1953
Nov. 16, 17 & 18
1954
Aug. 4

BETWEEN:

LOUIS FRANCIS ..... SUPPLIANT,

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown—Petition of Right—Goods imported into Canada from U.S.A. by an Indian—Indian claiming exemption from duty and taxes—The Jay Treaty—Article III of the Treaty conferring certain rights upon Indians —Authority of Legislatures of Lower Canada and Upper Canada to implement, alter, amend or annul part of Article III of the Treaty— No legislation in force in Canada implementing part of Article III of the Treaty at time of importation of the goods by suppliant—The War of 1812—Part of Article III of the Treaty terminated by War of 1812—An Act to amend the Income Tax Act and the Income War Tax Act, S. of C. 1949, 2nd Session, c. 25, s. 49—Provisions of s. 49 of the Act a bar to any right of exemption from duty or tax—The Indian Act, R.S.C. 1952, c. 149, ss. 2(1) (g), 86(1) (b), 88 and 89—S. 86(1) of the Act of no application to payment of customs duties or excise taxes.

Article III of the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, signed on November 19, 1794, commonly known as the Jay Treaty, is in part as follows:

> "No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales or other large packages unusual among Indians shall not be considered as goods belonging *bona fide* to Indians."

Suppliant is an Indian within the definition of that term in the Indian Act, S. of C. 1951, c. 29, s. 2(1) (g), and resides on an Indian reserve in the Province of Quebec adjoining an American Indian reserve in the State of New York, U.S.A. In 1948, 1950 and 1951, suppliant brought from the United States into Canada certain articles acquired by him in the U.S.A., without reporting to the nearest customs house, declaring the goods or paying the duties in respect thereto. Following their seizure by the Crown suppliant claimed exemption from duty and taxes by reason of the provisions of that part of Article III of the Jay Treaty, which claim was rejected by the Crown and demand for payment of the amount owing made. Payment under protest was effected, the goods released and then a Petition of Right filed in which suppliant asks for a declaration of this Court that as an Indian he is entitled to transport by land and inland navigation into Canada his own proper goods and effects of whatever nature, free of any impost or duty whatsoever; and also the return of the amount paid to respondent for certain customs and excise duties in respect of said goods. On the evidence the Court found that that part of Article III of the Jay Treaty in favour of Indians was implemented in Canada in 1796 by the Legislature of Lower Canada and, in 1801, by the Legislature of Upper Canada; that those legislative enactments either lapsed or

were repealed more than 125 years ago; and there is no evidence that for that length of time, any Indian in Canada has claimed or been allowed the exemption conferred by the treaty.

Held: That notwithstanding the fact that the legislatures of Lower and Upper Canada did for a time implement that part of Article III of the Jay Treaty, those legislatures had full authority to alter or amend or annul such legislation, as was in fact done. *Hoani Te Heu Heu Tukino* v. *Aotea District Maori Land Board* [1941] A.C. 308 referred to.

2. That as there was no legislation in effect at the time of the importation of the goods into Canada which sanctioned or implemented that part of Article III of the Jay Treaty, suppliant is not entitled to exemption from the duties claimed by reason of the provisions of that treaty. *Arrow River and Tributaries Slide and Boom Co. Ltd.* v. *Pigeon Timber Co. Ltd.* [1932] S.C.R. 495; *Attorney- General for Canada* v. *Attorney-General for Ontario* [1937] A.C. 326; *Albany Packing Co.* v. *Registrar of Trade Marks* [1940] Ex. C.R. 256 referred to and followed.

3. That in any event that part of Article III of the Jay Treaty which so conferred an exemption upon Indians from payment of duties while passing and repassing the border with their own proper goods and effects, was abrogated by the War of 1812. The privilege necessarily ceases to operate in a state of war, since the passing and repassing of subjects of one sovereignty into territory of another is inconsistent with a condition of hostility. *Karnuth* v. *United States* (1928) 279 U.S. 221; *United States* v. *Garrow* 88 Fed. Rep. (2d) 318 referred to and followed.

4. That the provisions of s. 49 of "An Act to amend the Income Tax Act and the Income War Tax Act", S. of C. 1949, 2nd Session, c. 25, are sufficient to bar any right of exemption from duty or tax unless the exemption is provided by some Act of the Parliament of Canada. The duties here were levied under the provisions of the Customs Tariff Act and the Excise Tax Act and neither of these Acts confer any exemption upon Indians as such.

