

CORRESPONDENCE

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THE JAY TREATY.

The Editor, CANADIAN BAR REVIEW.

SIR,—Mr. R. A. Reid, Barrister, of Toronto, one of the counsel in the case of Arthur J. Karnuth, United States Director 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, after reading the proof of my article on "The Jay Treaty of 1794, *Canadian Bar Review*, Vol. VII., 431, wrote suggesting the inclusion of two additional facts. Unfortunately this information did not reach me until the article had gone to press. I would appreciate it, if you can find space for their inclusion in an early issue of the *REVIEW*.

They are as follows:—

The Supreme Court of the United States on October 8th, 1928, dismissed the appeal of the United States Government (from the decision of the District Court) and refused the Immigration Department the writ of certiorari applied for to review the decision of the Circuit Court of Appeals.

The United States government, however, took advantage of a Rule of the Supreme Court which permits an application for a re-hearing of any dismissed appeal to be made within 25 days after the refusal to review and the new appeal came on for hearing at Washington on Tuesday, March 5th, 1929.

On the point of the present validity of the Jay Treaty Mr. Reid gives interesting admissions by two of the officials of the United States Government.

"The Solicitor-General, referring to the Jay Treaty of 1794, states at the bottom of page 2 and at the beginning of page 3 of his Petition herein for a Rehearing, that 'in view of the fact that mutual rights were granted by Article 3 to British Subjects and American Citizens, as well as to Indians dwelling on either side of the Border, it reasonably might appear that any question regarding whether the Treaty is in force and effect is a political and not a judicial one.'

"And again on page 11 of the his Petition for a Rehearing herein, referring to the same matter as above mentioned, he states in the second paragraph on that page that 'the Court need not have decided whether the Treaty of 1794 was in force and effect and should have left that matter to the decision of the political branch of the Government.'

"And again in Volume 14, containing documents Nos. 1 to 61 of the Senate documents of the 66th Congress of the United States, first (1) session 1919, Senate document No. 2, on pages 18, 19 and 20 of that volume, under the official paging title of '*Proposed Abrogation of Treaties*,' an official letter from the Honourable Wm. Phillips, formerly the United States Ambassador to Belgium, and now the first Minister from the United States to Canada at Ottawa, and who was at the time mentioned the Acting Secretary of State of the United States, the letter being dated March 27th, 1919, transmitted, in response to resolutions adopted by the United States Senate, on December 5th, 1918, and February 3rd, 1919, transmitting information regarding the abrogation of Treaties."

"This letter was referred to the Committee on Foreign Relations on May 20th, 1919, as shown by the record, and ordered to be printed.

"The resolution of the United States Senate above mentioned and set out at length on the pages of Volume 14 referred to, is in the following words and language:—

"Resolved that the Secretary of State be, and he is hereby, directed to furnish the Senate the following information:—'The countries with which the United States has Treaties which prevent us from giving preference to Americans or American ships in the carrying of imports or exports, and what is necessary to be done to abrogate such Treaties, and what, if any, steps our Government has taken to secure the abrogation of the same.'"

"The above resolution will be found on page 5 of the said Volume 14 cited above."

"The Acting Secretary of State then informs the United States Senate officially in his said letter of transmission regarding the matters referred to in the resolution of the Senate, and in this letter he says:—

"The Acting Secretary of State transmits to the Senate herewith a memorandum prepared in the Department of State in response to the resolution quoted above. It is hoped that this memorandum will contain the information desired by the Senate."

"This letter is then signed by Wm. Phillips and is dated March 27th, 1919.

Section 3 of the Jay Treaty of 1794 is then copied in full on pages 18 and 19 of the said Volume 14, and the Treaty is cited as from 8 Stat. L., 117, and Malloy, 582, and the Acting Secretary of State then follows this up with his judgment and opinion stated as a matter of fact and law regarding the Jay Treaty of 1794, and article 3 thereof, that:—

"The treaty from which the above quoted article is taken contains no provision for abrogation: hence, agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement. No action has been taken by either government looking to abrogation."

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