# CASE AND COMMENT

SOLICITOR AND CLIENT—PRIVILEGE IN LAW OF DEFAMATION—PRIVILEGE OF NON-DISCLOSURE.—The cases of *More* v. *Weaver*[1] and *Minter* v. *Priest*[2] illustrate two meanings which are given in law to the term "privilege."

In *More* v. *Weaver*, the defendant made defamatory statements about the plaintiff in letters which she wrote to her solicitors concerning a loan transaction which she had entered into with the plaintiff. These documents had been disclosed to the plaintiff before the action for defamation was brought and the questions before the Court were, whether the statements complained of were made on a privileged occasion, and, if so, whether the privilege was qualified or absolute. The Court of Appeal treated the decision of Darling, J., in *Morgan* v. *Wallis*,[3] that the privilege between solicitor and client is qualified, as erroneous and held that it is absolute. The Court, however, stated that before a privileged occasion can be made out it must be shown that the communication in question was relevant to the discussion between the solicitor and client. Scrutton, L.J., said: "But suppose in the middle of the conversation the client, being of a gossipy nature, says, 'Have you heard that Jones has run off with Mrs. Brown?' That would not be relevant to the discussion."[4]

In *Minter* v. *Priest* a prospective client interviewed a solicitor with a view to obtaining a loan for a deposit on a contemplated purchase of a house and with the intention, if he could find the money, of employing him to carry out the purchase. The solicitor did not accept the retainer and, in stating his reasons for refusing to find the money, slandered the vendor of the house. The vendor brought an action for defamation against the solicitor, and the prospective client, as a witness, claimed privilege from disclosing what had passed at the interview between the solicitor and himself. In *More* v. *Weaver* the question as to privilege of non-disclosure and as to the admissibility of the client's evidence was not before the Court; the problem was whether the communication between solicitor and client gave rise to a cause of action.

[1] [1928] 2 K.B. 520.
[2] [1929] 1 K.B. 655.
[3] (1917), 33 T.L.R. 495.
[4] [1928] 2 K.B. 520 at p. 525.

It is well established that the privilege of non-disclosure, arising when the communication is confidentially made,[5] is intended not for the protection of the solicitor, though in practice it operates for his protection, but for the protection of a client seeking advice or legal assistance.[6] The Court of Appeal in *Minter* v. *Priest* had to consider whether the privilege arises if a retainer does not follow the communication. Lord Bowen, in *Browne* v. *Dunn*,[7] suggested that all that passes between a solicitor and a presumptive client with a view to the client retaining the solicitor to act for him is protected by privilege if the client does in fact retain the solicitor. To this Hanworth, M.R., answered: "I think that this last qualification is unnecessarily narrow, and that if what passes is with a view to, and for the purpose of retaining the solicitor, then it is protected even if the solicitor does not accept the retainer."[8] A further difficulty was presented to the Court when it was argued that the solicitor was not consulted in his professional capacity, but the members of the Court were unanimous in holding that it is an ordinary part of a solicitor's duty to lay out moneys for his clients.

There still remains unanswered the question whether, if the evidence of the client in *Minter* v. *Priest* had been properly before the Court by reason of waiver of privilege, or otherwise, the occasion would have been one of absolute or only of qualified privilege. In respect to this problem, Greer, L.J., said: "The area of absolute privilege in the law of libel may be narrower than the area of the privilege of non-disclosure."[9]

S. E. S.

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MORTGAGE OF REAL ESTATE—BONUS—LACK OF STATEMENT SHOWING AMOUNT ADVANCED.—The decision in *Rogers* v. *Labow*[1] is one of considerable importance to lawyers in Ontario and it serves to restore one's belief in the validity of the principle, so often

[5] See *Fraser* v. *Sutherland* (1851), 2 Gr. 442 (communications by a debtor to his solicitor of a compromise to be effected with and divulged to his creditors, not privileged).

[6] See Hanworth, M.R., [1929] 1 K.B. 655 at p. 667; *Stewart* v. *Walker* (1903), 6 O.L.R. 495 at p. 497. Cf. *Re United States* v. *Mammoth Oil Co.* (1924), 56 O.L.R. 307 at p. 315; 4 C.E.D. (Ont.) p. 659 *et seq.*

[7] (1893), 6 The Reports, 67 at pp. 71, 72 and 80. See also *Cromack* v. *Heathcote* (1820), 2 B. & B. 4 at p. 6.