5. That the exemptions from taxation provided in the Indian Act, R.S.C. 1952, c. 149, s. 86(1) are intended to apply equally to the property of all Indians on all reserves. The section cannot be construed as conferring special benefits only on Indians who reside on a reserve adjacent to the Canadian border. The exemption from taxation therein provided relates to personal property of an Indian or band *situated on a reserve,* and not elsewhere. Section 86(1) has no application whatever to the payment of customs duties or excise taxes.

PETITION OF RIGHT by suppliant seeking a declaration of the Court that as an Indian he is entitled to the benefit of certain provisions in Article III of the Jay Treaty.

The action was tried before the Honourable Mr. Justice Cameron at Ottawa.

Gordon F. Henderson, Q.C., A. T. Hewitt and *John MacDonald* for suppliant.

D. H. W. Henry, for respondent.

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The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (August 4, 1954) delivered the following judgment:

In this Petition of Right the suppliant asks for a declaration of this Court that as an Indian, subject to the provisions of the Indian Act, Statutes of Canada, 1951, c. 29, he is entitled to transport by land or inland navigation into the Dominion of Canada his own proper goods and effects of whatever nature, free of any impost or duty whatsoever; and also for the return of the sum of $123.66 paid by him to the respondent, under protest, for certain Customs and Excise Duties in respect of goods imported by him into Canada.

This is a test case and in the main the facts are not in dispute. The suppliant is an Indian within the definition of that term in section 2(1)(g) of the Indian Act and at all relevant times resided on the St. Regis Indian Reserve in St. Regis village. That village is situated on the south side of the St. Lawrence River, about opposite Cornwall, Ontario, but is in the most westerly tip of the Province of Quebec and adjacent to the State of New York. It adjoins an American Indian reserve, the members of which are also part of the St. Regis tribe of Indians. Like some other residents of the St. Regis Indian Reserve of Canada, the suppliant's employment has been mainly in the United States and he served for some years with the American Army in the Second World War. Following his discharge from the American Army in 1946, he returned to his home in St. Regis and has since resided there. For the purpose of this case only, certain admissions were agreed to by the parties hereto and duly filed. Thereby it was agreed that on or about October 19, 1951, the suppliant imported from the United States into Canada one washing machine, one oil heater, and one electric refrigerator, being his own property acquired by him in the United States. No duty was paid by him on the importation of the said articles either under the Customs Tariff Act or the Excise Tax Act. The three articles were seized while on the premises and in the possession of the suppliant and detained on behalf of His Late Majesty under the provisions of the Customs Act for

failure to pay duty and taxes on the importation into Canada of the said goods under the Customs Tariff Act and the Excise Tax Act. Following the seizure, the suppliant claimed exemption from duty and taxes with respect to the said articles by reason of the provisions of Article III of the Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, signed on the 19th day of November, 1794, and which is commonly known, and will be hereinafter referred to as the Jay Treaty.

The claim for exemption of duty and taxes was not recognized and the Crown demanded payment of the sum of $132.66 for duty and taxes. The suppliant thereupon under protest paid the said sum and the goods were released to him; he then filed this Petition of Right.

The evidence at the trial indicated that the date of entry of the said goods was not on October 19, 1951, as stated in the agreement of the parties. It showed that the suppliant imported them on the following dates—the washing machine in December, 1948; the refrigerator on April 24, 1950; and the oil heater on September 7, 1951. The Petition of Right was amended accordingly but the change in the date of importation, however, is not of importance in determining the main issue between the parties. It is shown by the evidence, also, that each of the articles when imported was taken directly to the home of the suppliant and was not taken to a Custom-house at a port of entry, or reported to any collector or other customs officer.

The main case put forward on behalf of the suppliant is that as an Indian he is entitled to the benefit of certain provisions contained in Article III of the Jay Treaty (Exhibit 2), the relevant part being as follows:

> No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales or other large packages unusual among Indians shall not be considered as goods belonging *bona fide* to Indians.

At the trial the suppliant relied also on the provisions of section 86 of the Indian Act, R.S.C. 1952, c. 149. Notwithstanding the fact that that Act had not been referred to in the pleadings, counsel for the respondent made no objection to its being considered, and the scope of the argument is regularized by his approval.

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For the respondent it is submitted that the suppliant is not entitled to the exemptions claimed on any ground. First it is said that the Jay Treaty—or at least the relevant provisions of Article III—was terminated by the War of 1812. If it were not so terminated, then it is contended that it is enforceable by the courts only when the Treaty has been implemented or sanctioned by legislation rendering it binding upon the subject, and that at the time the goods here in question were imported, there was no such legislation in effect in Canada. Then it is submitted as a further alternative that even if the Treaty was in full force and effect at the relevant times, the nature of the goods imported is not such as to be within the purview of the goods mentioned in Article III. The respondent also submits that section 86 of the Indian Act does not assist the suppliant. Finally, the respondent relies on the provisions of section 49 of the Income Tax Act and the Income War Tax Act, Statutes of Canada, 1949, 2nd Session, chapter 25, as barring any right to exemption which the suppliant might otherwise have had.

