NOTES.

THE ST. JOHN RIVER AND THE ASHBURTON TREATY.—In the case of *The Attorney-General of New Brunswick* v. *The Canadian Pacific Railway Company,* Grimmer, J. (June 26th, 1923), had to decide an interesting and important point of constitutional law. It was this: Whether in view of the provisions of Article III of the Ashburton Treaty of 1842, the right to regulate the navigation of the St. John River within the Province of New Brunswick is in His Majesty in right of that Province, or in right of the Dominion of Canada? The case on its practical side involved the right of the Dominion Government to authorize the construction and maintenance of a railway bridge at or near the City of St. John by the Canadian Pacific Railway Company. Article III of the Treaty in question is in the following terms:—

"In order to promote the interests and encourage the industry of all the inhabitants of the countries watered by the River Saint John and its tributaries, whether living within the Province of New Brunswick, or in the State of Maine, it is agreed that where by the provisions of the present treaty, the River Saint John is declared to be the line of boundary, the navigation of the said river shall be free and open to both parties, and shall in no way be obstructed by either; that all the produce of the forest, in logs, lumber, timber, boards, staves, or shingles, or of agriculture, not being manufactured, grown on any of those parts of the State of Maine watered by the River Saint John or by its tributaries, of which fact reasonable evidence shall, if required, be produced, shall have free access into and through the said river and its tributaries, having their source within the State of Maine to and around the Falls of the said river, either by boats, rafts or other conveyances; that when within the Province of New Brunswick, the said produce shall be dealt with as if it were the produce of the said Province; that in like manner the inhabitants of the territory of the upper Saint John determined by this treaty to belong to Her Britannic Majesty, shall have free access to and through the river for their produce, in those parts where the said river runs wholly through the State of Maine; provided, always, that this agreement shall give no right to either party to interfere with any regulations not inconsistent with the terms of this Treaty, which the Governments, respectively, of New Brunswick or of Maine may make respecting the nagivation of the said river, where both banks thereof shall belong to the same party."

It was alleged by the plaintiff that in virtue of these provisions, the power and authority to regulate the navigation of the St. John river, where both banks of the river were situate within the Province of New Brunswick, became vested in the Crown in right of the Province and remains there notwithstanding any of the provisions of the *British North America Act, 1867.* The plaintiff contended that as the purpose of the Treaty was to avert imminent war between the parties to it—Great Britain and America—it did not require legislative sanction to make it a law of the Empire; but that if such sanction were necessary legislation embodying it had been passed. Dealing specifically with the latter question, the learned Judge said:—

"The only Article of the Treaty bearing upon this case is No. 3. . . . The plaintiff contends this is sufficient to invest the sole control of the navigation of the river in the Provincial Government, as the Treaty upon being signed became the law of the Empire, of the same effect as a statute and that in addition to being a treaty to avert, as they allege, imminent war, or a treaty of peace, it did not require legislative sanction. It was also contended that the Treaty, however, did receive legislative sanction; but while this appears to be the case in respect to some sections thereof it was not shown, or pointed out, nor have I been able to discover where by the Legislative Assembly of this Province or by the Parliaments of Canada or Great Britain, Article 3 was ever in any way subjected to legislative sanction.

"Extracts from the Commons Papers of Canada, from Hertslet's Commercial Treaties and from Anson's Law and Custom of the Constitution were read and cited to me, but I cannot find that they by any means sustain the first of the above grounds, nor am I convinced even if under any circumstances the second might be sound, that any sufficient reason was presented to compel me to find, or to convince me, that the Ashburton Treaty was a treaty to make peace or to avert imminent war, for I do not think it was either of these, nor anything more than it purported to be, namely, for the settling of the boundary line between Canada and the United States. . . . The Extradition Act 6 and 7 Victoria was passed to give legislative sanction to the article of the Ashburton Treaty relating to extradition of criminals, from which it appears it was considered necessary that Article 10 should be properly confirmed to make it effective and law enforceable in the courts. And it would seem the same thing might reasonably be expected in respect to the other articles of the Treaty, but so far as I am informed and advised nothing of the sort was done in respect to Article 3 upon which the plaintiff relies. . . . I have, therefore, reached the conclusion that the control of naviga-

tion on the St. John river is in no way affected by the Ashburton Treaty, nor the powers of the Dominion Government as designated in the *British North America Act* in respect thereof limited or abridged thereby."

On the more general question as to whether a treaty is to be regarded as part of the law of the land *ex proprio vigore,* the learned Judge held:

"It is also apparently well settled law that a treaty does not of itself create municipal law, and while a treaty is a contract between States or powers and its breach may occasion diplomatic protest, or be considered cause for war, yet as stated under our law a treaty made by the Crown and not sanctioned by legislative enactment does not create law by which the Courts are bound."