[8] [1929] 1 K.B. 655 at p. 666. Cf. *Rudd* v. *Frank* (1889), 17 O.R. 758 at p. 764 (the fact that the solicitor supposed the result of the communication would be that he would be employed did not turn it into a privileged communication).

[9] [1929] 1 K.B. 655 at p. 687. Cf. note: 45 Law Q. Rev. 281.

[1] (1929), 36 O.W.N. 316.

repeated but not always observed, that if the words of a statute are in themselves precise and unambiguous no more is necessary than to expound these words in their natural and ordinary sense.[2] In three classes of cases, section 6 of the Interest Act[3] prohibits the allowance of any interest whatever under a mortgage of real estate unless it contains a statement showing the amount of the principal money actually advanced and the rate of interest chargeable thereon. The mortgage in *Rogers* v. *Labow*, which came within one of the classes provided for in section 6, on its face purported to secure repayment of $800 with interest at 8% per annum on the said sum of $800. In fact, the principal sum advanced was $750. The further sum of $50 was a bonus and under the decision in *Singer* v. *Goldhar*[4] an Ontario court is bound to treat a bonus as interest. The mortgage did not contain a statement complying with section 6. The Master, on taking of the account in a foreclosure action, followed *Lastar* v. *Poucher*,[5] *Prousky* v. *Adelberg*[6] and *Thompson* v *Wilson*[7] and fixed the amount to be paid by the defendant, in order to redeem, at $750 with interest thereon at 8% per annum. The Second Divisional Court of the Appellate Division, in refusing to sanction the allowance of any interest, held that section 6 means what it says. It is true, the Court considered that the cases relied upon by the Master had been over-ruled (albeit unconsciously) by the First Divisional Court, in 1928, in *Re Brown*.[8] An argument based upon Section 7 of the Interest Act was addressed to the Court by counsel for the mortgagee, but the Court once more gave effect to the cardinal principle for the interpretation of statutes and held that the opening phrase of section 7, "whenever the rate of interest shown in such statement" means that section 7 can only apply where the statement required by section 6 is given in the mortgage. Solicitors must so draft their mortgages as not to come within the classes of cases provided for in section 6 or, as an alternative, give a statement therein showing the amount of the principal money advanced and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance. Otherwise, no interest whatever shall be chargeable, payable or recoverable.

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[2] See article: The Validity of Bonuses in Mortgages of Real Estate, (1927), 5 C.B. Rev. 161, particularly at pp. 169, 170.
[3] R.S.C. 1927, c. 102.
[4] (1924), 55 O.L.R. 267. See also *Meagher* v. *London Loan and Savings Co. of Canada* (1929), 36 O.W.N. 260.
[5] (1926), 58 O.L.R. 589.
[6] (1926), 59 O.L.R. 471.
[7] (1927), 32 O.W.N. 317.
[8] 61 O.L.R. 602.

HABEAS CORPUS — PROVINCIAL STATUTE — APPEAL — CONSTITUTIONALITY. The recent case of *Ex parte Fong, Ex parte You, Ex parte Chalifoux,*[1] adds one more to the long list of cases which has arisen over the problem of the distribution of legislative power between the Dominion and the provincial legislatures. In this case, the point involved was the right of appeal from a judgment granting a writ of *habeas corpus* to a person convicted of a criminal offence under a Dominion statute. Two of the three persons concerned in this case were convicted under the Opium and Narcotic Drug Act[2] and the third was convicted for the theft of a postal letter. All three were liberated on *habeas corpus* proceedings, and we have the unusual spectacle of the Crown appealing, and seeking to win the appeal by assigning the matter to the jurisdiction of the provincial legislatures. When the Crown appealed, the respondents moved to quash the appeal on the ground that "the granting or refusing of a writ of *habeas corpus* arising out of criminal matters is a criminal appeal, and falls within the heading of 'criminal law' assigned to the Dominion by section 91 of the British North America Act, 1867; whereas the Habeas Corpus Act,[3] granting an appeal from all final judgments maintaining or quashing writs of *habeas corpus* is, so far as it purports to apply to writs of *habeas corpus* in criminal matters, unconstitutional." The Court of King's Bench of the Province of Quebec held that the writ of *habeas corpus* was a civil writ, and the question of appeals was a matter of provincial jurisdiction, and therefore the provincial Act was valid.

