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FOREWORD

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OFFICIAL OPINIONS

of

THE ATTORNEYS GENERAL

of

THE UNITED STATES

Volume 30

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OFFICIAL OPINIONS

OF

THE ATTORNEYS GENERAL

OF

THE UNITED STATES

ADVISING THE

PRESIDENT AND HEADS OF DEPARTMENTS

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITED BY

GEORGE KEARNEY

VOLUME 30

WASHINGTON
GOVERNMENT PRINTING OFFICE
1919

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T. W. GREGORY.

CANADIAN BOUNDARY WATERS.

Section 3109 of the Revised Statutes, in imposing certain restrictions upon masters of foreign vessels which are not imposed upon masters of domestic vessels, is in conflict with the provisions of article 1 of the convention concerning the boundary waters between the United States and Canada, concluded January 11, 1909, between the United States and Great Britain.

Section 3109 of the Revised Statutes being incompatible with the provisions of the later self-executing treaty of January 11, 1909, the former must be regarded as superseded by the latter in so far as it is inconsistent therewith, and hence it is the duty of the administrative officers of the Government to fulfill the requirements of the treaty.

DEPARTMENT OF JUSTICE,
April 2, 1915.

SIR: I have the honor to acknowledge receipt of your letter of January 30, 1915, inclosing copies of correspondence of the Department of State with the Department of Commerce and the British Embassy in relation to representations made by the Embassy to your Department to the effect that section 3109 of the Revised Statutes appears to be in conflict with article 1 of the convention concerning the boundary waters between the United States and Canada, concluded January 11, 1909, between the United States and Great Britain. You request my opinion upon the same.

Revised Statutes, section 3109, as amended by the act of February 17, 1898 (30 Stat. 248), is as follows:

"The master of any foreign vessel, laden or in ballast, arriving, whether by sea or otherwise, in the waters of the United States from any foreign territory adjacent to the northern, northeastern, or northwestern frontiers of the United States, shall report at the office of any collector or deputy collector of the customs, which shall be nearest to the point at which such vessel may enter such waters; and such vessel shall not transfer her cargo or passengers to another vessel or proceed farther inland, either to unlade or take in cargo, without a special permit from such collector, or deputy collector, issued under and in accordance with such general or specific regulations as the Secretary

of the Treasury may, in his discretion, from time to time prescribe. This section shall also apply to trade with or through Alaska. For any violation of this section such vessel shall be seized and forfeited."

Article 1 of the convention referred to above is as follows (36 Stat. 2449):

"The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

"It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use thereof, but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof."

It will be seen that section 3109 of the Revised Statutes imposes certain restrictions upon the masters of foreign vessels with respect to the duty to report to the collector of customs and the right to transfer cargo or passengers, or to proceed further inland, which are not imposed upon the masters of domestic ships. The treaty provides that the navigation of boundary waters between the two countries for purposes of commerce shall be free and open, subject only to such laws and regulations, not inconsistent with the privilege of free navigation, as shall apply equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries. In other words, such navi-

gation shall not be subject to laws and regulations which are discriminatory. There is, therefore, in my opinion, a clear conflict between the provisions of the treaty and section 3109 of the Revised Statutes, for, since that section relates only to foreign vessels, it constitutes a discriminatory law or regulation to which, under the terms of the treaty, British ships would not be subject.

It is well settled by the decisions of the United States Supreme Court that treaty provisions, which are self-executing in the sense that they require no additional legislation to make them effective, are equivalent to and of like obligation with an act of Congress. The Constitution declares that both shall be the supreme law of the land and both are equally binding upon the courts. *Foster* v. *Neilson* (1829), 2 Pet. 253, 314; *The Cherokee Tobacco* (1870), 11 Wall. 616, 621; *Chew Heong* v. *United States* (1884), 112 U. S. 536, 539; *Head Money Cases* (1884), 112 U. S. 580, 599; *Whitney* v. *Robertson* (1888), 124 U. S. 190, 194.

Where such a treaty is in conflict with an act of Congress, that which is later in date will control. A treaty may supersede or abrogate a prior act of Congress, and an act of Congress similarly may abrogate or supersede a prior treaty. *Foster* v. *Neilson, supra; The Cherokee Tobacco, supra; Whitney* v. *Robertson, supra; Head Money Cases, supra; Botiller* v. *Dominguez* (1889), 130 U. S. 238, 247; *The Chinese Exclusion Case* (1889), 130 U. S. 581, 600; *Horner* v. *United States* (1892), 143 U. S. 570, 578; *United States* v. *Old Settlers* (1893), 148 U. S. 427, 468; *Fong Yue Ting* v. *United States* (1893), 149 U. S. 698, 720; *Lem Moon Sing* v. *United States* (1895), 158 U. S., 538, 549; *Wong Wing* v. *United States* (1896), 163 U. S. 228, 230; *Thomas* v. *Gay* (1898), 169 U. S. 264, 271; *Stephens* v. *Cherokee Nation* (1899), 174 U. S. 445, 483, 484; *La Abra Silver Mining Co.* v. *United States* (1899), 175 U. S. 423, 460; *De Lima* v. *Bidwell* (1901), 182 U. S. 1, 195; *United States* v. *Lee Yen Tai* (1902), 185 U. S. 213, 220, 221; *Hijo* v. *United States* (1904), 194 U. S. 315, 324; *Sanchez* v. *United States* (1910), 216 U. S. 167, 175–176.

Article I of the treaty of January 11, 1909, confers rights upon the inhabitants and ships of the contracting nations by force of its own provisions which require no legislation to make them effective, and is clearly self-executing within the meaning of the authorities above cited. In *Johnson* v. *Browne*, 205 U. S. 309, 321, it was said:

"Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty."

In the present instance section 3109 of the Revised Statutes is in my opinion so clearly incompatible with the provisions of the later treaty that it must be regarded as superseded by the latter in so far as it is inconsistent therewith. It is, therefore, in my opinion, the duty of the officials, whose function it is to administer the laws and regulations relating to commerce upon the Great Lakes, to fulfill, by proper administrative action, the requirements of the treaty and it is not necessary that the statute should be expressly repealed. As already pointed out, a treaty made under the authority of the United States is equally with an act of Congress the supreme law of the land and is binding upon the administrative officers of the Government as well as upon the courts.

As to the duties of the master of a foreign ship under Revised Statutes, section 2774, referred to in the correspondence from the Department of Commerce, I express no opinion, as the question does not appear to be now involved.

Respectfully,

T. W. GREGORY.

To the Secretary of State.