THE CHICAGO DIVERSION FROM LAKE MICHIGAN.

Before attempting to analyse the situation at Chicago, let us first of all place Lake Michigan, not as the geographers would, on a topographical map, but rather as students of international law, in its true legal position. From this point of view Lake Michigan fufills all the requirements of an "inland sea," being wholly surrounded by American land and water; it has, therefore, the same status as the Black Sea had, for instance, at the end of the 15th century, when the latter, along with the Bosphorus and the Dardanelles, was wholly encompassed by Turkish territory. Having thus defined Lake Michigan as being an American inland sea,[1] we can now proceed to consider it from the point of view of the position it has taken in the treaty negotiations of the United States.

In 1842 the Webster-Ashburton Treaty[2] was ratified and proclaimed; it defined the boundary line between Canada and the United States; no mention was made of Lake Michigan.

In 1854, another treaty with Canada was negotiated,[3] this time for the purpose of reciprocal advantages as to fisheries, duties, and navigation. By the year 1854 the American navigation interests, which had been heard from as early as 1823,[4] won their point as to the navigation of the Canadian portion of the St. Lawrence River by American ships. However, Canada did not make this concession to her American neighbour "gratis," but rather in return for a full equivalent: the right of British subjects to navigate Lake Michigan. Art. IV of the treaty reads:

> It is further agreed that British subjects shall have the right freely to navigate Lake Michigan with their vessels, boats, and crafts so long as the privilege of navigating the river St. Lawrence, secured to American citizens by the above clause of the present article shall continue; . . .

Again in 1871, by the treaty of Washington,[5] a similar agreement was reached, the reciprocity treaty of 1854 having been ter-

[1] Chandler P. Anderson, U.S. Congress, House Committee on Rivers and Harbors, Hearings, Vol. 2, 68th Congress, 2nd Session, page 1296.
"Furthermore, it would seem that there could be no serious objections to placing the Lake of the Woods in the same category as the Great Lakes system including Lake Michigan, in which the right of free navigation is given under Article XXVIII of the treaty of 1871, although its waters are wholly within the territory of the United States."

[2] Malloy, Vol. I, p. 650.

[3] Malloy, Vol. I, p. 668.

[4] Correspondence relating to the St. Lawrence and its free navigation by U.S. citizens. Vol. 6, American State Papers, Foreign Relations 1828, p. 758.

[5] Malloy, Vol. I, p. 700.

minated in 1866, as a result of American post Civil War animosity. The article in question, Article XXVIII, is phrased as follows:

> The navigation of Lake Michigan shall also, for the terms of years mentioned in article XXXIII of this treaty (10 years), be free and open for the purposes of commerce to the subjects of Her Brittanic Majesty, subject to any laws and regulations of the United States or the States bordering thereon not inconsistent with such privilege of free navigation.

Considering the last two articles together, one can reach but one logical conclusion, and that is that Great Britain always possessed complete right of control over the St. Lawrence river in all parts where both its river banks were within her own territorial domain, and that the United States possessed a similar right of jurisdiction over Lake Michigan. No doubt in view of this legal situation both countries realized the necessity for mutual concession and accommodation, and so entered into agreements by which each State granted to the other the right of navigating what each recognized as being the waters under its own exclusive territorial jurisdiction.

On January 11, 1909, a treaty[6] between the United Kingdom and the United States of America, relating to boundary waters and questions arising along the boundary between Canada and the United States was signed at Washington. The Preliminary Article of the treaty says:

> For the purposes of this Treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers and waterways, or waters flowing from such lakes, rivers and waterways, or the waters of rivers flowing across the boundary.

Lake Michigan, according to this article, comes within the category of "tributary waters which in their natural channels flow into such lakes" i.e. Lake Huron, and such *tributary waters*, as Lake Michigan, are not made the subject of negotiation under this preliminary article.

Article I of the same treaty continues:

> The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purpose 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.

[6] Malloy, Vol. 3, p. 2607.

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 . . .

