.

Appeal dismissed with costs.

W. B. A. Ritchie, K.C., for appellants. *Newcombe*, K.C., and *J. J. Ritchie*, K.C., for respondents.

Province of Ontario.

COURT OF APPEAL.

Full Court.] REX *v.* BROWN. [Sept. 29.

Criminal law—Unlawfully solemnizing marriage—Minister of independent congregation — Qualification — Appointment— Ordination — Appeal within s. 1017 *of Cr. Code — —Jurisdiction.*

Certain persons met and professed to form themselves into an independent church or congregation known as "The First

Chinese Christian Church, Toronto," and appointed the defendant, one of their number, the minister of the church. At a subsequent meeting he was ordained by two Congregationalist ministers, not as a Congregationalist minister, but as a minister of a new independent church.

Held, that he was not a minister ordained or appointed according to the rites and ceremonies of the church or denomination to which he belonged, within the meaning of R.S.O. 1897, c. 162, s. 2, sub-s. 1; and, the above facts appearing upon his indictment and trial for solemnizing or pretending to solemnize a marriage without lawful authority, contrary to s. 311 of the Criminal Code, there was evidence upon which he could be convicted, and his conviction was affirmed.

Per Moss, C.J.O., that where the judge at the trial states a case for the opinion of the Court of Appeal, the case comes before that court as an appeal, within the meaning of s. 1017 of the Code, and the court has the right to refer to the evidence, even when it is not made a part of the case.

Per MEREDITH, J.A., that the Court of Appeal had no jurisdiction to entertain the case, the questions reserved for the opinion of the court being questions of fact.

A. R. Hassard, for the defendant. *J. R. Cartwright*, K.C., for the Crown.

Full Court.] REX v. YALDON. [Sept. 29.

Criminal law—Perjury—Indictment—Intent to deceive—Crim. Code, s. 852—Lord's Day Act—C.S.U.C. c. 104, s. 3—Perjury in Police Court—Jurisdiction of magistrate—Absence of information—Judicial proceeding—Crim. Code, s. 171—Evidence—Record of trial.

The indictment contained in substance a statement that the accused committed the indictable offence of perjury in a judicial proceeding.

Held, 1. It complied with the requirements of s. 852 of the Criminal Code, and was not bad because it did not allege that the accused committed perjury with intent to deceive.

2. The statute C.S.U.C. c. 104, s. 3, is in force in Ontario. *Attorney-General for Ontario* v. *Hamilton Street R.W. Co.* [1903] A.C. 524 followed.

The accused was arrested by a police constable, and brought before a police magistrate, when a charge of gambling with dice

on the Lord's Day was laid against him. So far as appeared, no information was laid, but the constable had a warrant, which he read to the accused. The latter made no objection to the manner in which he had been brought before the magistrate or in which the charge had been laid; his trial was proceeded with, and in testifying on his own behalf he committed the perjuries for which he was indicted.

Held, 1. The magistrate had jurisdiction, and the accused gave his evidence in a judicial proceeding, within the meaning of s. 171 of the Code.

2. There being no information or other formal record, the charge and the proceedings thereon, so far as material, were proved in the only way in which they were capable of being proved, i.e., by the oral evidence of the magistrate and his clerk, each speaking with the aid of his notes taken at the trial, which was the best evidence possible in the circumstances, and therefore sufficient.

Rex v. *Drummond* (1905) 10 O.L.R. 546 distinguished.

G. Lynch-Staunton, K.C., and *M. J. O'Rielly,* K.C., for the accused. *J. R. Cartwright,* K.C., and *S. F. Washington,* K.C., for the Crown.

HIGH COURT OF JUSTICE.

Boyd, C., McGee, J., Riddell, J.] [Sept. 28.

BRADLEY *v.* MCCLURE.

Landlord and tenant—Lease of farm for "pasturing purposes" —Tenant selling hay raised on farm—Injunction.