The first question for consideration is this. Is the suppliant entitled to an exemption from the duties claimed by reason of that part of Article III of the Jay Treaty which I have cited above? Here I should emphasize the fact that in this opinion, my comments and conclusions—unless otherwise stated—are referable only to that part of Article III and to no other part of the Treaty.

I have given this matter the most careful consideration and after referring to the authorities cited to me, I have reached the conclusion that this question must be answered in the negative. Briefly, the reason for so finding is that at the time the goods were imported into Canada by the suppliant there was in force in Canada no legislation sanctioning or implementing that term of the Treaty.

The first authority to which I would like to refer on this point is the case of *Arrow River & Tributaries Slide & Boom Co., Ltd.* v. *Pigeon Timber Co. Ltd.* (1). The facts in that case were as follows: The appellant, which had constructed certain works upon that part of the Pigeon River which was in Ontario (the remaining part being in the United States) was desirous of charging tolls upon timber passing

(1) [1932] S.C.R. 495.

through such works, under the authority of the Lakes and Rivers Improvement Act, R.S.O., 1927, chapter 43. The respondent applied for an injunction restraining the District Judge from acting on the appellant's application to fix the tolls on the ground that the Pigeon River being an international stream, its use under the Ashburton Treaty is free and open to the use of the citizens of both the United States and Canada and that Part V of the Lakes and Rivers Improvement Act, in so far as it purports to authorize the appellant company to charge tolls for the use of improvements on that river, is *ultra vires* of the Ontario Legislature. Application for an injunction was refused by Wright, J. on the ground that in British countries treaties to which Great Britain is a party are not as such binding on the individual subject in the absence of legislation. The Appellate Division of Ontario agreed with that principle and apparently would have upheld the decision of Wright, J. had there been, in their view, legislation in Ontario that authorized the construction of the works in question. In the Supreme Court of Canada, the appeal was allowed and the judgment of Wright, J. restored. At p. 510, Lamont, J. speaking also for Cannon, J. said:

> The Act must, therefore, be held to be valid unless the existence of the Treaty of itself imposes a limitation upon the provincial legislative power. In my opinion, the treaty alone cannot be considered as having that effect. The treaty in itself is not equivalent to an Imperial Act and, without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power. For a breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law, enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject. Upon this point I agree with the view expressed by both courts below:
>
> > that, in British countries, treaties to which Great Britain is a party are not as such binding upon the individual subjects, but are only contracts binding in honour upon the contracting States.
>
> In this respect our law would seem to differ from that prevailing in the United States, where, by an express provision of the constitution, treaties duly made are "the supreme law of the land" equally with Acts of Congress duly passed. They are thus cognizable in both the federal and state courts. In the case before us it is not suggested that any legislation, Imperial or Canadian, was ever passed implementing or sanctioning the provision of the treaty that the water communications above referred to should be free and open to the subjects of both countries. That provision, therefore, has only the force of a contract between Great Britain and the United States which is ineffectual to impose any limitation upon the legislative

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power exclusively bestowed by the Imperial Parliament upon the legislature of a province. In the absence of affirming legislation this provision of the treaty cannot be enforced by any of our courts whose authority is derived from municipal law. *Walker* v. *Baird*, [1892] A.C. 491; *In re The Carter Medicine Co's Trade Mark*, (1892) 61 L.J. Ch. 716; *United States* v. *Schooner "Peggy"*, (1801) 1 Cranch, 103; *The Chinese Exclusion Case, Chae Chan Ping* v. *United States*, (1889) 130 U.S.R. 581; *Oppenheim's International Law*, 4th ed., 733-4.

I am, therefore, of opinion that section 52, in question in this appeal, must be considered to be a valid enactment until the Treaty is implemented by Imperial or Dominion legislation.

Reference may also be made to *Albany Packing Co.* v. *Registrar of Trade Marks* (1), in which the late President of the Court said at p. 265:

Before proceeding to do so, however, I should perhaps here add that, I think, it is correct to say that the terms of the Convention of The Hague may be referred to by the Court as a matter of history, in order to understand the scope and intent of the terms of that Convention, and under what circumstances any of the provisions of the Unfair Competition Act were enacted, in order to give legislative effect to the same. But the terms of the Convention cannot, I think, be employed as a guide in construing any of such provisions so enacted, for the reason that in Canada a treaty or convention with a foreign state binds the subject of the Crown only in so far as it has been embodied in legislation passed into law in the ordinary way.

