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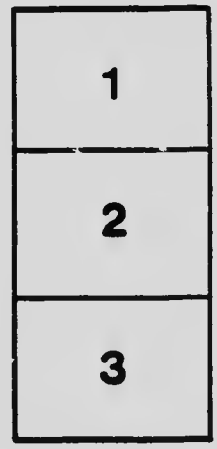

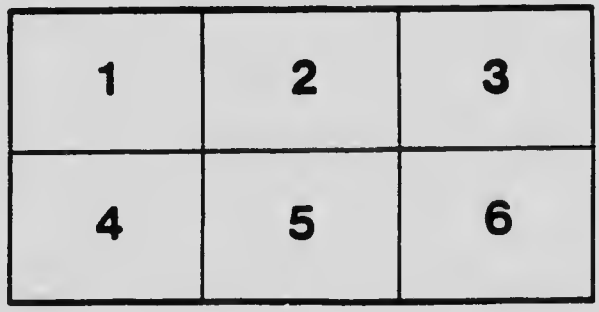

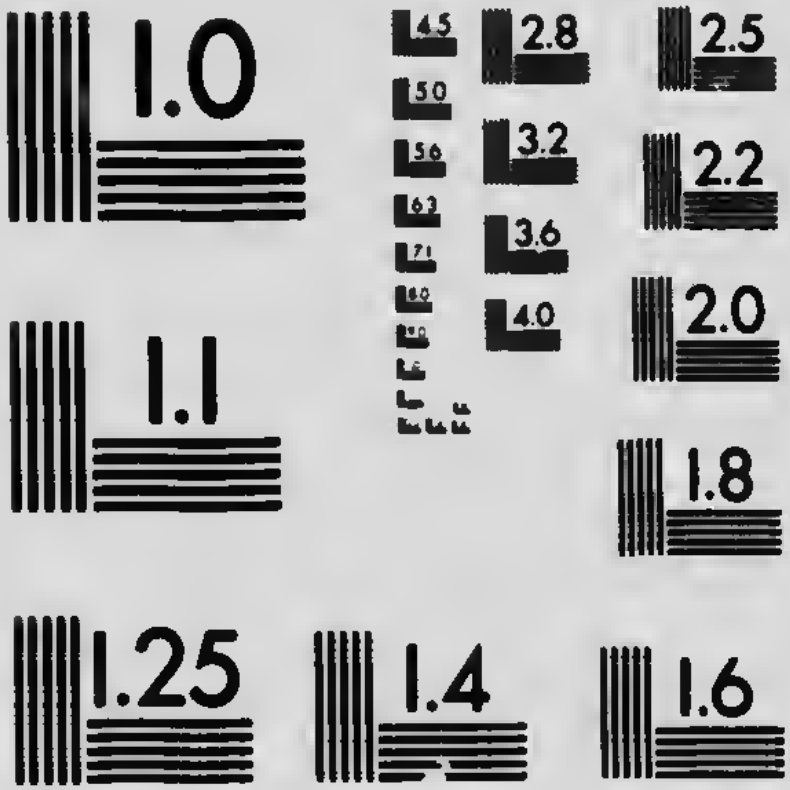

Settlement of International Disputes

BY
HON. MR. JUSTICE WILLIAM RENWICK RIDDELL

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SETTLEMENT OF INTERNATIONAL DISPUTES.

By Hon. Mr. Justice William Renwick Riddell.

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In the following paper I propose to show the methods adopted for the settlement of their international differences by Britain (including Canada) and the United States, that is, the English-speaking nations, from the time of the substantive Treaty of Peace, signed September 3rd, 1783.

This treaty had, by Article II, fixed the boundaries of the new Republic; one of these was with reference to the source of the Saint Croix, while another was the middle line of the Great Lakes and connecting rivers.

There were two rivers either of which might fairly be called the St. Croix, and the two nations claimed respectively that as the true St. Croix which would give it the more territory.

Again, Britain continued in possession of the forts on the left bank of the waters (Dutchman's Point, Point au Fer, Oswegatchie, Oswego, Niagara, Buffalo, Detroit, Michillimacinac). This was because some of the States had passed legislation which prevented British creditors from recovering their debts from American debtors.

The Treaty of 1783 had by Article IV expressly provided that "creditors on either side shall meet no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted." Notwithstanding this, the States refused to repeal the obnoxious laws, and the state courts held that these laws were binding. Many representations were made by the United States as to Britain remaining in possession of the forts spoken of; but they were told with the utmost firmness that Britain intended to remain in possession of the territory until redress should be granted to British subjects.

Some three thousand negro slaves had, during the Revolutionary War, come into the British lines relying on proclamations which offered freedom, and they accompanied the British forces on evacuation. The Treaty of 1783 by Article VII had provided that the British troops should not carry "away any negroes or other property of the American inhabitants." The United States demanded the return of the 3,000 negroes or payment for them. Britain replied: "The negroes became free when they came within British lines and were no longer property of the American inhabitants"; and refused either to give back the slaves or to pay for them.

In the terrible war which Britain carried on with France arising out of the French Revolution, she found it necessary to starve France out if possible; accordingly Orders-in-Council were passed to stop all vessels carrying food to France. Other restrictive orders were made, and as the British navy was immensely superior to any which could be brought against it, nearly all importation to France was stopped. Many American vessels suffered—indeed it was the American mercantile fleet which contributed most of the victims. The United States claimed the illegality in international law of these regulations. Britain answered—"Necessity".