Here we find specific mention of Lake Michigan. It appears that the right to navigate this American inland sea was given to Canada by way of a privilege quite apart from any right which she might automatically and normally exercise over the "boundary waters" defined in the preliminary article and made mention of in the first paragraph of this same article I, above. In fact the United States sacrificed to Canada a right of navigation on waters which belonged wholly to the United States; there never was a duty on the part of the United States to make any such sacrifice.

Article II of the treaty is couched in the following terms:

Each of the High Contracting Parties reserves to itself, or to the several State Governments on the one side and the Dominion or Provincial Government on the other, as the case may be, subject to any Treaty provision now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties thereto.

According to this first paragraph of Article II, the diversion at Lake Michigan falls among "those cases already existing" in 1909, date of the treaty, and, therefore, the whole provision relating to injuries inflicted through diversion of waters flowing into boundary waters does not apply, as the Chicago diversion, by way of the drainage canal, began as early as 1900.

The rest of the article reads as follows:

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right which it may have to object to any interference with or diversion of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

This provision refers to public interests as contrasted with private interests and would have been unnecessary if the preceding provision had included a right to recover damages for injuries to public interests on the other side of the line. The very definite statement that cases already existing are not included within the scope of the article is a plain recognition of the fact that the diversion at Lake

Michigan was purely a domestic affair, and that Canada would not try to restrict the right of the United States to authorize such a diversion.

Article V of the treaty provides for a diversion by the United States of 20,000 cubic feet of water per second above Niagara Falls for power purposes and a diversion by Canada of 36,000 cubic feet per second from the same place and for like purposes.

Article VIII enumerates the uses to which the boundary waters shall be put giving the following order of precedence:

(1) domestic and sanitary purposes;
(2) navigation purposes;
(3) power and irrigation purposes.

Other articles provide for the setting up of an International Joint Commission, for its operation, and for the proper termination of the Treaty, should occasion for such action arise. Article 10 is of particular importance and reads as follows:

> Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two Parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor-General in Council. In each case so referred, the said Commission is authorized to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.
>
> A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred.
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> If the said Commission is equally divided, or otherwise unable to render a decision or finding as to any question or matters so referred, it shall be the duty of the Commissioners to make a joint report to both Governments, or separate reports to their respective Governments, showing the different conclusions arrived at with regard to the matters or questions so referred, which questions or matters shall thereupon be referred for decision by the High Contracting Parties to an Umpire chosen in accordance with the procedure prescribed in the fourth, fifth and sixth paragraphs of articles 45 of The Hague Convention for the pacific settlement of international disputes, dated October 18, 1907. Such Umpire shall have power to render a final decision with respect to those matters and questions so referred on which the Commission failed to agree.

Thus having regarded the relevant articles of the Treaty of 1909 and decided that the diversion at Lake Michigan was definitely excluded from the substance of the treaty, except for a possible indirect

reference in article 10 which covers all questions of interest to both the United States and Canada, let us turn to the statements of various men, who were either connected with the drafting of the treaty or with its subsequent interpretation, and see why this was done.

In 1906 we find the following article in the First Report of the Canadian Section of the International Waterways Commission[7] for that year reporting on the conditions existing at Niagara Falls:

> The Commission, therefore, recommend that such diversion, exclusive of water required for domestic use or the service of locks in navigation canals be limited to the Canadian side to 36,000 cubic feet per second, and on the United States side to 18,500 cubic feet per second (and in addition thereto a diversion for sanitary purposes not to exceed 10,000 cubic feet per second, be authorized for the Chicago Drainage Canal) and that a treaty or legislation be had limiting these diversions to the quantities mentioned.

In its Third Report[8] the Canadian section wrote:

> The position at Niagara Falls has been dealt with having regard to the exceptional circumstances there existing and taking into consideration the large permanent diversion by way of the Chicago Drainage Canal.