And in the case of *Attorney-General for Canada* v. *Attorney-General for Ontario* (2), Lord Atkin said at p. 347:

It will be essential to keep in mind the distinction between (1.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secured as possible they will often in such cases before final ratification seek to obtain from Parliament on expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created,

(1) [1940] Ex.C.R. 256. (2) [1937] A.C. 326.

while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a State where the Legislature does not possess absolute authority, in a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends upon the authority of the competent Legislature or Legislatures.

Following the signing of the Jay Treaty, the relevant part of Article III was in fact implemented in Canada. In 1796, the legislature of Lower Canada by c. VII of its Statutes passed "an Act for making a Temporary Provision for the Regulation of Trade between this Province and the United States of America, by Land or by Inland Navigation".

Thereby power was conferred on the Government with the advice and consent of the Executive Council to give directions and make orders with respect to importation and duties, for carrying on trade between the province and the United States. Section II of the Act was as follows:

And be it further enacted by the authority aforesaid, that this Act shall be in force and have effect from and after the passing thereof, until the first day of January, one thousand, seven hundred and ninety-seven, and from thence to the end of the then next session of the Provincial Parliament, and no longer.

Pursuant to that authority and in conformity with the terms of the Jay Treaty, a regulation was passed and duly gazetted on July 7, 1796 (Exhibit 4), such regulation putting into effect the same exemption in respect to the goods of Indians passing between the two countries as is found in the Jay Treaty, the language used being practically identical with that in the Jay Treaty itself.

As I have said, the Act of 1796 was of a temporary nature; the regulation appears to have been renewed from time to time, the last renewal being found in the Statutes of 1812, c. 5, by virtue of which it expired on June 1, 1813.

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That part of the Jay Treaty was first implemented in Upper Canada in 1801 by s. VI of c. V of the Statutes of that year (Exhibit 6), the relevant part thereof being as follows:

> VI. And be it enacted by the authority aforesaid. That no duty of entry shall be payable, or levied, or demanded by any Collector or deputy on any Peltries brought by land or inland navigation into this Province, and that Indians passing or repassing with their proper goods and effects, of whatever nature, shall not be liable to pay for such goods and effects any impost or duty whatever, unless the same shall be goods in bales or other packages unusual among Indians for their necessary use, which shall not be considered as goods belonging *bona fide* to Indians, or as goods entitled to the foregoing exemption from duties and imposts;

It will be noted that the wording is similar to but not precisely the same as that found in Article III. That Act remained in force until 1824, when it was repealed by c. XI, 4th George IV—4th Session. The Jay Treaty was also implemented in part by the Imperial Act of 1797, chapter 97. It would seem that thereby no attempt was made to implement those parts of the Treaty which concerned only the Province of Canada, and in particular that the Act did not implement that part of Article III relating to Indians which is here in question.

In so far as I am aware, there has been no legislative enactment in Canada implementing in any way this particular provision in favour of Indians other than those in Upper and Lower Canada to which I have referred, and those statutes either lapsed or were repealed more than 125 years ago. Moreover, there is nothing to indicate that by usage, practice or custom, any Indian in Canada for that length of time has claimed or been allowed the exemption conferred by the Jay Treaty. The suppliant did give evidence that for a few years after taking up residence on the Reserve in 1946, he did bring certain small articles such as food and clothing into Canada from the United States without paying any duty. The fact, however, is that on those occasions he neglected to report the matters to any customs officer, and it is not shown that he was at any time authorized to import anything without declaring the goods and paying proper duties in respect thereto.

I am of the opinion, also, that notwithstanding the fact that the legislatures of Upper and Lower Canada did for a time implement that part of Article III now under consideration, those legislatures had full authority to alter or

amend or annul such legislation at any later time, as was in fact done. Reference may be made to the case of *Hoani Te Hou Heu Tukino* v. *Aotea District Maori Land Board* (1), in which the following statement appears at p. 327:

> If then, as appears clear, the Imperial Parliament has conferred on the New Zealand legislature power to legislate with regard to the native lands, it necessarily follows that the New Zealand legislature has the same power as the Imperial Parliament had to alter and amend its legislation at any time. In fact, as pointed out by the learned Chief Justice, s. 73 of the Act of 1852 was repealed by the New Zealand legislature by the Native Land Act, 1873. As regards the appellant's argument that the New Zealand legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the native lands, and, in any event, even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactments.