Feeling ran high in the United States, and measures were threatened in congress which would inevitably have resulted in war—and for war the United States could not be more unprepared. The ordinary means of negotiation having failed, Washington (April 16th, 1794) sent John Jay, Chief Justice of the Supreme Court, as envoy extraordinary to negotiate a treaty with Britain if possible.

He succeeded, November 19th, 1794, in obtaining a Treaty, no doubt as favourable as could be had, but not containing everything which had been hoped for.

Britain absolutely refused to give any compensation for the negroes —and of this Washington made particular complaint. She refused all compensation for retaining the forts, saying that this was due to the fault of the United States. But the United States agreeing to pay the debts that British subjects had been prevented from recovering, Britain agreed to give up the retained territory by June 12th, 1796. Britain also agreed to pay American subjects for ships, etc., illegally taken. By this Treaty, which is the beginning of modern international arbitration, three matters were left to arbitration.

1. What is the River St. Croix? This by Article V was to be left to commissioners, one to be appointed by His Majesty, one by the President, and they to agree upon a third; if they were not able to agree, each was to propose one person, and one of these should be drawn by lot.

Britain named Thomas Barclay of Annapolis, a pupil of Jay's, who, born in New York State, had fought on the Loyalist side during the Revolution and attained the rank of colonel. He afterwards practised law in Nova Scotia, and became a member and Speaker of the Legislative Assembly. He was also for a time British Consul at New York.

The American Commissioner was David Howell, a Judge of the Supreme Court of Rhode Island; he suggested as the third Commissioner Egbert Benson, formerly Judge of the Supreme Court of New York, and afterwards a Judge of the Circuit Court of the United States. Colonel Barclay accepted Mr. Benson as a "cool, sensible and dispassionate third Commissioner"—no bad recommendation.

The three made a unanimous award at Providence, Rhode Island, in 1798, fixing the Schoodiac as the true river St. Croix, thus giving effect to the British claim, the United States having put forward the Magaguadavic.

2. The amount the United States should pay for debts which British creditors were prevented from recovering, was by Article VI to be determined by five commissioners, two appointed by His Majesty, two by the President, and the fifth by the unanimous vote of these four; if they could not agree, the two commissioners on one side were to propose one person, the two on the other side another person, and of these two so proposed, one should be chosen by lot.

The British representatives were Thomas Macdonald and Henry Pye Rich; the American, Thomas Fitzsimons and James Innes. They could not agree on the fifth, and accordingly a lot was taken resulting in the selection of John Guillemard, of London, the nominee of the British commissioners. Colonel Innes, dying, was succeeded by Samuel Sitgreaves. The Board seems to have been at loggerheads from the beginning; faults of temper showed themselves, the reference was a failure and the Board dissolved.

The Governments, finally, in 1802, entered into a Convention whereby £600,000 was to be paid by the United States in full.

3. The amount due to American citizens for illegal seizures, etc., was by Article VII left to a Board of five commissioners selected in the same way. The British commissioners were Drs. John Nichol and John Anstey; one of the American was Christopher Gore, the preceptor of Daniel Webster, and at the time United States attorney for Massachusetts. He was afterwards Governor of Massachusetts and a member of the Senate of the United States. The other was William Pinkney, who had been a member of the Maryland Legislature and who afterwards became Minister to London, and Attorney-General of the United States. He was a man of great ability and sound judgment. These chose by lot Colonel John Trumbull the painter, as fifth Commissioner.

Dr. Nichol retired from the Board in November 1798, when he was knighted and became King's Advocate. Twenty-five years later he became judge of the High Court of Admiralty, having been in the meantime Dean of Arches and Judge of the Prerogative Court of Canterbury. He was succeeded on the Board by Dr. Maurice Swabey, also of Doctors' Commons.

Much delay took place in this arbitration, due chiefly to the trouble in that under Article VI; but when that was out of the way, the arbitrators speedily agreed, finishing their labours February, 1804. A sum of £ 330,000 or $11,650,000 was paid by Britain on this head.

Jay's Treaty was received in the United States with execration by the party which was favourable to France and which was powerful in the House of Representatives. Jay was charged with selling his country, and was even burned in effigy. Rochefoucault, who travelled through the United States at the time, speaks of the hatred against Britain of the Americans and their confidence that the President (Washington) would not be hoodwinked into approving the Treaty. Washington waited long before ratifying the Treaty, and when at length he did so, after a secret vote by the Senate, he lost much of his popularity and was joined with Jay in the curses of a whole political party. This extraordinary outbreak of popular malevolence prevented Jay from obtaining the prize upon which he had set his heart—the Presidency. But time brings about its revenges; the Treaty which made him the best hated man of his time is now his highest title to immortality. It should be added that notwithstanding the feeling against it when it was negotiated, there was never any popular complaint against the results of the arbitrations provided for in the Treaty.

The war between France and Britain continued to do its evil work indirectly as well as directly. Britain was compelled to rely upon her navy for her very existence, and she could not get enough sailors to man it voluntarily. It is a part of the common law of England, as of all civilised countries, that his country has a right to call upon every man to defend it. It was, and is, law that every British subject may in case of need be forced into the navy as a sailor; hence the press gang with all its hor Again, by the common law of England—and by Magna Charta—no man may put off his allegiance. Many British subjects had joined American ships and some of these were become American citizens. Britain claimed the right of seizing these whenever she found them. The United States admitted that she might take them if she found them in her own waters; Britain admitted that she had no right to take them in American waters; the dispute was as to the high seas. Britain said: "The high seas are no man's land, therefore I violate no other nation's territory by seizing my subjects off American ships there". The United States said: "No man's land, and therefore my flag makes it mine for the time being." Britain had the power and she continually seized her subjects, former and present, on American ships on the high seas.