This was an appeal from the judgment of ANGLIN, J. The defendant rented a farm from the plaintiff. Part of the land was cleared, part seeded down, and the rest brush and swamp. The only stipulation in the lease as to the use of the place was contained in the words "for pasturing purposes." The defendant pastured sheep and cattle over the whole place the first winter and during the fall. The next spring he fenced off about 67 acres on which he allowed hay to grow, the cattle feeding on the rest of the farm. On taking the lease he bought 40 tons of hay from the plaintiff, which he fed on the place during the first winter. He began to cut the hay on the part seeded down in

July, and placed it in the barn expecting to winter his stock with part of the produce, and to sell part.

Held, 1. The defendant was properly enjoined from selling and allowing the removal from the place of any part of the hay, following *Crosse* v. *Ducker* (1873) 37 L.T.N.S. 816.

2. The meaning of the lease was that all herbage was to be used and consumed on the premises and that it was immaterial whether part of the hay was removed from one part of the farm to another so far as damages were concerned, following *Westropp* v. *Elligott*, 9 App. Cas. 815.

F. W. Wilson, for defendants. *R. McKay*, for plaintiff.

Province of Nova Scotia.

SUPREME COURT.

Longley, J.] HOBRECKER *v.* SANDERS. [Sept. 29.

Judgment—Application under O. XIV.—Effect of pleading.

Plaintiff applied by summons for leave to enter final judgment under the provisions of O. XIV. in a case where the defendant had appeared to a summons specially indorsed under O. III. r. 5. After the issue of the summons for judgment defendant filed and served pleas.

Held, that the court could not interfere with the pleas so pleaded on the faith of the affidavit made by plaintiff previously to the filing of the pleas.

Quœre, whether the court had power to enlarge the time to enable plaintiff to furnish further sworn statements.

W. B. A. Ritchie, K.C., and *Terrell*, for plaintiff. *Mellish*, K.C., for defendant.

Drysdale, J.] RE DYAS. [Oct. 2.

Physician and surgeon—Registration obtained by means of false certificates—Power of Medical Board to revoke.

Appellant obtained registration as a physician and surgeon in the Province of Nova Scotia on the presentation of certificates

shewing pass marks in various subjects covering a three years' course at a medical school in the United States, and similar certificates shewing pass marks in subjects covering a one year's course in another institution. On complaint made to the Medical Board that the registration in question was obtained by means of false certificates an investigation was held which resulted in the passing of a resolution striking appellant's name from the register. On appeal,

Held, that the Medical Board had power, after proper enquiry, to pass the resolution they did, and that as their finding was supported by the evidence produced upon the enquiry the appeal must be dismissed.

J. J. Ritchie, K.C., for appellant. *W. B. A. Ritchie,* K.C., for respondents.

Longley, J.] SAM CHAK *v.* CAMPBELL. [Oct. 5.

Summons—Incorrect address of plaintiff—Stay ordered—Costs.

Where a writ of summons was issued by plaintiff, through his solicitor, against defendant, and the address given as that of plaintiff was shewn to the satisfaction of the court to be untrue, and a stay was ordered until the right address was furnished, and the defendant subsequently, in pretended compliance with the order of the court, furnished addresses which were found to be incorrect, the court refused, on motion for that purpose, to set aside the writ, but ordered a further stay until an address was given in strict compliance with the Act and ordered the costs of the application to be paid by plaintiff.

Macilreath, in support of motion. *O'Connor,* contra.

Drysdale, J.] A. *v.* B. [Oct. 6.

Patent—Patentable improvement—Infringement—Damages.

Plaintiffs claimed an injunction to prevent defendant from infringing a patent obtained by plaintiffs for an improvement in the manufacture of caps, and damages for the infringement complained of. The patent related to a flexible elastic material attached to the interior of the cap which, when turned outward and downward, afforded an efficient and comfortable covering for the ears without changing the proper fit of the cap.

Held, that the improvement referred to was a patentable one, and that plaintiffs were entitled to the injunction claimed and to an accounting in respect to damages.

J. J. Ritchie, K.C., and *W. B. A. Ritchie*, K.C., for plaintiffs. *Mellish*, K.C., and *Bill*, for defendant.

Drysdale, J.] R. v. DUTTON—RE WOO JIN. [Oct. 7.

Chinese Immigration Act—Deportation of person violating provisions—Powers of minister.

On the argument of the return to a habeas corpus for the release of Woo Jin, a person of Chinese origin, who was being deported from Canada by the steamship "Bornu," on account of an alleged violation of the Chinese Immigration Act.