My conclusion on this point, therefore, is that, as there was no legislation in effect at the time of the importation of the goods into Canada which sanctioned or implemented the particular terms of the Jay Treaty which are here under consideration, the suppliant is not entitled to exemption from the duties claimed by reason of the terms of that Treaty.

Counsel for the respondent submitted also that in any event the relevant provision of the Jay Treaty was terminated by the War of 1812, and for the following reasons I am of the opinion that that contention must be upheld.

It is not altogether settled what treaties are annulled or suspended by war and what treaties remain in force during its continuance or revive at its conclusion. The diversity of opinion in regard thereto is very substantial as will be seen by reference to such texts as Pitt Cobbett's Leading Cases on International Law (Walker), Vol II, 5th Ed., p. 50 ff., and Hall's International Law, 8th Edition, p. 453 ff. In 5 Moore's Digest of International Law, s. 779, p. 383, it is stated that the view now commonly accepted is that "Whether the stipulations of the treaty are annulled by war depends upon their intrinsic character".

(1) [1941] A.C. 308.

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Counsel for the suppliant stresses the provision of Article 28 of the Treaty as indicating that the terms of Article III were to be "permanent" and that therefore they remained unaffected by the outbreak of war in 1812. The relevant part of that article is as follows:

> Art. 28. 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, to be computed from the date on which he ratification of this Treaty shall be exchanged . . .

Reference was made to *Sutton* v. *Sutton* (1). That was a decision of the Master of the Rolls in 1830 in which it was declared that under the Jay Treaty and the Act of 37, Geo. III, ch. 97, American citizens who held lands in Great Britain on the 28th of October, 1795, and their heirs and assigns, are at all times to be considered, so far as regards these lands, not as aliens but as native subjects of Great Britain.

The Act referred to provided for carrying into effect certain of the terms of the Jay Treaty, as section 24 thereof incorporated the provisions of Article IX of the Treaty relating to the rights of American citizens who then held lands in the British Dominions, and of British subjects holding lands in the United States to continue to hold and dispose of them as if they were natives and not aliens. By section 27 it was provided that the Act would remain in force so long only as the Jay Treaty remained in effect. The Act was continued by 45 Geo. III, ch. 35, in which it is interesting to note that both in the recital and in the enactment, it is stated that "The said Treaty has ceased and determined". The Act was further continued, and finally by 48 Geo. III, ch. 6, it was extended to the end of that Session of Parliament and it would appear that thereafter no Act was passed to revive or prolong the operation of the Treaty. The judgment of the Master of the Rolls in that case was as follows:

> The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of 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 be permanent, and not depend upon the continuance of a state of peace.

(1) I Russ. & M. 663.

The act of the 37 G. 3, gives full effect to this article of the treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent, and independent of a state of peace or war, then the act of parliament must be held, in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the act is to continue in force, so long only as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the act only as would in their nature depend upon a state of peace.

Similarly, in the case of *The Society for the Propagation of the Gospel in Foreign Parts* v. *New Haven* (1) the Supreme Court of the United States upheld the right of a British corporation to continue to hold lands in Vermont. It was held that the title to the property of the Society was protected by the 6th Article of the Treaty of 1783; was confirmed by Article IX of the Jay Treaty, and was not affected by the War of 1812. The applicable rule was stated at p. 494 in the following words :

But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. 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 the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, 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, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

Both these cases were considered by the Supreme Court of the United States in *Karnuth* v. *United States* (2). That case arose under section 3 of the Immigration Act of 1924, ch. 190. Two persons resident in Canada sought to enter the United States either to continue or to secure work, and

(1) 8 Wheat. 464. (2) (1928) 279 U.S. 221.

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both were denied admission by the immigration authorities. In habeas corpus proceedings, the Federal District Court sustained the action of the immigration officials and dismissed the writ, but that judgment was reversed by the Circuit Court of Appeals. In reaching its conclusion, that Court seemed to be of the opinion that if the Immigration Act were so construed as to exclude the aliens, it would be in conflict with the opening words of Article III of the Jay Treaty, which result it thought should be avoided if it could reasonably be done. By *certiorari* the matter was brought to the Supreme Court. There the Court considered the pertinent provisions of Article III of the Jay Treaty, which 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 boundary 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 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 . . .

The main point for consideration by the Court was the contention made by the Government that the treaty provision relied on was abrogated by the War of 1812. The Court reached the conclusion that the view now commonly accepted was that "whether the stipulations of a Treaty are annulled by war depends upon their intrinsic character".