Probably this would not have been so much objected to; but the British commanders went further. They impressed hundreds of American citizens, claiming them to be British. Sometimes, perhaps, this was by mistake, it is too much to think it was always so. The captains had to have men, and they themselves were only men, and men to whom the salvation of their country was paramount to every other consideration.

This was a constant source of irritation and of negotiation wholly fruitless. Britain was in death grips with Napoleon and must have men.

Then in her war with France she closed the continent to all trade, (including the American) by Orders-in-Council, ruining American commerce.

The Americans—or some of them—believed, or pretended to believe, that Britain was stirring up the Indians on the West and North-West frontier, and the west was embittered against her accordingly. No one now believes that Britain was guilty of any such conduct. The enmity of the Indians was due to two causes: the one, inevitable, arising out of the advance to the West and North-West of settlement, the other which might have been, and by the British was avoided, that is the treatment of the Indians as inferior creatures unworthy of consideration or decent treatment; in short, treating them on the brutal principle laid down by one of the most celebrated of American generals—"The only good Indian is a dead India

Canada was a tempting morsal, and, as it was thought, could be taken without difficulty. Which of these considerations were the real cause of the war declared in 1812 I do not stop to discuss; they were all talked of.

The war lasted two years and a half and decided nothing; the parties agreeing to the *status quo ante bellum*. Some American writers claim that impressment of American sailors was put an end to by the war. This is absolutely without basis in fact.

But the Treaty of Ghent, December 24th, 1814, furnishes other instances of arbitration.

4. From the time of the Treaty of Peace there was a dispute as to the Islands Moose, Dudley and Frederick in Passamaquoddy Bay. Negotiations went on for some time, and during the war of 1812 the British took possession of Moose Island. By Article IV of the Treaty of Ghent, it was left to two commissioners, one appointed by the King and one by the President, to determine the ownership of all the Islands in Passamaquoddy Bay.

The British commissioner was Colonel Thomas Barclay, whom we have already met; the American was John Holmes, afterwards a member of Congress and a Senator. They made an award, New York, November 24th, 1817, giving the three named islands to the United States, and all the others to Great Britain, and add: "In making this decision it became necessary that each of the commissioners should yield a part of his individual opinion."

5. In the Treaty of Peace, 1783, the boundaries of the United States were thus laid down: "From the northwest angle of Nova Scotia, viz., that angle which is formed by a line drawn due north from the source

of Saint Croix River to the Highlands; along the said Highlands which divide those rivers which empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean to the north-westernmost head of Connecticut River." We have seen that the "Saint Croix River" was identified by arbitration in 1798; but what were "the Highlands" remained a matter of dispute. In 1803 a commission to settle was agreed upon by Lord Hawkesbury (afterwards the first Earl of Liverpool) and Rufus King, the American Minister; but this failed of ratification in the Senate. In the negotiations at Ghent, the British Commissioners endeavoured to have the line revised; but this was not acceded to by the American Commissioners. It was agreed by Article V of the Treaty to leave this dispute to two Commissioners, appointed by the King and the President respectively. If the Commissioners could not agree they were to report to their Governments and the matter was to be referred "to some friendly sovereign or State". Colonel Thomas Barclay was again appointed by Britain; the American Commissioner was Cornelius P. Van Ness, subsequently Chief Justice and Governor of Vermont. They were unable to agree and so reported. We shall find the "Northeastern Boundary" cropping up more than once.

6. Another of the boundaries mentioned in the Treaty of Peace was thus stated: "Along the middle of said River (Iroquois or Cataraquy) into Lake Ontario, through the middle of said Lake until it strikes the communication by water between that lake and Lake Erie, thence along the said communication into Lake Erie, through the middle of said lake until it arrives at the water communication between that lake and Lake Huron, thence, etc." Disputes arose as to the ownership of certain islands and as to what was the middle of the several lakes and rivers; and this matter was left, by Article VI, to two Commissioners, one appointed by each side. The British representative was at first John Ogilvy, of Montreal; he died at Amherstburgh in 1819 from fever caught in the discharge of his duties, and was succeeded by Anthony Barclay, son of Colonel Thomas Barclay, already mentioned. The American Commissioner was General Peter Buel Porter who had made a good record as a soldier during the war of 1812, and was to be Secretary for War in Adams' Cabinet. They made an award at Utica, June 18th, 1822, which gave universal satisfaction.

7. The Treaty of Ghent by Article I had provided that "all territory, places and possessions whatsoever taken by either party from the other . . . shall be restored . . . without . . . carrying away of . . . any slaves or other private property." During the war many slaves had entered the British lines, most of them induced so to do by a Proclamation of Admiral Cochrane which in effect promised their freedom. The United States claimed the return of these slaves; Britain refused saying

that they were not slaves but free men. Much negotiation took place, and at length, October 18th, 1818, was signed a convention between the two countries, which by Article V provided that the question whether the United States were entitled to restitution of, or a full compensation for these slaves should be left to some friendly sovereign or State, The Emperor of Russia was selected, and he, April 22nd, 1822, made an award in favour of the contention of the United States.