Maintaining the validity of the provisions of the provincial statute in question, Greenshields, J., made the following statement: "Even if it be considered that the attacked statute is legislation in criminal matters, it is not repugnant to any federal legislation. Nowhere has the federal Parliament at least since Confederation passed any enactment with respect to appeals in the matter of *habeas corpus.*"[4] And: "The Criminal Code is silent as regards *habeas corpus.*"[5] It is respectfully submitted that such a statement indicates a misconception of the correct interpretation of sections 91 and 92 of the British North America Act. The theory that the omission of the Dominion to occupy the field allotted to it under the enumerated subjects of section 91 enables the provincial parliaments to legislate in relation to such matters has long since been

[1] [1929] 1 D.L.R. 223.
[2] 1923 (Can.) c. 22.
[3] R.S.Q., 1925, c. 167.
[4] [1929] 1 D.L.R. 223 at p. 235.
[5] [1929] 1 D.L.R. 223 at p. 231.

discarded as erroneous.[6] It is therefore submitted that if a statute deals with criminal law or procedure in "criminal matters" within the meaning of sub-section 27 of section 91, it must accordingly come under the exclusive jurisdiction of the Dominion Parliament.

Is the granting of a writ of *habeas corpus*, or the appeal therefrom, a matter which can properly be called a matter in respect of criminal law or procedure in criminal matters? At first blush, it would certainly seem so. The learned judge, however, came to the conclusion that the matter of *habeas corpus* is purely a civil proceeding, and therefore comes under the provincial jurisdiction under the heading "procedure in civil matters." In support of this conclusion, he traced briefly the history of the writ of *habeas corpus*, but seems to have placed undue weight on the statement of an annotator to the effect that, "That the writ of *habeas corpus* in England is not considered in any way a criminal proceeding is evidenced by the fact that it would even prior to the Act of 1679 issue out of the courts having no criminal jurisdiction whatever, e.g., the Chancery and the Common Pleas, although for convenience it usually issued out of the King's Bench so that any criminal question arising on the return might be decided by the Court of competent jurisdiction." In doubting the authenticity of the foregoing statement, reference might safely be made to the history of the writ of *habeas corpus* contained in Maitland's Constitutional History of England,[7] where the author said: "When the three courts of common law had become separate this work of investigating the cause of an imprisonment belonged most properly to the King's Bench, but by means of fictions the other two courts followed its example and issued and adjudicated on writs of *habeas corpus*." If the other courts had to adopt a fiction in order to acquire jurisdiction, the argument that such courts had original jurisdiction in the matter (whatever they may later have acquired) shows that they did not have inherently such jurisdiction.

What is the extent of the jurisdiction conferred by the words "criminal law and procedure in criminal matters" as used in the British North America Act? Lord Halsbury, in delivering the judgment of the Privy Council in the case of *Attorney-General of Ontario* v. *Hamilton Street Railway*,[8] said: "It is, therefore, the criminal law in its widest sense that is reserved. . . The fact that from the criminal law generally there is one exception, namely,

[6] See *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96.
[7] 1926 edition at p. 272.
[8] [1903] A.C. 524, at p. 529.

. . . 'the constitution of Courts of criminal jurisdiction,' renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament."