Held, that under the provisions of the Act, as amended by Acts of 1908, c. 14, the courts are not charged with any duty or authority in the matter, but, by s. 27*a* of the Act, the Minister is authorized to apprehend and deport. The Minister seems to be charged with the responsibility not only of the deportation, but of ascertaining the liability of the person to deportation and it is not necessary that he should have first caused the person to be indicted and secured a conviction for a violation of the Act.

O'Connor, for the prisoner. *Fulton*, for the steamship.

Longley, J.] R. C. E. CORPORATION *v.* MACPHERSON. [Oct. 9.

Venue—Motion for change refused—Grounds—Costs.

Where a motion for change of venue was made on the ground that some fifteen necessary and material witnesses for defendant resided, at S., but the application was not made until a few days before the date of the opening of the court at A., where the cause was set down for trial, and the effect of granting the application might be to postpone the trial indefinitely. And where it was shewn on the part of plaintiff that under the circumstances of the case knowledge of the matters in issue must be largely confined to the two contending parties, and that a number of the witnesses named by defendant could have no knowledge of the matter, the application was refused, costs to

be plaintiff's costs in the cause, plaintiff to be subject to an undertaking to pay extra costs, not exceeding a fixed amount, due to the holding of the trial at A.

Robertson, in support of motion. *Mellish*, K.C., contra.

Longley, J.] SMILEY *v.* CURRIE. [Oct. 12.

Execution—Omission in recital—Action against sheriff for escape—Damages.

An execution which, in the preamble, recites the recovery of a judgment against . . . , and then proceeds, in the directory part to require the sheriff "to take the body of the said B. and commit unto our jail, in your bailiwick, etc.," is ample authority notwithstanding the omission of the name of the judgment debtor from the preamble, to justify the sheriff in holding him under the execution, and where the sheriff upon his own responsibility, though acting in good faith, under the impression that the execution is bad for the reason stated, allows the debtor to go, he will be liable to the execution creditor in damages as for an escape.

Where it appears from the evidence that the debtor is not a person of substance, and on account of his financial position is not likely to be in a position to pay, damages will be assessed accordingly.

Graham, for plaintiff. *W. C. Robinson*, for defendant.

Province of Manitoba.

KING'S BENCH.

Mathers, J.] [Sept. 21.

TIMMONS *v.* NATIONAL LIFE INS. CO.

Practice—Examination for discovery—Particulars—Action for libel.

Action for libel. The defendants pleaded that the libel complained of was a privileged communication and set up certain

circumstances creating it. The plaintiff applied for an order for particulars of the privilege. Defendants, while not denying the plaintiff's right to the order, claimed the right to examine the plaintiff for discovery before furnishing particulars.

Held, following *Zerenberg* v. *Labouchere* (1893) 2 Q.B. 183, and *Beaton* v. *The Globe*, 16 P.R. 281, that, in an action for libel, the defendant has not the right claimed in this case.

Appeals from orders of the Deputy Referee, postponing the application for particulars until after the examination of the plaintiff for discovery and that the plaintiff should attend for such examination at his own expense, allowed with costs.

Deacon, for plaintiff. *Robson*, for defendant.

Mathers, J.] FOLEY v. BUCHANAN. [Sept. 21.

Practice—Examination for discovery—Service of copy of appointment instead of original.

The plaintiff's solicitor, desiring to examine the defendant for discovery, served upon his solicitor a copy of the examiner's appointment, relying on sub-rule (1) of Rule 391a, added to the King's Bench Act, R.S.M. 1902, c. 40, by 5 & 6 Edw. VII. c. 17, s. 2, and, upon defendant failing to attend on the appointment, obtained an order from the Deputy Referee directing the defendant to attend for examination at his own expense.

Held, on appeal from this order, that, as the sub-rule speaks of the service of an appointment upon the solicitor, service of a copy only of the appointment was not sufficient, without service also of a subpœna on the defendant personally under Rule 389, and that the order should be set aside with costs.

Myers v. *Kendrick*, 9 P.R. 363, followed.

Burbidge, for plaintiff. *Deacon*, for defendant.

Cameron, J.] BROUGH v. MCCLELLAND. [Sept. 25.

