

THE JAY TREATY OF 1794.

On April 8th, 1929, Mr. Justice Sutherland delivered the opinion of the Supreme Court of the United States in the case of Arthur J. Karnuth, United States Director of Immigration, and Charles Dreher, Inspector in Charge, United States Immigration Service, Petitioners v. United States of America, on the petition of Preston M. Albro, an attorney for Mary Cook and Antonio Danelon, respondents. Among other conclusions, he stated that:

These expressions, and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty (Article III.) now under consideration was brought to an end by the war of 1812, leaving the contracting powers discharged from all obligations in respect thereto, and, in the absence of renewal, free to deal with matters as their views of national policy respectively might from time to time dictate.¹

The facts of the case were as follows:

The respondents, Mary Cook and Antonio Danelon, sought admission to the United States from Canada on December 1, 1927. Neither was born in Canada. Mary Cook is a British subject, born in Scotland, and came to Canada in May, 1924. She resided at Niagara Falls, Ontario, and is a spinner by occupation. She had been employed for three weeks in the United States, crossing daily to her work. At the time in question she was out of employment and sought admission to look for work, hoping to find employment in a silk mill in Buffalo. Antonio Danelon was born in Italy. He came to Canada, through the United States, in 1923 and lived with his father, Pietro Danelon, in Niagara Falls, Ontario. His petition for *habeas corpus* alleged that he became a Canadian citizen in 1924 by his father's naturalisation, but the record does not contain any proof of that fact. He had been working at Niagara Falls, N.Y., from November 1926, for the United States Light and Heat Company and for the Aluminum Company, crossing the border daily by means of an identification card. His father had made application to the United States Consul in Canada in 1925 for quota visas for himself and the whole family, but had not obtained them. When held for enquiry in December, 1927, he was seeking admission to work by the day. Both (Danelon and Cook) were refused admission

¹ Supreme Court of the United States. No. 198. October term 1928. (Judgment delivered April 8, 1929). P. 8.

because they were not in possession of an unexpired consular immigration visa, and because they were immigrants, and not visiting the United States for business. A writ of *habeas corpus* was sued out in their behalf.² The District Court held that, assuming Article III. of the Jay Treaty to be still in force, it only permitted passing from one country to another to carry on trade or commerce, and that passing to labour for a daily wage was not within the contemplation of the treaty. The District Court also held that a visit to labour for hire was not a visit for business within the meaning of the exception in Section 3 of the Immigration Act of 1924. Holding that Danelon and Cook were immigrants and not covered by any exceptions, it dismissed the writ and remanded them to the custody of the immigration officials for exclusion.³ On appeal the Circuit Court of Appeals held that they were not immigrants because they did not intend to remain in the United States permanently and that a daily visit to labour for hire was a visit for business within the meaning of Section 3(2) of the Immigration Act. It also held that Article III. of the Jay Treaty was still in effect and that its provision allowing British subjects to pass the United States boundaries by land or inland navigation and to navigate United States waters and to carry on trade and commerce also allowed British subjects to go into the United States and to labour for hire, thereby reversing the order of the District Court.⁴ From this decision the United States officials in charge of the Immigration service appealed to the Supreme Court, with the result (as stated above) that the decision of the Circuit Court of Appeals was reversed. Danelon and Cook were held to be immigrants and not within the exception, and what is more important, Article III. of the Jay Treaty was held to be abrogated by the war of 1812.⁵

This decision gives rise to some very nice questions of law which vitally affect Canada and Canadians. The interpretation of United States Statutes and Orders, the extent of the exceptions provided, and the meaning of immigrant and business are properly matters for United States courts, and do not concern us. The present validity of the Jay Treaty is another, and an international matter, and one which I submit is beyond the jurisdiction of any American court, in so far as it affects the interests of another state. Allied to this

² Facts taken from *United States v. Karnuth*, 24 U.S. Fed. Rep. (2nd) Series, pp. 649-653 (1928) and the Briefs of the Petitioners and Respondents in the Supreme Court (No. 198).

³ See 1 (*supra*), p. 3.

⁴ See 24. F. (2d). 649.

⁵ See 1 (*supra*).

second matter is the further question of the meaning to be given to the relevant articles of the Treaty, if it is valid, and their present economic and political effect.