The general interpretation of the British North America Act seems to be that "when a particular statute is determined to be within the 'criminal law' as that class enumeration is properly to be construed, then legislation as to the procedure to be followed in judicial proceedings instituted for its enforcement is exclusively within the Dominion's competence. All federal penal legislation . . . . that is to say legislation imposing punishment as its sanction . . . . is within this class of the 'criminal law,' whether such legislation is to be found in the Criminal Code or in separate enactment."[9] Undoubtedly the Acts, in respect of which the prosecutions in the case under discussion were taken, are within the exclusive legislative jurisdiction of the Dominion. The Court of Appeal of British Columbia, in *Re Tiderington*,[10] decided that it had no jurisdiction to hear an appeal from an order made by a judge of the Supreme Court of British Columbia discharging upon *habeas corpus* a person who had been committed for extradition. The Court in that case held that the procedure was "procedure in criminal matters" in regard to which the provincial legislature could not confer a right of appeal. MacDonald, C.J.A., said: "Now, while there is no provision in our Court of Appeal Act that there should be no appeal in any criminal cause or matter, it is not necessary, in my opinion, that there should be such in order to exclude such an appeal, because the Province has no jurisdiction at all. Any Act of the Province giving the right of appeal in a criminal matter, in the sense in which the jurisdiction is given to the Dominion in such matters, would be *ultra vires* of the Province."[11] Similarly, in *R.* v. *DeCoste*,[12] where a conviction under the Canada Temperance Act had been quashed by a County Court Judge, purporting to act under a provincial Act which gave jurisdiction in certain cases to a County Court Judge to quash convictions upon certiorari, the Supreme Court of Nova Scotia held that the provincial legislature has no power to confer jurisdiction, or legislate at all, in reference

[9] Clement: Law of the Canadian Constitution, 3rd ed., p. 538.
[10] (1912), 17 B.C.R. 81.
[11] (1912), 17 B.C.R. 81 at p. 84.
[12] (1888), 21 N.S.R. 216.

to proceedings under the Canada Temperance Act. The authority conferred by the legislature on County Courts to grant writs of certiorari must of necessity be limited to matters over which it has power to legislate. Even more striking were the words of Sir Charles Fitzpatrick, C.J., in the case of *Re McNutt*[14]: "If the subject comes within the powers of the province then the right to impose punishment by imprisonment to enforce its provisions undoubtedly exists. Sec. 92(15). Such legislation if enacted by the Imperial Government would be denominated criminal law; and I fail to understand how the element of criminality disappears merely because the Act is competent to the provincial legislature. At all events, it cannot be said to be in any aspect legislation creating or regulating a civil remedy or process." This was referred to with approval by Mignault, J., in *Mitchell* v. *Tracey*.[15]

The point came up squarely in the case of *Re Mah Shin Shong*,[16] in a British Columbia Court, and this case seems to be an exact parallel to the *Fong* case. MacDonald, C.J.A., said: "The proceedings are criminal proceedings, and therefore the provincial Act giving an appeal from an order of discharge in *habeas corpus* is not applicable to this case. The Court, I think, has no jurisdiction and the appeal should be quashed."

*Re Rex* v. *McAdam*,[17] is another very recent case which held that there is no right of appeal from an order refusing the writ of *habeas corpus* arising out of a criminal appeal, on the ground that such is a criminal proceeding and falls within the jurisdiction conferred on the Dominion under section 91 of the British North America Act. Although the other judges in that case rested their decisions on another point, MacDonald, C.J.A., again rested his judgment solely on the ground that it fell under criminal law, basing his decision on the judgment of the English Court of Appeal in *Ex parte Woodhall*.[18] In that case the question was whether an appeal from a decision refusing to issue a writ of *habeas corpus* was an appeal in a criminal matter or cause, and therefore was prohibited by section 47 of the Judicature Act.[19] The Court of Appeal held that it was an appeal in a criminal matter and that they could not entertain it. Applying this to Canadian conditions, MacDonald,

[14] (1912), 47 Can. S.C.R. 259 at p. 263.
[15] (1919), 46 D.L.R. 520.
[16] [1923] 4 D.L.R. 844.
[17] [1925] 4 D.L.R. 33.
[18] (1888), 20 Q.B.D. 832. See also *R.* v. *Fletcher* (1876), 2 Q.B.D. 43 at p. 47; Short and Mellor's Crown Practice, 2nd ed., p. 485.
[19] 1873 (Imp.) c. 66.

C.J.A., held that it was *ultra vires* of the province to introduce into provincial statutes any reference to appeals in criminal matters or causes, among which he placed *habeas corpus.*

In a Manitoba case, *R.* v. *Barre,*[20] the Full Court of Manitoba held that there was no right of appeal on a question of *habeas corpus* in criminal matters.