Action—Covenant of indemnity—Assignment of—Sale subject to unpaid purchase money—Liability of sub-purchaser—Implied contract.

One Galbraith agreed in writing to purchase certain lands from the plaintiff and paid $200 on account of the purchase

money. He afterwards transferred his interest in the lands under the agreement to the defendant by an assignment indorsed thereon signed by himself, but not by the defendant. The defendant did not make any of the payments remaining due to the plaintiff under the agreement and Galbraith then assigned to the plaintiff "all and every covenant, agreement and obligation of the said A. B. McClelland of any and every nature and kind whatsoever, whether expressed in the assignment hereinbefore mentioned to the said McClelland or implied from any or all of the transactions between them and also all obligations both legal and equitable" of the defendant.

Held, that, upon plaintiff adding Galbraith as a party defendant with his consent, for which leave was given, the plaintiff was entitled under the assignment from Galbraith to him to recover from the defendant the amount remaining due under the original argument of sale to Galbraith.

Maloney v. *Campbell*, 28 S.C.R. 228, and *Cullen* v. *Rinn*, 5 M.R. 8, followed.

Hull and *McAllister*, for plaintiff. *Higgins*, for defendant.

Province of British Columbia.

SUPREME COURT.

Martin, J.] [Sept. 23.

DARNLEY v. CANADIAN PACIFIC RY. CO.

Master and servant—Employment obtained by misrepresentation "Serious and wilful misconduct as serious neglect"—Release signed by infant.

The making of a false representation by an infant to the effect that he is of full age in order to secure employment is not such "serious and wilful misconduct or serious neglect" as disentitles the applicant to recover under the Workmen's Compensation Act, 2 Edw. VII. c. 74, it not appearing that the accident in question was "attributable solely" to the circumstance of such misrepresentation having been made.

A release signed by the infant while still of non-age held not a bar to his recovering, the infant having returned the advantage derived.

W. S. Deacon, for the applicant. *McMullen*, for defendants.

Book Reviews.

Company Law. By W. R. PERCIVAL PARKER, B.A., LL.B., and GEORGE M. CLARK, B.A., LL.B., Barristers-at-law. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company. 1908. 683 pages.

The rapid commercial growth of Canada requires increasingly the formation of limited companies, and as a consequence company law has become one of the most important branches with which the practitioner has to deal. This work is a concise manual of the law and practice connected with the organization, management and winding up of companies. The authors have treated the subject consecutively from incorporation to winding up, and have dealt with each title clearly and exhaustively. Useful forms are appended to each chapter. Whilst the author says that "theoretical discussions have been avoided as far as possible," there are very useful collections of cases, carefully arranged. The index appears to have received special attention, and the printing and binding of the volume are excellent.

The Law of Tender. By GEORGE LUCAS BEVAN HARRIS, Barrister-at-law. London: Butterworth & Co., 11 and 12 Bell Yard, Temple Bar, Law Publishers.

No more enticing book to a lawyer has been written for many years. The reason for its appearance was the felt want in some important suit of an exclusive and exhaustive work upon the subject; a subject, which, for its proper understanding, needed an extensive research into the black letter sources of the doctrine of tender. The author is evidently a writer of much literary ability as well as one who dug deep into the mine of legal lore for the information which was appropriate to his subject; and he has set it forth with great clearness and aptness of ex-

pression. Whilst he speaks of tender as "one of the radiant gems of elementary justice drawn from the rude primordial judicature of barbarism," he gives us something more definite in his definition of it: "An unqualified voluntary offer of continuing readiness on the part, or on behalf of, an obligor to perform a definite obligation, duty or act of reparation, accompanied by production of the means of fulfilling the offer, made with the object of protecting the person making it against demands, penalties or other consequences in excess of the offer, the actual performance being prevented by the refusal of the other party to accept the same." A much more complete and satisfactory definition than any we have come across elsewhere.

The author adopts the following method of sectional concentration and arrangement, which seem convenient both for the practitioner for every day reference, as to a reader who simply desires a good bird's-eye view of the subject. Part 1. Tender on contracts of debt. Part 2. Tender of amends. Part 3. Tender on contracts of sale. Part 4. Tender on conduct money. Part 5. Tender of evidence, of vadium, to a pawnee, where lien claimed, of vote at election, etc. The mechanical execution by both printer and publisher is of the highest merit.