8. Upon the award being communicated to the parties, they at once entered (July 12th, 1822) into a convention for carrying it into effect.

It was agreed, Article II, first to determine the average value of the slaves to be paid for. Each government was to appoint a Commissioner and an Arbitrator, and these four were to sit as a Board. If the Board or a majority could not agree, "recourse shall be had to the arbitration of the Minister or other agent" of Russia at Washington.

The British Commissioner was George (afterwards Sir George) Jackson, a diplomat of great experience; the arbitrator was John McTavish. The American Commissioner was Langdon Cheves, who had been a member of Congress, Speaker of the House and a Judge of the Supreme Court of South Carolina; the arbitrator was Henry Seawell, a Judge of the Superior Court of North Carolina. These four made a unanimous award, September 11th, 1824.

9. Article III of the Convention of 1822 provided that when the average value of the slaves had been determined, the two Commissioners should determine the number to be paid for. If they should not agree; they were to choose by lot one of the arbitrators. They failed to agree; and the Governments got tired of the delay and settled by Britain paying $1,204,960 in full satisfaction (under a Convention November 13th, 1826.)

10. We have seen that the Treaty of Ghent provided by Article V that if the Commissioners should not agree as to the northeastern boundary, "some friendly sovereign or State" should be appealed to. We have also seen that the Commissioners did not agree. A Convention was entered into, September 29th, 1827, under which William, King of the Netherlands, was chosen arbitrator. January 10th, 1831, he made an award; the American Minister promptly protested against it, and the British Government did not insist. The line was afterwards settled by diplomatic negotiation by Ashburton and Webster, and is set out in the Ashburton Treaty of August 9th, 1842.

11. After the Treaty of Ghent, many claims were made against Britain by American citizens and many by British subjects against the United States. On the part of the United States were such claims as the wrongful seizure of vessels as slavers or for fishing in British waters,

seizure by British men-of-war after Treaty of Peace signed; duties wrongfully exacted, etc. On the part of Britain, seizure of vessel before war declared, arrest of British subjects, detention of vessels and other property, duties inproperly exacted, dishonoured bonds of Florida and Texas, etc. These were agreed by Article I of a Convention entered into February 8th, 1853, to be left to the decision of Commissioners, one appointed by each Government, they to choose a third person to act as Arbitrator or Umpire. If they should not be able to agree, they were each to name one person and then select one of those named by lot.

The British Commissioner was Edmund Hornby, a barrister, afterwards Sir Edmund Hornby, Judge of the Consular Court at Constantinople and later Judge of the Supreme Court of China and Japan. The American was Nathaniel G. Upham, for some years a Judge of the Supreme Court of New Hampshire. They agreed on Martin Van Buren, former President of the United States, as Umpire, but he declined to act, and they selected Joshua Bates, an American by birth and allegiance, but carrying on business in London, as partner in the firm of Baring Bros., & Co.

They disposed of a great many cases, sometimes the two Commissioners agreeing and sometimes Mr. Bates being called upon. The awards against Britain totalled about $330,000, against the United States $275,000.

12. After the war of 1812, the question arose whether the United States had not forfeited by that war all right to fish within British territory. October 20th, 1818, the parties entered into a convention whereby the United States renounced all right to fish within three miles of British land except the Magdalen Islands, the coast of Labrador and a named part of Newfoundland. By Article I of the Reciprocity Treaty of June 5th, 1854, it was agreed that so long as the Treaty should last, the Americans should have the rights (or "liberties") given up by the Convention of 1818; but to prevent any dispute as to the places at which they should have the right to fish, a Commission was agreed to be formed. Each Government was to appoint a Commissioner, and they to choose an Arbitrator or Umpire; if they could not agree each was to name one person and one of these to be selected by lot.

Britain appointed M. H. Perley, of New Brunswick, the United States G. G. Cushman, of Maine; and the Hon. John Hamilton Gray of New Brunswick was selected Umpire by lot.

Mr. Cushman resigned pending the reference, and Benjamin Wiggin succeeded him; he, too, resigned and was followed by John Hubbard, and he by E. L. Hamlin. On Mr. Perley's death, the well-known Joseph Howe, of Nova Scotia, succeeded him. Very many rivers, streams, etc., came on for decision; there was much dissatisfaction on the part of the

United States with the Umpire, Mr. Gray, going so far as to suggest his removal on the ground of flagrant partiality; but on the whole the reference was successful.

13. There was for many years a dispute as to the boundary between the two nations toward the west. By the Convention of 1818, it was agreed that the 49th parallel should be the boundary from the Lake of the Woods to the Rocky Mountains. Britain west of the Rocky Mountains claimed down to the mouth of the Columbia between 46° and 47°; the United States as far north as 54° 40′. By Article III of the Convention, it was agreed that west of the Rockies the disputed territory should, for ten years, be open to the vessels, citizens and subjects of either power without prejudice to the rights of each. In 1823 and 1826, attempts were made to settle the line, and the Convention of August 6th, 1827, indefinitely extended the period for common use; finally in 1846, Pakenham, the British Minister, accepted the offer made more than once, and the line of 49° was agreed upon. This was after Polk's election had been fought on the battle cry "Fifty-four forty or fight"; and war had been thought inevitable. The Treaty was concluded June 15th, 1846. By Article IV it was provided that the farms, etc., of the Puget Sound Agricultural Company to the north of the Columbia River should be confirmed to the Company, but that the United States might take them at a proper valuation. Article III provided that "the possessory rights of the Hudson Bay Company and of any British subjects . . . should be respected." These rights were not respected, and negotiations failed to fix the amount which should be paid. A Treaty was at length concluded, July 1, 1863, whereby these claims should be referred to two Commissioners (appointed by the Governments concerned), who should choose an Arbitrator or Umpire; if they could not agree the King of Italy was to appoint. The Commissioners were Alexander S. Johnson and Sir John Rose, the well-known Canadian financier and statesman. They selected as Umpire, Benjamin R. Curtis, who had been a Judge of the Supreme Court of the United States, and who gave the magnificent dissenting judgment in the Dred Scott Case; he was afterwards to be of Counsel for Andrew Johnson on his impeachment. September 10th, 1869, the Commissioners agreed upon an award without calling upon the Umpire, giving $450,000 to the Hudson's Bay Company and $200,000 to the Puget Sound Agricultural Company.