These statements bear out the contention that the Canadian Commissioners, who were investigating conditions existing at Niagara Falls, in order that their findings might be used as a basis for the Treaty of 1909, were fully aware of the Chicago diversion then existing, and that they took into account this diversion when alloting water to the United States and Canada at the Falls. The American Commissioners were equally cognizant of the Chicago diversion.[9] The most pertinent statement on the subject was made by Elihu Root in the Senate,[10] when the Treaty of 1909 was before the critical eye of that body. He said:

> The great bulk of the water goes to the Canadian side, and the waterways commission that was appointed some time ago, to deal with the question of the lake level reports, I think, that 36,000 feet can be taken out on the Canadian side and 18,500 on the American side without injury to the Falls. I thought it wise to follow the report of the Commission and put in 1,500 feet additional to get round numbers—so our limit is higher than we want, but their limit would not be cut down below what it is because there are three companies on the Canadian side who have works there. Then there is this further fact why we could not object to this 36,000 cubic feet on the Canadian side: We are now taking 10,000 cubic feet per second out of Lake Michigan at Chicago, and I refused to permit them to say anything in the

[7] First Report of the Canadian Section of the International Waterways Commission. Canadian Sessional Papers 19a, Vol. XVII, part 1, pp. 339-340.
[8] Third Report of the Canadian Section of the International Waterways Commission. Canadian Sessional Papers 11a, Vol. XVII, part 1, p. 400.
[9] Same, p. 424.
[10] Proceedings of For. Rel. Committee, 57th-62nd Congresses, pp. 271-272.

treaty about it. I would not permit them to say anything about Lake Michigan. I would not have anything in the treaty about it, and under the circumstances, I thought it better not to kick about this 36,000. They consented to leave out of this treaty any reference to the drainage canal which really comes out of the lake system.

This statement makes it quite clear that the United States was unwilling to accept any restriction upon its right to divert water from Lake Michigan and the foregoing Canadian statements make it just as clear that the Canadian advantage of 16,000 cubic feet per second at Niagara was fully counter-balanced by the Chicago diversion of 10,000 cubic feet.

On April 21, 1928, an article appeared by Mr. Kellogg in the "United States Daily" in which Mr. Kellogg said in answer to certain questions put by the Canadian Government as to the withdrawal of water from Lake Michigan:

> As to the observation by the Canadian Government that the installation of compensatory works to restore lake levels would not recoup to the Great Lakes System the power lost to the system by the diversion at Chicago, I would, without in any way admitting the principles of compensation, call attention to the fact that Canada now receives 36,000 second feet at Niagara as against 20,000 cubic feet per second on the American side for power purposes.

The principle of compensation which Mr. Kellogg was so loathe to admit, nevertheless, as we have seen, played an important role in the framing of the Treaty of 1909. In fact both the Canadian and the American officials admitted that the discrepancy between the 36,000 cubic feet per second diversion by Canada and the 20,000 second feet diversion by the United States was accounted for by the American diversion of 10,000 second feet at Chicago.

In 1910 Mr. Chandler P. Anderson before the House Committee on Rivers and Harbors[11] in explaining article II of the Treaty of 1909, that article pertaining directly to diversions, future and past, made the following remarks:

> In response to this objection (that Canada might some day interfere with the Chicago diversion) attention is called to the express provision in this article that it shall not apply to cases already existing which would seem to cover and was certainly intended to cover the canal system at Chicago.

From all these corroboratory statements, one can draw but one conclusion, namely that the diversion of water at Chicago for sanitary purposes was definitely not referred to in the Treaty of 1909, because both parties to the treaty realized that such diversion was purely a domestic affair of the United States; and that the discrep-

[11] Hearings, Vol. 2, 68th Congress, 2nd Session, p. 1297.

ancy in the amounts diverted at Niagara is accounted for by the tacit acceptance of the 10,000 cubic feet per second diversion at Chicago. This conclusion leads us to a contemplation of the theory which lies behind such a diversion as the one we are considering.

Heffter[12] says:

> Each of the proprietors of a river flowing through several states as well as the proprietor of a river wholly in one country can *stricto jure,* devote the water to its own uses and to those of its subjects and exclude others.