A Digest of the Law of England, with Reference to the Conflict of Laws. By A. V. DICEY, K.C., Vinerian Professor of English Law in the University of Oxford. Second edition. London: Stevens and Sons, Limited, Chancery Lane; Sweet & Maxwell, Limited, Chancery Lane. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company. 1908. 883 pages.

This standard work was first published about twelve years ago, and the new edition brings it up to date. The book, while a masterpiece of learning and research, is not a theoretical treatise but rather an eminently practical handbook on the subject of private international law. Among the titles dealt with are the jurisdiction of foreign courts in matters of divorce, the effect of foreign judgments, the effect of foreign bankruptcy, the effect of foreign grant of administration and the validity of contracts made or to be performed in a foreign country.

The Law of Copyright and Designs with the Practice Relating to Proceedings in the Courts Under the Various Acts and Rules with Full Appendix of Statutory Forms and Precedents. Second edition. By EDMUNDS and BENTWICH. London: Sweet & Maxwell, 3 Chancery Lane. 1908.

The reason for this edition is the necessity for a re-statement of the English Law of Designs owing to the recent passing of the Patents and Designs Act which has consolidated various statutory divisions previously in force. As the number of designs registered in England last year was over 26,000, one can easily imagine that there was need to give to the many parties interested all available assistance.

Law Reports Annotated. N. S. Rochester, N.Y.: Lawyers' Co-operative Publishing Co. 1908.

Of the making of reports there is no end. How learned we all should be, if we had the diligence of Lord Coke, and lived as long as Methuselah. This is a most excellent series of United States reports, issued with the promptitude and ability for which the company is noted. The digest of vols. 1 to 12 has also been received, giving a reference to and a digest of the cases appearing in these 12 volumes covering a period of the last two years.

United States Decisions.

The construction of a bridge approach in a public street in such a way as to destroy the access to abutting property and impound snow and water thereon is held, in *Ranson* v. *Sault Ste. Marie*, 143 Mich. 661, 107 N.W. 439, 15 L.R.A. (N.S.) 49, to be a taking for which compensation must be made. A note to this case collates the other authorities on cutting off access to a highway as a taking.

A real estate agent authorized by express contract to sell property at a certain price is held, in *Ball* v. *Dolan* (S.D.) 114 N.W. 998, 15 L.R.A. (N.S.) 272, to have no right to recover on a quantum meruit for the value of his services in finding a purchaser who pays less than that sum, where the owner receives no benefit from the agent's services, although the agent is present and assists in the sale, and the owner changes the price.

A street railway company is held, in *Riley* v. *Rhode Island Co.* (R.I.) 69 Atl. 338, 15 L.R.A. (N.S.) 523, not to be liable for injuries to a passenger who slips upon snow and ice accumulated during a storm upon a step after the car has started upon a trip.

A memorandum written on the back of a promissory note at the time of execution, which limits its consideration, affects its operation, and was intended to be a part of the contract, is held, in *Kurth* v. *Farmers' & M. State Bank* (Kan.) 94 Pac. 798, 15 L.R.A. (N.S.) 612, to be regarded as a substantive part of the note.

Flotsam and Jetsam.

One day Lord Cockburn went into the second division of the Court of Session, but came out again very hurriedly, meeting Lord Jeffrey at the door.

"Do you see any paleness about my face, Jeffrey?" asked Cockburn.

"No," replied Jeffrey; "I hope you're well enough."

"I don't know," said the other; "but I have heard Boyle (Lord Justice Clerk Boyle) say: 'I for one am of opinion that this case is founded on the fundamental basis of a quadrilateral contract, the four sides of which are agglutinated by adhesion!'"

"I think, Cockburn," said Jeffrey, "that you had better go home."

Lord Eskgrove is described by Lord Cockburn, in his "Memorials," as a most eccentric personage. Lord Cockburn heard him sentence a tailor for murdering a soldier, in these words: "And not only did you murder him where he was bereaved of his life, but you did thrust, or pierce, or push, or project, or propel the lithall weapon through the belly-band of his regimental breeches, which were His Majesty's."