A very important treaty commonly called the Treaty of Washington was concluded May 8th, 1871, by which four matters in dispute were referred to arbitration.

14. The first of these was the "Alabama Claims": the United States claimed for the damage due directly and indirectly to Confederate cruisers built or equipped in British waters during the Civil War, chiefly

the Alabama, Florida, Georgia and Shenadoah. This was by Article I of the Treaty referred to five arbitrators, one to be appointed by the Queen, one by the President, and one by each of the potentates, the King of Italy, the President of Switzerland and the Emperor of Brazil. The English Commissioner was Sir Alexander J. E. Cockburn, Lord Chief Justice of England, the American, Charles Francis Adams, son of President John Quincy Adams, born in Boston, a student of Daniel Webster, called to the Bar but never having practised, a member of the State Legislature and afterwards of Congress, and Minister at the Court of St. James. The King of Italy appointed Count Frederic Sclopis, a distinguished judge, who became President of the Commission; the President of Switzerland, M. Jacques Staempfli, an advocate, who had been thrice President of the Swiss Confederation; and the Emperor of Brazil, Baron (afterwards Viscount) d'Itajubâ, who had been a professor in the faculty of law of Olinda.

This Board met at Geneva, and, Cockburn dissenting, rendered an award, September 14th, 1872, allowing the United States the sum of $15,500,000 as indemnity. The award met some criticism in England, but the amount was promptly paid.

15. There were claims distinct from the Alabama claims. A number of Confederate raiders had left Montreal and plundered the town of St. Alban's, Vermont; some daring Confederates had attacked American steamers on Lake Erie; vessels had been detained at Calcutta because laden with saltpetre, etc. On the other hand, there were British claims against the United States—detention of vessels, destruction of property or its appropriation by the United States, unlawful arrest, etc.

These were, by Article XII of the Treaty, referred to three Commissioners, one to be appointed by each Government, and the third by the Governments jointly; if they could not agree, then by the Spanish Minister at Washington.

The British Commissioner was Russell Gurney, Recorder of London and Judge of the Sheriff's Court; the American, James Somerville Frazer, formerly a Judge of the Supreme Court of Indiana; and the third, named by the Queen and President conjointly, Count Louis Corti, Italian Minister at Washington.

They disallowed all the American claims, and, September 25th, 1873, made a final award of $1,929,819 in favour of Britain.

16. The next reference was of great importance. By the Convention of 1818, the United States had renounced the right to fish within three marine miles of British land, with certain exceptions. By the Reciprocity Treaty of 1854 they were given further rights so long as that Treaty should be in force; the Treaty was abrogated in 1866 and the United States were accordingly relegated to their position under the

Convention of 1818. The Treaty of Washington by Article XVIII restored these rights, but as they were claimed to be more valuable than certain rights given to British subjects by Articles XIX and XX, a Board of Commissioners was provided by Article XXII to determine the amount to be paid by the United States. This was to be composed (Article XXIII) of three Commissioners appointed, one by each party and one by them jointly.

Sir Alexander Tulloch Galt was appointed British Commissioner; John H. Clifford, the American, and on his death, Ensign Kellogg. M. Maurice Delfosse, the Belgian Ambassador at Washington, was appointed by the Queen and the President jointly. They met at Halifax, and, Mr. Kellogg dissenting, made an award November 23rd, 1877, of $5,500,000 in favour of Britain. The result was a surprise to the United States; and there was some talk of repudiation, but the amount was paid within the year allowed by the Treaty.

17. The fourth matter in dispute agreed by the Treaty to be disposed of by arbitration has a rather curious history. By the Pakenham-Buchanan Treaty of 1846 the boundary was "the forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver Island, and thence southerly through the middle of the said channel and of Fuca's Straits to the Pacific Ocean." With a not unusual irony of geography there turned out to be three channels, any of which might fairly be called "the channel": Rosario (or Vancouver's) Douglas and De Haro, in the order from east to west. Britain claimed Rosario, the United States, De Haro as "the channel", and much negotiation was the result. In 1869 a Convention was entered into to refer the dispute to the President of Switzerland; but this failed to pass the Senate. British subjects entered and settled on San Juan, one of the disputed islands. General Harney landed an armed force and took possession of it for the United States. Britain ordered out men-of-war to the spot; it was, however, agreed that the two nations should occupy the disputed territory jointly until the ownership should be decided.

By Article XXXIV of the Treaty of Washington, the question was left to the decision of the Emperor of Germany. That monarch, October 21st, 1872, decided in favour of the American contention.