Having regard to the fact that the British Constitution has no such provision as that contained in the Constitution of the United States (See Article VI), which declares that all treaties made under the authority of the United States shall be part of the supreme law of the land, it might be thought that while an English statute could override the provisions of a treaty, the Congress of the United States would be impotent to do so. But the American Courts have distinctly held that notwithstanding the constitutional safeguard mentioned, Congress has the power to modify or repeal treaties between the United States and foreign countries. See *Chinese Exclusion Cases,* 130 U.S. 581, and Tucker's "Limitations on the Treaty-making Power," p. 26.

The learned judge arrives at the following conclusions in the case:

"That the control of the navigation of the river St. John is vested exclusively in the Government of the Dominion of Canada, including therein the right to authorize the construction of bridges across the same, and that this control is in no way affected by the Ashburton Treaty, nor are the powers of the Dominion Government as set forth in the British North America Act in respect thereof limited or abridged thereby; that the objection that this action was not properly brought, and that the Attorney--General of New Brunswick is not the proper person to institute these proceedings, must prevail."

In addition to the grounds relied on by Grimmer, J., in his very able judgment for regarding the questioned provisions of the Ashburton Treaty obsolete and inoperative, the following may be mentioned:—

1. All treaties are concluded under the tacit condition *rebus sic stantibus.* Where the existence or vital development of a State stands in unavoidable conflict with its treaty obligations the latter must

give way; for self-preservation and development in accordance with the growth and vital requirements of the nation, are the primary duties of every State. Conditions were changed when New Brunswick of her own free will and choice became part of the Dominion of Canada. It was a policy of development and expansion of the province as an integral part of the Empire. See Oppenheim, International Law, 3rd ed., Vol. 1 (*Peace*), p. 688; Hall, International Law, 7th ed., p. 360; Wheaton, International Law, 5th English ed., p. 377; Westlake, International Law (Pt. 1, *Peace*) p. 295.

2. The grant of authority to New Brunswick under the Treaty to regulate navigation may be looked upon as a grant of police power or local government by the British Crown in view of the fact that the Treaty *quoad hoc* was not sanctioned by Parliament. If so must not the grant be held *ultra vires*? In giving a legislature to the Province of New Brunswick in 1784, the Crown became *functus officio* so far as its prerogative of legislation was concerned. See *Campbell* v. *Hall*, 1 Cowp. 204; *Re Lord Bishop of Natal* (1864), 3 Moo. P. C. N. S. 115, at p. 148; Clement's Canadian Const., 3rd ed., p. 16, ff; Anson, Constitution (*Crown*, Pt. II.) p. 105.

3. New Brunswick as a part of the Empire had no status to complain of a repeal of any of the provisions of the Treaty by the Imperial Parliament. See *Routledge* v. *Low* (1868), 3 E. & I. App. 100, at p. 113.

Any complaint of a breach of the Treaty should come from a party to it. See *per* Field, J., in *Whitney* v. *Robertson* (1888), 124 U.S. 190.

4. Sec. 2 of the *Colonial Laws Validity Act* (28-29 Vict. ch. 63) enacts that:

"Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

On the construction of the words "colonial law" used in the above section, high light is thrown by the definitions in sec. 1:

"The term 'colonial law' shall include laws made for any colony, either by such Provincial legislature as aforesaid or by Her Majesty in Council."

For this purpose, any provision of the Ashburton Treaty which it is claimed has the force of law may be looked upon as a colonial law made by "Her Majesty in Council," and so rendered inoperative

as against any of the provisions of the *British North America Act.* Sec. 91 assigns exclusive legislative authority over "Navigation" to the Dominion; and sec. 132 enacts that:

"The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire towards foreign countries under treaties between the Empire and such foreign countries."

5. Then we come to a more intimate ground, which we find in a judicial pronouncement, on another Article of the very Treaty in question, by an American Court. Article II of the Treaty provides that:

"All the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries."

This article was under consideration in the case of *Minnesota Canal & Power Co.* v. *Pratt,* 101 Minn. 197. There the Canal Company sought the diversion of certain waters which might have had the result of infringing the Treaty were its provisions inviolable. At p. 232 Elliott, J., says:

"A treaty may stipulate for the protection of the rights and privileges granted or conceded therein to the people of the other contracting power. The United States may thus be a party to a treaty which prohibits its citizens or the States from doing some designated thing. Being the supreme law of the land, the treaty is obligatory upon all the courts and people of the nation. Its prohibitions recognize no State lines. Every citizen of the United States is under a duty to observe and respect the law of the treaty. The petitioner is proceeding to construct dams and reservoirs which it is claimed will result in a violation of the Webster-Ashburton treaty. If this result would follow the construction of such works, we are very clear that the courts of the state should not authorize any proceeding which would result in the violation of the treaty. The Act of Congress of March 3, 1899, has been referred to as being inconsistent with the Webster-Ashburton Treaty. *If this is true, it supersedes the treaty as a municipal law,* because the last expression of the legislative will of the nation binds the courts and the citizens of the country, *and, to the extent to which it is inconsistent with the treaty, abrogates the treaty as a municipal law. Chinese Exclusion Cases,* 130 U.S. 581, 9 Sup. Ct. Rep. 623, 32 L. Ed. 1068."

C. M.