It would seem that having regard to the decisions and the true principles which govern the interpretation of sections 91 and 92 of the British North America Act, the proper view is that the matter of appeals in *habeas corpus* proceedings in criminal cases, i.e., offences created by Dominion legislation, lies within the exclusive jurisdiction of the Dominion Parliament under sub-section 27 of section 91, and accordingly is beyond the jurisdiction of the provincial authorities. They can only legislate in relation to such appeals when the proceedings relate to an offence created by a provincial statute. And it is submitted that the Habeas Corpus Act of Quebec, in so far as it purports to deal with appeals from *habeas corpus* proceedings in criminal matters or causes, is unconstitutional.

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INDIANS AND TREATIES IN LAW.—In *Rex* v. *Syliboy,*[1] the accused, Syliboy, grand chief of the Mick Mack Indians of Nova Scotia was convicted under the Lands and Forests Act[2] of having in his possession at Askilton in the County of Inverness, Nova Scotia, on November 4th, 1928, fifteen green pelts, fourteen muskrat and one fox. He made no attempt to deny having the pelts, but claimed that as an Indian he was not bound by the provisions of the Act, but had by treaty the right to hunt and trap at all times. He appealed from this conviction to the County Court, and his appeal was heard before His Honour Judge Patterson.

The treaty relied upon was made in 1752 between Governor Hopson of the Province of Nova Scotia and His Majesty's Council, on behalf of His Majesty, and Major Jean Baptiste Cope, chief Sachem of the tribe of Mick Mack Indians inhabiting the Eastern Coast of the said Province, and Andrew Hadley Martin and Francis Jeremiah, members and delegates of the same tribe. Article 4 of this treaty stated that "the said tribe of Indians shall not be

[20] (1905), 11 Can. C.C. 1; 15 Man. R. 420.

[1] [1929] 1 D.L.R. 307.

[2] 1926 (N.S.), c. 4.

hindered from, but have free liberty to hunt and fish as usual." Judge Patterson after a thorough hearing of facts and arguments delivered a very interesting judgment dismissing the appeal. His decision hinged on two main considerations. One, that the treaty was made by certain individuals on behalf of a very small group of Mick Mack Indians living on the mainland of Nova Scotia, and that its terms applied only to them and to "their heirs and to the heirs of their heirs forever." Cape Breton, in which Chief Syliboy resided and in which he trapped the pelts in question, was not a part of Nova Scotia in 1752 but belonged to the French, and the Indians, with whom the treaty was made, did not reside there nor could it be shown that Syliboy and the Cape Breton Indians "had any connection by descent or otherwise with" Major Jean Baptiste Cope and his party.

The other consideration was that the so-called treaty was not a treaty at all, first, because the Indians of Nova Scotia did not have the capacity to enter into a treaty and second, because Governor Hopson did not have the authority to conclude a treaty with them. His Honour states:

> Treaties are unconstrained Acts of independent powers. But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.
>
> Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and Council with a handful of Indians giving them in return for good behaviour, food, presents and the right to hunt and fish as usual—an agreement that as we have seen was very shortly after broken.
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> Did Governor Hopson have authority to make a treaty? I think not. Treaties can be made only by the constituted authorities of nations or by persons specially deputed by them for that purpose. Clearly our treaty was not made with the constituted authorities of Great Britain. But was Governor Hopson specially deputed by them? Cornwallis' commission is the manual not only for himself but for his successors and you will search in vain for any power to sign treaties. A treaty, such as that with which we are dealing,

if made to-day, is one that would require to be ratified by Parliament before becoming effective, and would be invalid until such ratification: (6 Hals. pp. 440-1, para. 679). Though there was authority in Cornwallis' commission to summon a parliament for Nova Scotia, we all know that none was summoned for some years after the treaty was signed. It is a fair inference I think that after parliament had been assembled and began to legislate this treaty should have been ratified, or otherwise it would lose its validity. At any rate it was not very long after Parliament assumed its functions that a statute was passed which ignored the Treaty and treated it as non-existent. . . . . Where a statute and treaty conflict a British Court must follow the statute.[3] The result therefore is that even assuming the so-called Treaty of 1752 is a treaty; assuming that it was valid as such without ratification by parliament, and that any rights under it could be claimed by the Indians of all Nova Scotia as that Province is now constituted, the prosecution would still succeed, because the statute not the treaty prevails.