18. Russia had, before the cession of Alaska, attempted to exercise rights of ownership in the Behring Sea which were protested against by both Britain and the United States. Not long after the cession, in 1867, of Alaska, legislation was passed by the United States which was interpreted as preventing the killing of fur seals in Behring's Sea. A little later the United States openly claimed the sea as its own, a *mare clausum*, although it is "a sea larger than the Mediterranean and the

gateway . . . 450 miles wide." As early as 1886, Canadian sealers were seized by American cruisers and their crews detained, some imprisoned and some turned adrift in San Francisco. As the place of seizure was sixty miles from land in the open sea, this was intolerable, and immediate and vigorous protest was made.

At length, after much negotiation and a renewal of seizures in 1889, it was agreed by Article I of a Treaty signed February 29th, 1892, that the questions which had arisen "concerning the jurisdictional rights of the United States in the waters of Behring's Sea" should be referred to a tribunal of seven Arbitrators, two to be appointed by each party, one each by the President of France, the King of Italy and the King of Sweden and Norway.

The British Arbitrators were Lord Hannen, Lord of Appeal in Ordinary and Sir John S. D. Thompson, Minister of Justice of the Dominion of Canada (he became Prime Minister pending the reference). The American Arbitrators were John M. Harlan, Justice of the Supreme Court of the United States and Senator John T. Morgan of Alabama, afterwards commissioned to frame a code for the Hawaiian Islands. The President of France appointed Baron Alphonse de Courcel, a senator of France, who became president of the Board; the King of Italy, the Marquis Emilio Visconti Venosta, a Senator of Italy; and the King of Sweden and Norway, Mr. Gregers Gram, a Minister of State.

These seven met at Paris in 1893, and, August 15th, 1893, made an award substantially in favour of the British contention. It is of interest to Canadians to note that Sir Charles Hibbert Tupper was agent, and our own Christopher Robinson one of the Counsel on the British side.

19. The amount of damages to be paid Canadians, etc., for wrongful seizure was not determined by this Board; but a Convention signed February 8th, 1896, left this to be determined by Commissioners. Each nation was to appoint one; and any case in which these two were unable to agree was to be left to an Umpire appointed by the Government jointly, or if they could not agree by the President of the Swiss Confederation.

The Commissioners appointed were George Edwin King, Justice of the Supreme Court of Canada, and William L. Putnam, a Judge of the United States Court of Appeals. They agreed on an award, December 17th, 1897, of $473,151.26, which sum was paid forthwith by the United States. It was not necessary to appoint an Umpire.

20. The boundary between the United States and British territory by this time was well settled, except at Alaska—there, there was much uncertainty and difficulty. July 22nd, 1892, was concluded a convention for joint surveys of the line; but surveyors cannot decide matters of this kind. On January 24th, 1903, a convention was entered into for

the submission of the matter to "six impartial jurists of repute." Britain appointed Lord Alverstone, Lord Chief Justice of England; Sir Louis A. Jetté, Lieutenant-Governor of Quebec (formerly Chief Justice in that Province), and John Douglas Armour, Justice of the Supreme Court of Canada (previously Chief Justice of Ontario). Mr. Armour dying, Allen Bristol Aylesworth, K.C. (afterwards Sir Allen Aylesworth, Minister of Justice of the Dominion) was appointed in his stead. Elihu Root, Senator Henry Cabot Lodge of Massachusetts, and Senator George Turner of Washington were appointed on the other side. They met in London in 1903, and on the 20th October of that year made an award (the Canadian representatives dissenting, but Lord Alverstone joining in the award.)

This award created much dissatisfaction in Canada; few believed that Alverstone's action was judicial, most thought he acted as he did against his judgment, but diplomatically, so that there might be an award made. But Canadians resented still more—and chiefly—the constitution of the Board. Promised impartial jurists of repute, it was thought that two of the American Commissioners had expressed themselves in advance of their appointment in no uncertain terms upon the merits of the controversy—of one this was certainly true. This was not thought the "square deal" on the part of its most prominent and strenuous advocate.* The award, however, was submitted to without hesitation.

21. The Treaty of 1818, giving privileges to American citizens in respect of fishing in the Atlantic waters, drying and curing fish, etc., was not very definite; and constant friction showed itself between the two peoples. After many fruitless attempts at settlement, an agreement was entered into at London, April 4th, 1908. to refer the whole matter to a

* Hon. John W. Foster, once Secretary of State at Washington, who was the agent of the United States on this occasion, has the following in his "Diplomatic Memoirs" (1910) Vol. II, pp. 197, 198: "The Canadian Government complained to the British Colonial Office that the members nominated by the President of the United States were not such persons as were contemplated by the Treaty, to wit, 'impartial jurists of repute'; but the British Government did not regard this complaint of such a serious character as to bring it to the attention of the President. It was alleged that one of the American members had expressed himself publicly, some time previous to his appointment, as strongly convinced of the justice of the claim of his Government. It was also objected that no one of the three was taken from judicial life, and that they all might be considered as political rather than legal representatives of their country. The editor of Hall's 'International Law' (ed. 1904) refers to the selection of the American members as a 'serious blot on the proceedings'". Mr. Foster does not deny the charges made by the Canadian Government, nor does he attempt to justify or excuse the appointments, contenting himself with saying: "Whatever appropriateness there may have been in the objections urged by Canada, the sequel showed that the selection of the President was judicious"; adding a eulogy on the capacity and conduct of the American appointees. It is not without interest to note that Mr. Foster says nothing of the appointment of Mr. Justice Armour as a British representative.