The Jay Treaty,⁶ or, as its official title reads, A Treaty of Amity, Commerce and Navigation between His Britannic Majesty and the United States of America, was concluded by Lord Grenville, Foreign Secretary of Great Britain, and John Jay, Chief Justice of the United States,⁷ in November of 1794, and ratified October 28, 1795. It was of great importance to the United States and eagerly sought after, for it gave official recognition to their status as an independent nation. But its terms did not satisfy everyone, and there were many criticisms of Jay and of his Treaty in the former Colonies—criticisms occasioned not only by the terms of the Treaty, but by the fact that he was Chief Justice and might be required to interpret the treaty that he had made. However, a contemporary writing from Philadelphia under the name of Peter Porcupine in 1795 replied to the critics in the following terms:

A Treaty of Amity, Commerce and Navigation with Great Britain is a thing which has been so long and so ardently desired on your part, and so often solicited by your government, that one cannot help being astonished that even the democratic or French faction should have the temerity to raise a cry against it now it is brought so near a conclusion.⁸

Mr. Pinckney, the American ambassador in London, in a letter to the Secretary of State wrote that:

Mr. Jay communicated freely with me on this subject during the course of the negotiation, and I have witnessed the great difficulties which have occurred in adjusting several of the articles. Although some points might have been arranged more beneficially for us if the treaty had been dictated entirely by the United States, yet when it is considered as a composition of differences where mutual complaints had rendered mutual concessions necessary to establish a good understanding, I think it may fairly be said that, as little has been conceded by Mr. Jay, and as much obtained for the United States as, all circumstances considered, could be expected, the business upon the whole has been concluded more beneficially for us than I had any hope we could obtain six months ago, and in my opinion places us in a more advantageous situation that we should have been by becoming parties to the war.⁹

⁶ "Treaties and Conventions between the United States of America and Other Powers," 1873. Government Printing Office Washington., P. 318.

⁷ Bemis: "Jay's Treaty." pp. 259 and 270.

⁸ Cobbett, W.: "A Little Plain English," p. 1.

⁹ Cobbett: *Ibid.*, p. 111.

Article III. of the Jay Treaty is as follows:

It is agreed that it shall *at all times be free to* His Majesty's subjects and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundry line, freely to pass and repass by land or inland navigation into the respective territories, and countries of the two parties, on the continent of North America (the country within the limits of the Hudson's Bay Company only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other. . . . As this article is intended to render in a great degree the local advantages of each party common to both, and thereby to promote a disposition favourable to friendship and 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 who may be concerned therein.¹⁰

And Article XXVIII.:

It is agreed that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years . . . if His Majesty and the United States should not be able to agree on such new arrangements (as provided in Article twelve) . . . all the articles of this treaty except the first ten shall then cease and expire altogether.¹¹

And in an explanatory article attached to the Treaty in 1796 and ratified by His Majesty and the President of the United States, it was stated that:

No stipulations in any treaty subsequently concluded by either of the contracting parties with any other state or nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse and commerce secured by the aforesaid third article of the Treaty of Amity, Commerce and Navigation to the subjects of His Majesty and to the citizens of the United States and to the Indians dwelling on either side of the boundary line aforesaid but that all the said persons shall remain at full liberty freely to pass and repass, by land or inland navigation into the respective territories and countries of the contracting parties, on either side of the said boundry line, and freely to carry on trade and commerce with each other according to the stipulations of the said third article of the Treaty of Amity, Commerce and Navigation.¹²

From these sections it seems clear that the intention of the parties was to make the terms of Article III. permanent. The only circumstance that may have invalidated this article was the war of 1812, and as the Supreme Court of the United States has based its decision on the effect of that war on the treaty, it is necessary to examine the

¹⁰ See 6 (*supra*), pp. 319, 320.

¹¹ See 6 (*supra*), p. 332.

¹² See 6 (*supra*), pp. 333, 334.

effect of war generally on treaties. On this there is no unanimity of opinion, but out of a variety of opinions it seems clear that there are certain treaties on which a subsequent war has no effect; others which a state of war abrogates immediately and permanently; others which war merely suspends; and finally, those which are abrogated in part and continue effective in part.¹³

Birkenhead in his *Treatise on International Law*¹⁴ states:

On the question of the effect of war upon treaty obligations, it is impossible to lay down any general rule . . . a belligerent entering a territory ceded in the past to his adversary clearly enters as a military occupant and not as a sovereign; the United States, if at war with Great Britain, would not be thrown back to the position of a revolutionary which she occupied before the recognition of her independence in 1783. And it is not only treaties of cession and the like which have this characteristic of permanence. States may make conventions as to the private rights of their respective subjects, as when the United States and Great Britain, in 1794, gave to each other's subjects the right to hold and transmit land; where the rights were held not to have been interrupted by the war of 1812, though the treaty was not expressly revived on the conclusion of peace in 1815. As Leach, M.R., said, 'The relations which had subsisted between Great Britain and the United States, when they formed one empire, led to the introduction of the ninth section of the Treaty of 1794, and, the privileges of the natives being reciprocally given not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should . . . not depend upon the continuance of a state of peace.'¹⁵ And in an American case, a similar judgment was pronounced: 'There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which in their terms are meant to provide for an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. . . . Treaties stipulating for permanent rights and perpetual arrangements and professing to aim at perpetuity and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties or new and repugnant stipulations are made, they revive in their operation at the return of peace.'¹⁶