One other matter of interest was also dealt with by His Honour, namely, that the treaty

was almost at once put an end to by the breaking out of war. The ink was not much more than dry on the Treaty when Indians led by a son of Cope (let us hope not that son to whom the complacent Governor had sent a laced hat as a present) were carrying on in the characteristic way, a war against Britain. It was the very Indians who were parties to the Treaty that were responsible for the repeated raids upon Dartmouth. . . . . Would that clause in the Treaty guaranteeing them the right to hunt be in consequence put an end to, or would it be merely suspended? Mr. McLennan (for the prosecution) argues it would be put an end to, but I am inclined to hold it would only be suspended.

He quotes in support of his contention Woolsey on International Law.[4] 'Great Britain admits of no exception to the rule that treaties, as such, are put an end to by a subsequent war between contracting parties;' but this is not Woolsey's own language,—it is a quotation from Dr. Twiss' Law of Nations in Peace.[5] and it is clear that Woolsey himself does not hold that view. that he recognizes certain exceptions to the rule that treaties are abrogated by war between the contracting parties. The treaty we are discussing was not made with the signatories alone but 'with their heirs, and the heirs of their heirs forever,' (for this reason) it is my opinion, and if it were necessary I would so hold that assuming the Treaty of 1752 to be a treaty the right referred to was only suspended during the war and would become operative again when peace came. Quite recently some Canadians in the U.S. Courts have invoked, and successfully invoked, the provisions of the Jay Treaty of 1794,[6]—though the war of 1812 has intervened.

With the result arrived at by His Honour no exception can be taken, but certain of his *obiter dicta* require consideration; while

[3] *Re Carter Medicine Co.'s Trade-Mark,* [1892] 3 Ch. 472; *Walker* v. *Baird,* [1892] A.C. 491 at pp. 494-5.

[4] Woolsey: International Law, 5th ed., p. 272.

[5] Twiss: Law of Nations in Peace, (1884), pp. 440-1, para. 252.

[6] I Malley's Treaties, p. 590.

two or three points that he raises are among the most interesting and difficult in International Law. What is a treaty, and when is a so-called treaty not a treaty? What distinguishes a treaty from a convention or agreement? Is a treaty more binding than an agreement between governments? Is the "Irish Treaty," or as the English statute has it, "Articles of Agreement for a treaty," a treaty, and if so between the heads of what states was it made? If it is not a treaty, in what does it differ as to binding effect from a treaty? Are the conventions of the International Labour Organization treaties? Are the so-called treaties between His Britannic Majesty and the Native Princes of India treaties and if so in what do they differ from the treaties made a century or more ago with the chiefs of the tribes of North American Indians? Can the British Dominions make treaties? Are all treaties contracts, or are some of the multilateral ones really legislation?

Judge Patterson defines a treaty as "an unconstrained act of independent powers." But that definition is too narrow and too limited. Brierly[7] has the following: "Contractual engagements between states are called by various names, treaties, conventions, acts, declarations, protocols. None of these terms has an absolutely fixed meaning; perhaps a treaty suggests the most formal kind of agreement; a convention generally, but not always, an agreement less formal or less important. . . . . International law has no technical rules for the formation of treaties. In most respects the general principles applicable to private contracts apply." Hall[8] has an extensive chapter and numerous other references to treaties and he would exclude all "peculiar agreements" from the classification of treaties which are the subject of international law. Oppenheim[9] defines international treaties as "conventions or contracts between two or more states concerning matters of interest." Hyde[10] deals with them under the general heading of "Agreements between States" and says that "they are a necessary incident of international intercourse and increase in number and variety, as that intercourse expands and produces a consciousness of mutual dependence." He quotes Westlake to the effect that "The Contracts of States are not tied in any form. Those expressed in documents vary greatly in kind and formality. Many are not recorded."