Then, after referring to the cases of *Sutton* v. *Sutton (supra)* and *Society, etc.* v. *New Haven (supra)*, the Court said at p. 239:

> These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. 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 that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly 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. See 7 Moore's Digest of International Law, s. 1135; 2 Hyde, International

Law, s. 606. The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefinitely survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture. It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties, in respect of which, we quote, as apposite, the words of a careful writer on the subject: . . .

Reference was then made to Hall, International Law (5th Ed.), pp. 389-390; Westlake International Law, Part II, pp. 29-32, and to Fauchille, Traité de Droit International Public, 1921, Vol. II, p. 55, and the judgment continued at p. 241:

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

We are not unmindful of the agreement in Article XXVIII of the Treaty "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. It is quite apparent that the word "permanent" as applied to the first ten articles was used to differentiate them from the subsequent articles—that is to say, it was not employed as a synonym for "perpetual" or "everlasting", but in the sense that those articles were not limited to a specific period of time, as was the case in respect of the remaining articles. Having regard to the context, such an interpretation of the word "permanent" is neither strained nor unusual. See *Texas, etc. Railway Co.* v. *Marshall,* 136 U.S. 393, 403; *Bassett* v. *Johnson,* 2 N.J. Eq. 154, 162.

The finding in that case, it is true, was limited to "the provision of the Jay Treaty now under consideration", which, as noted, was the opening part of Article III relating to the rights of the subjects of both contracting parties and of Indians dwelling on either side of the boundary line freely to pass and repass into the territories of the two contracting parties. It seems to me, however, that the *ratio decidendi* in that case is of equal application to the other part of Article III now under consideration. It involves the right of free entry of peltries *brought* by land or inland

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navigation and the particular rights of Indians when *passing* or *repassing* from one country to the other with their proper goods and effects. If such rights were not abrogated by war and the rights of passing and repassing were to continue during war, the door would likewise be open for treasonable intercourse.

However, the precise part of Article III with which we are here concerned has also been considered in the American courts. In *United States* v. *Garrow* (1), the second headnote is as follows:

> Provision of article 3 of Jay Treaty of 1794 permitting Indians to import their own proper goods and effects free of duty *held* terminated by War of 1812, as regards rights of Indians residing in Canada, and hence Canadian Indians' right subsequently to import goods free of duty depended on statutes rather than treaty.

In that case, which was decided in 1937, an Indian woman, also of the Canadian St. Regis Tribe and residing in Canada near the international border, entered the United States carrying twenty-four baskets which she had manufactured in Canada and intended to sell in the United States. The Collector at the port of entry imposed a duty under the existing Tariff Act. She filed a protest, claiming the baskets to be free under Article III of the Jay Treaty. She alleged also that those provisions were in substance carried into the various Tariff Acts from 1799 to August 28, 1894, and that, while that provision was repealed by the Tariff Act of 1897, such repeal in effect abrogated that part of the Jay Treaty and was therefore invalid. The United States Customs Court sustained her protest, holding that the case was controlled by *McCandless* v. *United States,* (2), a decision of the Circuit Court of Appeals for the Third Circuit. The Government then appealed to the Court of Customs and Patent Appeals on the following grounds.

1. Article 3 of the Jay Treaty of 1794 was annulled by the War of 1812.
2. Alternatively, if article 3 of the Jay Treaty was not abrogated by the War of 1812, it is, nevertheless, in conflict with the subsequent statute. It is well settled that when a Treaty and a Statute are in conflict, that which is later in date prevails.
3. Assuming, for the sake of argument, that article 3 was not abrogated but is still in force and effect, the importation is not within the purview of the language of said article 3.

(1) 88 Fed. Rep. (2*d*) 318. (2) 25 Fed. Rep. (2*d*) 71.

The Court, after pointing out that these terms of the Treaty were at that time self-executing, referred to the fact that they were also incorporated in an Act of Congress in 1799, and in substance were continued by various later amendments and revisions; that, however, in the Session of 1897, that provision was omitted and has not been carried into any later revision; that both by that Act and any succeeding Acts duties have been imposed upon similar goods. The Court then considered the *McCandless* case *(supra)* in which the United States District Court in 1928 held that the declaration of the War of 1812 did not end the Treaty rights secured to the Indians through the Jay Treaty so long as they remained neutral; that their rights were permanent and were at most only suspended during the instance of the war; and that therefore the petitioner, a fullblooded Indian, might pass and repass freely under and by virtue of Article III. The Court of Customs and Patent Appeals pointed out, however, that that case had not been appealed to the Supreme Court of the United States, possibly because of an Act of Congress in 1928 which provided that the Immigration Act of 1924 should not apply to Indians crossing the international border.