I have never heard the conduct of President Roosevelt in this matter justified by an American; it has been explained (I cannot say how truly) by the alleged fact that it was only on the understanding that such appointments should be made that the Senate's approval of the Treaty could be obtained.

tribunal of arbitration chosen from the general list of members of the Permanent Court at the Hague, Article V. There were chosen George Gray, of the Circuit Court of Appeals; Sir Charles Fitzpatrick, Chief Justice of Canada; Dr. H. Lammasch, of the University of Vienna and an Aulic Councillor, Jonkheer A. F. De Savornin Lohman, of the Netherlands, and Dr. Luis Maria Drago of the Argentine Republic. They met at the Hague in 1910 and made an award unanimous in all respects (except that Dr. Drago dissented on one point.)

The award gave complete satisfaction to both parties, so much so that each nation claimed a victory. The fact is that both were weary of the strife over the fisheries which had been going on for over a century, and any settlement with a semblance of fairness would have been acceptable. It should be remembered, too, that most of the international hatred and contempt of some section of either nation for the other had in great measure died out.

There is another arbitration which was in fact, though not in form, between the two English speaking peoples, and has a claim to be mentioned here.

In 1814 Britain acquired from the Netherlands the Province of Demerara, Essequibo and Berbice (British Guiana), and almost at once got into a dispute with Venezuela as to the boundary between the countries. Venezuela finally claimed to the Essequibo River, though she had previously insisted on a more favourable line. In 1840 Britain directed Sir Robert Schomburgk to lay out the boundaries, which he did, taking in a large area claimed by Venezuela. Much controversy ensued. Schomburgk's monuments were taken up by Britain, but in 1886 she returned to her claim of the line of 1840. More controversy took place, and in 1894 Venezuela took possession of the disputed territory by an armed force. Next year British police removed the Venezuelan flag and were arrested but subsequently released. Then the United States interfered and the celebrated Cleveland Message was sent, December 17th, 1895.

22. In the event, a Treaty was entered into, February 2nd, 1897, between Great Britain and Venezuela to leave the dispute to four Commissioners named in the Treaty, and a fifth to be selected by these four, and if they disagreed, by the King of Sweden and Norway, the fifth to be President of the tribunal. The British Commissioners were Lord Herschell, shortly before Lord Chancellor; and Sir Richard Henn Collins, then a Justice of the Supreme Court of Judicature and to be Master of the Rolls. The Venezuelan, Chief Justice Fuller and Associate Justice Brewer, of the Supreme Court of the United States. They chose M. de Martens of St. Petersburg, a distinguished Russian jurist, professor of International Law in the University of St. Petersburg, and an eminent legal writer, as the fifth.

An award was made October 3rd, 1899, which gave Britain practically what she claimed—in some respects more.

There was considerable anger expressed in Venezuela, but it met no echo in the United States. Perhaps the fact that the notorious Castro began his obnoxious career about the same time had something to do with this complaisance; but it is probable that the Spanish war (which began 1898) and the good-will then manifested towards the United States by the Mother Country had more.

There is still another settlement of a dispute which should be mentioned—a dispute not international but interprovincial.

By the British North America Act (1867), the Province of Ontario was given the same limits as the former Province of Upper Canada. In 1870, by the Dominion Act, 33 Vic., c. 3, the Province of Manitoba was formed with its eastern boundary at the meridian of 96° W.L. At once there was a movement in Ontario, the Government of that province claiming that it went further West than 96° W.L., although this had long been considered in fact about her western limit. Many communications passed between the Governments, but without result. Then in 1876 an Act was passed (39 Vict., c., 21), extending the limits of Manitoba to the "westerly boundary of Ontario". The Dominion and Manitoba claimed that the westerly boundary was about six miles east of Port Arthur. Armed forces of the Provinces of Manitoba and Ontario took possession of Port Arthur, but the scandal was abated by an agreement to arbitrate, December 18th, 1883, by the Dominion and Province. Ontario named William Buell Richards, Chief Justice of the Province, and when he became Chief Justice of Canada, his successor Robert A. Harrison; the Dominion, Sir Francis Hincks, and the two Governments jointly Sir Edward Thornton the British Ambassador at Washington.

These Arbitrators made, August 3rd, 1878, a unanimous award in favour of the Ontario contention, which by this time was in reality limited to the generally recognised boundary. This was at once accepted by Ontario, but the Dominion refused to ratify the award. At length, in 1883, the two Provinces concerned agreed to submit to the Judicial Committee of the Privy Council three questions: (1) whether the award was binding; (2) if not, what was the true boundary, and (3) what legislation was necessary to make the decision effectual.

The Judicial Committee, August 11th, 1884, decided (1) in the absence of Dominion legislation the award was not binding, (2) the award laid down the boundary correctly, and (3) Imperial legislation was desirable (without saying it was necessary).

The Imperial Act (1889), 52 and 53 Vic., c., 28, carried the decision into effect, and ended the controversy.

Thus far particular treaties, conventions and agreements for settlement of disputes have been spoken of; it will not be without interest to say something about the general agreements between Britain and Canada on the one hand, and the United States on the other. I quote from an article written by me in the Yale Law Journal, June 1913:

"In 1908, April 4th, a general Treaty of Arbitration between the United States and Great Britain was signed at Washington. This provided (Article I) that differences which might arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which could not be settled by diplomacy, should be referred to the permanent Court of Arbitration established at the Hague by the convention of July 29th, 1899, provided they did not affect the vital interests, the independence, or the honour of the two contracting States, and did not concern the interests of third parties.