[7] Brierly: Law of Nations, p. 165.
[8] Hall: International Law, 8th ed., p. 379 *et seq.*
[9] Oppenheim: International Law, 4th ed., vol. 1, p. 700.
[10] Hyde: International Law, vol. 2, p. 1 *et seq.*

From these and other statements it seems clear, as Judge Patterson points out, that the Treaty of 1752 was not an international treaty. But it was an agreement of a kind that approximates very closely to a treaty and the mere fact that it did not comply in all essentials with a certain rigid standard applicable to treaties would not in itself render it void. As to the capacity of the Indians to contract and the authority of Governor Hopson to enter into such an agreement, with all deference to His Honour, both seem to have been present. Innumerable treaties and agreements of a similar character were made by Great Britain, France, the United States of America and Canada with the Indian tribes inhabiting this continent, and these treaties and agreements have been and still are held to be binding.[11] Nor would Governor Hopson require special "powers" to enter into such an agreement. Ordinarily "full powers" specially conferred are essential to the proper negotiating of a treaty, but the Indians were not on a par with a sovereign state and fewer formalities were required in their case. Governor Hopson was the representative of His Majesty and as such had sufficient authority to make an agreement with the Indian tribes. Nor was Parliamentary ratification necessary. Treaty making is a prerogative power and ratification is carried out by His Majesty. It is necessary, if the treaty involves a change in the law, that it be implemented by statute and the usual practice is to submit all treaties to Parliament for consideration and assent.[12] But that is a domestic matter and does not concern the other party to the treaty or agreement. Great Britain or the Dominions may be internationally liable even though the treaty is contrary to statute or common law, though it seems highly improbable that this situation will arise.

The effect of a subsequent war on the terms of a treaty depends, as His Honour correctly states, on the kind of treaty it is. Some treaties are abrogated by war. Others are merely suspended. In

[11] An agreement even though it may fall short of an international treaty may have all the permanence and binding effect of the latter. For instance the Cayuga Indians living in Ontario were, in 1926, awarded one hundred thousand dollars by an International Tribunal by virtue of claims arising out of certain treaties made between their ancestors then living in the State of New York and that State, and this $100,000 was paid by the Federal Government of the United States. American and British Claims Arbitration Tribunal Award Cayuga Indians, Claim No. 6. See in this connection the two volumes of "Indian Treaties and Surrenders" from 1680-1890, King's Printer, Ottawa, 1891—and in particular the Treaties of Peace made with the Nova Scotia Indians in 1725, 1727, 1749, the last by Governor Cornwallis and His Majesty's Council, one of whom was a certain L. E. Hopson.

[12] On this see A. D. McNair, "British Treaties Legislation," British Yearbook International Law, 1928, p. 59.

this case as the hunting concession was granted the Indians in return for their good behaviour their breach of its terms would seem to terminate, automatically, the obligation of the other party and John Cope's heirs would not have any valid claim under it.[13]

In passing, it should be noted that the Supreme Court of the United States has (unfortunately for Canada) reversed the decisions of their lower courts and has seemingly held that the Jay Treaty was abrogated by the war of 1812, or at least the relevant sections of it were. His Honour correctly holds that when a statute and a treaty conflict the courts must follow the statute, but as was pointed out above, this would not relieve His Majesty's Government of its obligation to the other party to the treaty (unless that other party were subject to British laws). And here it should be noted that a domestic statute cannot derogate from public or private rights created by treaty or other agreement save by express words or necessary implication. From all this, it seems clear that the treaty of 1752 was, when made, a perfectly valid agreement by which Governor Hopson and the Council of Nova Scotia contracted on behalf of His Majesty with Major Jean Baptiste Cope and others on behalf of a certain group of Mick Mack Indians; that the Indians did not fulfil their obligations and consequently the British and the Government of Nova Scotia were relieved of theirs. If further reasons were necessary, it seems clear on the evidence submitted, that Chief Syliboy and the Mick Mack Indians living in Cape Breton do not come under the terms of the 1752 treaty at all and Judge Patterson rightly dismissed his appeal from the previous conviction.

One other point of interest arises out of the case, namely the position of the North American Indian in international and domestic law.