The Court then considered and followed the *Karnuth* case *(supra)*, concluding its opinion on this point as follows:

> The view of the Supreme Court on this interesting question, expressed in the case last cited, was confirmatory of views held by that court from the initiation of our government. See *Society for Propagation of Gospel in Foreign Parts* v. *Town of New Haven and William Wheeler,* 8 Wheat. 464, 494, 5 L. Ed. 662.
>
> It was also obviously in conformity with the current of authority both in the United States and England. Moore's International Law Digest, vol. 5, par. 779.

The Court then proceeded to consider the submission that the *Karnuth* case was not applicable to Indians and stated its conclusion in these words:

> It is contended by the appellee that some distinction should be made between the members of an Indian tribe and the immigrants in the Karnuth Case, supra. We know of no authority which states or indicates that any such distinction exists, especially as to Indians domiciled in a foreign country. There is no such line of demarcation indicated in the opinion of Mr. Justice Sutherland, hereinbefore quoted. If article 3 of the Jay Treaty was nullified by the War of 1812, as to Canadian citizens or subjects, it certainly was nullified, so far as Indians residing in Canada were concerned, for, although wards of the Canadian government, they were certainly within the category of citizens or subjects.

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We think, therefore, it must be said that so far as the provision under which the appellee here claims is concerned, the War of 1812 ended the right which the appellee now claims of bringing her goods across the border and into the United States without the payment of duty.

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Finally, the Court came to the conclusion that at least since 1812 the rights of the Indians of Canada to bring their peltries and goods into the United States free of duty were granted by Statute and not by Treaty; and that as the right of exemption was dropped from the Revising Act of 1897 and duties imposed thereafter, the appeal should be allowed, there being at the time of importation no treaty or statutory exemption in regard thereto.

Counsel for the suppliant herein laid considerable stress on the fact that the goods imported in the *Garrow* case were goods intended to be sold, whereas the goods imported by the suppliant herein were for his own personal use. In the *Garrow* case, however, the protestant relied entirely on the particular part of Article III which is here in question—the general right conferred on Indians to pass or repass with their own proper goods and effects; and the Court clearly held that that part of the article in the Treaty was terminated by the War of 1812. As I read the judgment, it is not based on the fact that the goods there imported were or were not for sale, but on a general consideration of the words of the provision itself.

The Supreme Court of the United State in the *Karnuth* case has held that the outbreak of the War of 1812 annulled the provisions of the opening part of Article III of the Treaty, which conferred the right upon citizens (including Indians) on either side of the boundary to pass and repass freely across the border. The reasons in that case would seem to be relevant also to that part of Article III now under consideration, which conferred an exemption upon Indians from payment of duties while passing and repassing the border with their own proper goods and effects. The Court of Customs and Patent Appeals in the *Garrow* case reached a similar conclusion. While it is true that these cases are not binding upon me, the reasons given in each case commend themselves to me and with respect I shall adopt them in this case. My conclusion, therefore, is that the particular provision of the Jay Treaty on which the suppliant relies was annulled by the War of 1812. In view

of that finding, it becomes unnecessary to consider the further submission made on behalf of the respondent that in any event the nature of the goods imported by the suppliant is not such as to be within the purview of the goods mentioned in Article III.

Counsel for the Crown also relies on the provisions of section 49 of the Statutes of Canada, 1949, 2nd Session, ch. 25, which is as follows:

> 49. For greater certainty it is hereby declared and enacted that, notwithstanding any other law heretofore enacted by a legislative authority other than the Parliament of Canada (including a law of Newfoundland enacted prior to the first day of April, nineteen hundred and forty-nine), no person is entitled to
>
> (*a*) any deduction, exemption or immunity from, or any privilege in respect of,
>
> (i) any duty or tax imposed by an Act of the Parliament of Canada, or
>
> (ii) any obligation under an Act of the Parliament of Canada imposing any duty or tax, or
>
> (*b*) any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a licence, permit or certificate for the export or import of goods,
>
> unless provision for such deduction, exemption, immunity or privilege is expressly made by the Parliament of Canada.

I have thought it advisable to set out the section in full although counsel relies only on para. (a) (i).

That Act is entitled "An Act to amend The Income Tax Act and the Income War Tax Act" and was assented to on December 10, 1949. Most of the sections have to do with income tax throughout the whole of Canada. Counsel for the suppliant suggests that inasmuch as this section appears between sections 48 and 50 which have to do specifically with Newfoundland, and as the enactment was made just prior to the entry of Newfoundland into Confederation, section 49 should be read as applicable to the province of Newfoundland only. I am quite unable to agree with that submission. Were I to do so, I would be disregarding the clear meaning of the words of the section itself which are general in their application and relate to "any other law heretofore enacted by a legislative authority other than the Dominion of Canada". The words "including a law of Newfoundland" could not be construed so as to exclude all other laws.