¹³ Hall: "International Law," 8th edit., p. 453 *et seq.*; Westlake: "International Law," Part II., pp. 29, 32; Faucille: "Traite de Droit International Public," 1921, Vol. II., p. 55 *et seq.*; Woolsey: "International Law," 6th edit. 1897, 263. Moore's Digest of International Law. Vol. 5, 372 *et seq.* See also discussion of effect of war on treaties, re North Atlantic Fisheries dispute as reported Stowell and Munro "International Cases." *Peace*, pp. 179-180.

¹⁴ Birkenhead: "International Law," 6th edit., p. 145 *et seq.*

¹⁵ *Sutton v. Sutton* (1830), 1 Russ & Mylne, 675.

¹⁶ *The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven and Wheeler* (1823), 8 Wheaton, 464.

From these judgments (quoted by Birkenhead) it is evident that the Jay Treaty has been held by courts in both England and the United States to have survived the war of 1812.

But Mr. Justice Sutherland, in his recent judgment, argues that while Article IX. of the Treaty which was under consideration in the two cases cited was not abrogated, that Article III. was. He states:

Article IX. and Article III. relate to fundamentally different things. Article IX. aims at perpetuity and deals with existing rights vested and permanent in character, in respect of which, by express provision, neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature, are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III. is one created by the Treaty, having no obligatory existence apart from the instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighbourly ends. It is in no sense a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility.¹⁷

With all due deference to Mr. Justice Sutherland and the Supreme Court of the United States, I submit that Article III. of the Treaty was merely suspended by the war of 1812 and was not abrogated. It has been held and admitted that the Treaty as a whole survived. Article III., like Article IX., is one of the ten articles that were definitely made permanent by Article XXVIII. Article III. itself states: "It shall *at all times* be free to His Majesty's subjects to pass and repass." The explanatory article or protocol signed two years later than the treaty re-emphasized this permanence of Article III. and negated the effect of subsequent treaties with other countries in so far as they might affect the terms of Article III.

An earlier decision of the Court of Appeals held that Paul Diabo, a full-blooded Iroquois, a native of Canada, had the right under the Jay Treaty to pass and repass the border at will or as Judge Buffington puts it:

We think that treaties stipulating for permanent rights and general arrangements and professing to aim at perpetuity and to deal with the case of war as well as of peace do not cease on the occurrence of war, but are at most only suspended while it lasts; and unless they are waived by the parties of new and repugnant stipulations are made, they revive in their operation at the return of peace. . . . So far as we are advised,

¹⁷ See 1 (*supra*), p. 6.

neither Great Britain nor the Dominion of Canada was denied to the Indians of the Six Nations resident in United States passage across the boundary line and if the Jay Treaty is in force as we find it to be, good faith and the observance of the treaty call for the same course of conduct by the United States.¹⁸

The privileges conferred by Article III. of the Treaty on British subjects have not been interfered with since the ratification of that treaty until the present time; and even granting the authority of Supreme Court of the United States to interpret United States statutes and the effect of treaty provisions on United States citizens, I deny its authority to decide the validity of an international treaty. The validity of Article III. of the Jay Treaty is clearly a matter to be decided by an international tribunal, and not by a national court, no matter how able or unbiased. Having properly determined the validity of Article III., it may be necessary to interpret it. Nationality, its acquisition, and relinquishment, was quite a different matter in 1794 from what it is in 1929. If Article III. is held to be still in effect, then Canada might, if she modified her naturalization laws, nullify the effectiveness of United States immigration quota laws. It is certain, too, that Lord Grenville and John Jay did not contemplate, when using the terms "trade and commerce," a time when large numbers of Canadians and Americans would want to live in one country and "commute" to work in the other. As a matter of fact, the terms of the treaty are seemingly unsuited to modern conditions, but that is no reason for a unilateral denouncement of them. If the treaty is valid—and I submit that there are excellent grounds for so holding—then Canada and Canadians have certain legal rights under it which can be clearly stated and defined. If these rights, when defined, interfere with the well being and prosperity of the United States, that is a matter for negotiation and diplomatic arrangement. The treaty can be revised, amended, or denounced altogether if all the interested parties agree and the proper procedure is followed. But the matter is one which involves an important principle and the Canadian Government should not allow it to pass unnoticed or unquestioned.

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¹⁸ *United States ex rel. Diabo v. McCandless*, 25 Fed. (2) 71 (1928).