Hall and Oppenheim have little or nothing to say about them, save a footnote in Hall copied from an American source, that "Indians, though born within the limits of the United States, are not 'citizens' under the fourteenth amendment to the Constitution since they are not in a full sense 'subject to the jurisdiction' of the United States."[14] The Supreme Court of the United States in 1832 stated that "the British Crown previous to the Revolution considered

[13] A treaty becomes void when an express condition, upon which the continuance of the obligation of the treaty is made to depend, ceases to exist: Hall, *ibid.*, p. 379 *et seq.*

[14] Hall, *ibid.*, p. 279; also Wharton's Digest, 2nd ed., sec. 196.

the Indians as nations competent to maintain the relations of peace and war and capable of governing themselves under its protection."[15]

Hyde[16] considers that the American Indians have never been regarded as constituting Persons or States of International law, and quotes Marshall to the effect that "they may more correctly perhaps be denominated domestic dependent nations."

The British American Claims Arbitration Tribunal (cited note 11 *supra*) on page four of their award state that "the Cayuga Nation is not a legal unit of international law and have never been so regarded." They cite Marshall to the effect that "they are domestic dependent nations," and Clifford, J., that they are "states in a certain domestic sense and for certain municipal purposes," and they go on to say that "these Indians are British Nationals; they have settled in Canada under the protection of Great Britain, and subsequently, of the Dominion of Canada."

Moore in his Digest of International Law[17] cites the Indian Appropriation Act of 1871 where it was declared that thereafter "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty," but it was also declared that "the obligation of any treaty previously made should not be impaired by anything in the Act. The effect of the Act was to require the Indian tribes to be dealt with in the future through the legislative, and not through the treaty making power."

Clement defines them as "natural born British subjects segregated into a class apart from the ordinary inhabitants of the provinces and insofar as the federal parliament has not made special provision as to their privileges and disabilities they are subject as any other inhabitant to the law of the province in which they live."[18]

In 1850 two branches of the tribe of Ojibway Indians entered into separate treaties with the Governor of the Province of Canada. While as late as 1873, a formal treaty, or contract, was concluded between commissioners appointed by the Government of the Dominion of Canada on behalf of Her Majesty the Queen, of the one part, and a number of chiefs and headmen duly chosen to represent the Salteaux tribe of Ojibway Indians, of the other part, by which the Indians in return for certain considerations surrendered their

[15] Wheaton, 4th ed., p. 64.
[16] Hyde, *ibid.*, vol. I., p. 19.
[17] Moore: Digest of International Law, vol. v., p. 220, sec. 756.
[18] Clement: Canadian Constitution, 3rd ed., p. 679.

title to 50,000 square miles of territory, but kept the right of hunting and fishing over it.[19]

From these opinions and decisions it is clear that Canadian Indians are British subjects, subject to certain disabilities and possessing certain privileges that do not appertain to the ordinary citizen. But as British subjects resident in Canada, they are subject to the jurisdiction of Canadian legislatures, as provided in the British North America Act, and like other subjects may have their rights and privileges altered and even taken away altogether by legislative action, despite any treaties that were agreed to by their ancestors, and former representatives of His Majesty.

In conclusion one cannot but approve of the sentiments expressed by Judge Patterson when he states that he hopes that such an interesting matter will be heard before a higher tribunal, and of the statement that "such sympathy as a Judge is permitted to have is with the defendant. I would gladly allow the appeal if I could find any sound reason for doing so, but I cannot and must confirm the conviction. Even so I venture to express the hope that the authorities will not enforce the conviction."

N. A. M. MacKenzie.

[19] *St. Catherines Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46; *Att'y-Gen. of Canada* v. *Att'y-Gen. of Ontario, Indian Claims Case*, [1897] A.C. 199; *Ontario Mining Co'y* v. *Seybold*, [1903] A.C. 73. On the position of Indians and Indian Treaties, see also *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637; *Johnson* v. *McIntosh* (1823), Wheaton, 21 U.S. 711; *Worcester* v. *State of Georgia* (1832), Peters, 31 U.S. 7; *Mitchell* v. *United States* (1835), Peters, 34 U.S.