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Now the clear effect of that part of the section when applied to the facts of this case is this—that thereafter no person is entitled to an exemption or immunity from any duty or tax imposed by an Act of the Parliament of Canada unless provision for such exemption or immunity is expressly made *by* the Parliament of Canada, notwithstanding any other law theretofore enacted by any other legislative authority which might have granted such exemption or immunity. The exemption must now be found in the Acts of the Parliament of Canada. All such exemptions, for example, as may have been made prior to 1867 by any of the previous legislative bodies such as those of Lower or Upper Canada, even if continued in practice, would, after the enactment of section 49 and in the absence of an Act of the Parliament of Canada conferring the exemption, be of no effect.

This section, as I have said, was assented to on December 10, 1949. It was therefore in effect at the time the suppliant imported the refrigerator and oil heater, but not in effect when the washing machine was imported in 1948. So far as the first two articles are concerned, the provisions of section 49 *(supra)* are sufficient in my opinion to bar any right of exemption from duty or tax unless by some Act of the Parliament of Canada the exemption is provided. The duties here in question were levied under the provisions of the Customs Tariff Act and the Excise Tax Act and it is common ground that neither of these Acts confers any exemption upon Indians as such.

Counsel for the suppliant, however, claims that such an exemption is to be found in s. 86 (1) of the Indian Act, R.S.C. 1952, ch. 149, which reads in part as follows:

> 86. (1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 82, the following property is exempt from taxation, namely,
>
> (*a*) the interest of an Indian or a band in reserve or surrendered lands, and
>
> (*b*) the personal property of an Indian or band situated on a reserve,
>
> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property . . .

This provision first appeared in that form in the Indian Act, Statutes of Canada, 1951 ch. 29, s. 86; prior thereto a somewhat similar right was provided in a different form in

the Indian Act, R.S.C. 1927, ch. 98, s. 102. I am of the opinion that subsection (11) (b) is of no assistance to the suppliant in this case. The exemption from taxation therein provided relates to personal property of an Indian or band *situated on a reserve,* and not elsewhere. The importance of that limitation is seen also from a consideration of sections 88 and 89.

Whatever be the extent of the exemption from taxation granted to Indians in respect of their personal property on a reserve, it does not in my view extend to an exemption from customs duties and excise taxes payable on the importation of goods into Canada. Indians, when they buy imported goods subject to such duties, must, like the others, pay a higher price.

Section 9 of the Customs Act provides:

> All goods imported into Canada, whether by sea, land, coastwise, or by inland navigation, whether dutiable or not, shall be brought in at a port of entry where a Custom-house is lawfully established.

Now the suppliant did not comply with the provisions of that section, which is imperative in its terms and applicable to everyone, including Indians. The evidence is that there was no custom-house on the St. Regis Reserve at the time the goods were imported, and it was therefore the duty of the suppliant to report at the nearest custom-house, declare the goods, and pay all duties in respect thereto before taking them to his home. In effect, the contention of the suppliant is this: "The reserve on which I live is adjacent to the American border. I brought the goods directly from the United States to the reserve, and, while I may have been guilty of non-compliance with the provisions of the Customs Act in that I failed to report the entries at a custom-house and there pay the proper duties, such duties cannot now be collected from me because, as an Indian, my goods are exempt from taxation as they are on a reserve."

It seems to me, however, that the suppliant is not entitled to take advantage of his own illegal actions to obtain an exemption in this manner. Were he permitted to do so, the result would be that the relatively few Indians who happen to reside on a reserve adjacent to the American border would be able to secure an exemption from duties and taxes not available to Indians residing on a reserve remote from the border. The latter, of course, would be required to

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comply with the Customs Act, report the goods, and pay the duties before there was any possibility of getting the imported goods to the reserve on which they lived. As I read the provisions of section 86 (1) of the Indian Act, the clear intention is that the exemptions from taxation therein provided are intended to apply equally to the property of all Indians on all reserves. I am quite unable to construe that section as conferring special benefits only on Indians who reside on a reserve adjacent to our borders. In my opinion, the section has no application whatever to the payment of customs duties or excise taxes.

For the reasons which I have stated, the claim must fail on all grounds. There will, therefore, be judgment declaring that the suppliant is not entitled to any of the relief claimed in the Petition of Right and dismissing his petition with costs payable to the respondent.

Judgment accordingly.