"Article II provides that in each individual case the parties were to conclude a special agreement defining the matter in dispute, the scope of the powers of the arbitrators and the times to be set for the several stages of the procedure.

"A provision of very great significance to a Canadian appears in the Treaty. The British Government reserved the right before concluding a special agreement in any matter affecting the interests of a self-governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion.

"This was not, indeed, the first time the concurrence of the colony had been provided for; in the Treaty of Washington (1871) it was provided that certain parts of the Treaty were not to come into force until legislation had been passed by the colonies concerned."

It was under this general Treaty that the Hague arbitration (21 above) was held.

This Treaty, it will be seen, applies to the whole British Empire: but there is another international arrangement which (as I said in an address at Washington some years ago) "may be called a miniature Hague tribunal of our own just for us English speaking nations of the Continent of North America."

This "Treaty of 1909 was preceded by the constitution of a board of commissioners. The board was formed at the request of the President, acting under the authority of the River and Harbour Act approved June 13, 1902. The functions of the proposed board were defined in the Act, and were substantially a full investigation of the question of the boundary waters; the board was to consist of six members, three appointed by the United States and three by Canada. The President, July 15, 1902, communicated through the American Ambassador at London with the British Government, that Government transmitted

the invitation to the Government at Ottawa, the Canadian Government accepted the invitation, and this acceptance was communicated to the American Government. The American part of the board was appointed in 1903, and the Canadian in 1903 and 1905; and work was begun with all convenient speed on the Sault Ste. Marie Channel, the Chicago Canal, the Minnesota Canal, etc. This board has done an immense amount of very valuable work already.

The Treaty of 1909 was really at the instance of that Board."

Signed January 11, 1909, this "Waterways Treaty" provides "for the establishment and maintenance of an International Joint Commission of the United States and Canada—three appointed by each Government —which Commission should (Article VIII) have jurisdiction over and pass upon all cases involving the use, obstruction or diversion of the waters between the United States and Canada. But Article IX contains an agreement that all matters of difference between the countries involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the frontier shall be referred to this Commission for inquiry and report. Article X provides that any questions or matters of difference involving the rights, obligations or interests of the United States or of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to this International Joint Commission. If the Commission be equally divided, an Umpire is to be chosen in the manner provided by Act 45 of the Hague Convention of October 18, 1907."

It will be seen that "every dispute involving the rights, obligations or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants" may be referred to the Commission by the consent of the two countries.

"It is hard to see how a more comprehensive clause could be framed; and if the Treaty had provided that such dispute 'shall' be referred, the work would be perfect. As it is, the Dominion must give consent through the Dominion Cabinet. That is an easy task. We have a Government which is united—it must be united or it could not stand—and which in this instance does not need to go to Parliament for authority."

It is not always the case that a Canadian Parliament will consent to an international agreement made by the Government; then the Government must take the opinion of the electorate (a recent example will occur to everybody), but in this instance the Government may act without the consent of Parliament.

"But in the United States the action must be by and with the advice and consent of the Senate; and sometimes, as it is well known, trouble arises in the Senate about confirming treaties.

Each reference to the Commission will or may be but equivalent to making a new treaty. Had the provision been that the consent might

be given by the President of the United States, the position of all the parties on the two sides would have been much alike.

Better even than this would be a provision making the arbitration of the Commission apply automatically. If such a provision proved unsatisfactory, the treaty could be denounced and a new treaty negotiated. But I suppose there may be some jealousy on the part of the Senate, or perhaps the Constitution prevents. And we Canadians notice that the Constitution of the United States prevents a great many things being done over which we should have no trouble at all."

The Rush-Bagot Convention of 1817 cannot fairly be called an agreement of the kind we have been considering—it was designed to prevent troubles arising, not to settle them after they had arisen. It may be well, however, to say a word about it here:

"During the war of 1812, much damage had been done by armed vessels upon the Great Lakes. The Treaty of Ghent did not provide that such armed forces should not be kept up; but it became apparent to both sides that it would be well strictly to limit the number and quality of armed vessels upon the fresh waters between the two countries. After some negotiation notes were interchanged, April 28th and 29th, 1817, containing the 'Rush-Bagot Convention,' which notes contained an agreement by one and the other party limiting the naval force to be kept on the lakes to a very few: on Lake Ontario one vessel, on the Upper Lakes two vessels, on Lake Champlain one vessel, none of the vessels to exceed one hundred tons burden, and each to have but one cannon of 18 pounds. It was agreed to dismantle forthwith all other armed vessels on the lakes, and that no other vessels of war should be there built or armed; six months' notice to be given by either party of desire of annulling the stipulation.

"The arrangement was after some delay submitted by the President to the Senate, and that body in 1818 approved of and consented to it."

This understanding has continued up to the present time—perhaps not always so strictly observed as might be desired.

"The understanding was, however, in great danger in 1864. The Minister of the United States in London was instructed in October of that year to give the six months' notice required to terminate the agreement; and Mr. Adams did so with the subsequent approval of Congress. Before the lapse of the time specified, however, matters on the lakes had taken a different turn, and the United States expressed a desire that the arrangement should continue and be observed by both parties. This was acceded to and all parties thereafter considered the convention to be in full force."

I say nothing of treaties which have been negotiated and have failed of ratification, or of negotiations which proved fruitless even diplomatically.