In the defendants' brief in the case of *Wisconsin, Minnesota, Ohio and Pennsylvania* v. *Illinois and the Sanitary District* at page 183 we find this statement:

> Some have maintained (and this is the position of the United States) that each State by virtue of its right of sovereignty over that part of the river flowing on its soil, can use the waters as it wishes and following its own needs only, without considering any injury it may cause to other riparians in depriving them of a portion of the waters, or in exposing them to inundation, or in polluting the waters.

In 1907 in a situation very much like that existing between Canada and the United States to-day, Judge Elliot[13] said:

> The respondents claim, that, as the Birch Lake Drainage area is tributory to the Rainy River and the various lakes which form the international boundary between the United States and Canada, the diversion of the waters to Lake Superior would be a violation of international comity. Birch Lake and its tributory waters are entirely within the United States, and under the generally accepted rules of international law are subject to its exclusive control without responsibility to any foreign government or its citizens. Modern international law rests upon the conception of territorial sovereignty. The territory of a nation consists of the land and waters within its geographical boundaries and the waters which wash its shores to the extent of a marine league or other distance determined by custom or treaty from the shore.

In the *Rio Grande Dam and Irrigation* case[14] we find the following:

> Under the treaties with Mexico each republic reserves all rights within its own territorial limits. This would have been so on principles of international law without such reservation. States lying wholly within the United States belong exclusively to it, and the soil within the United States is not burdened with a servitude in favor of Mexico in respect to any duty to so discharge the water as to promote or preserve the navigability of the Rio Grande.

One of the treaties referred to above, that of 1906,[15] bears out the above quoted statement:

[12] Europaische Volkerrecht, 1888, sec. 77.
[13] *Minnesota Canal and Power Co.* v. *Pratt & Others,* 1907, 101 Minn. 197, p. 228.
[14] *U.S.* v. *Rio Grande Dam and Irrigation Co.,* 9 N.M., p. 292.
[15] U.S. Treaty Series, Malloy, Vol. I, p. 1202.

The United States in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may be hereafter asserted by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion of the waters of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. The understanding of both parties is that the arrangement contemplated by this treaty extends only to the portion of the Rio Grande which forms the international boundary, from the head of the Mexican Canal down to Fort Quitman, Texas, and in no other case.

Lastly when, in 1895, Attorney-General Harmon[16] was called upon to interpret the treaty of Guadalupe-Hidalgo, of Feb. 2, 1848, and to decide whether a diversion of the Rio Grande lying wholly within the United States was lawful, he said:

The fact that there is not enough water in the Rio Grande for the uses of the inhabitants of both countries for irrigation purposes does not give Mexico the right to subject the United States to the burden of arresting its development and denying its inhabitants the use of a provision which nature has supplied, entirely within its own territory. The recognition of such a right is entirely inconsistent with the sovereign right of the United States over its national domain. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This theory of diversion, namely that a state has complete control over its own territory including any "inland waters," leads one to believe that the United States has then from a purely theoretical point of view complete jurisdiction over Lake Michigan and can divert such waters therefrom as it may deem necessary to the health and welfare of its citizens at Chicago, and in any amounts. Actually, the Supreme Court, in its decision of April 21, 1930,[17] has limited the amount of water to be diverted to 6,500 c.f. sec. from July 1, 1930 until December 31, 1935. On the latter date Chicago may divert only 5,000 c.f. sec., which is cut down to 1,500 c.f. sec. on December 31, 1938. Several writers[18] have suggested that it would be feasible to allow the Joint Commission, set up under the Treaty of 1909, to investigate and pass upon suitable amounts of water to be diverted at Chicago. Article 10 of that treaty provides for the resolving of just such a question. The Chicago Diversion may be accurately considered one of "those matters of difference arising between The High Contracting Parties

[16] 2 Ops. Attys. Gen., pp. 274-283.
[17] *Wisconsin* v. *Illinois*, 281 U.S., p. 696.
[18] A.J. Int. Law, Vol. 23, p. 328. "The Chicago Drainage Canal and St. Lawrence Development," J. Q. Dealey, vi.

involving the *interests*, not by any means the rights or the obligations of the United States and of the Dominion of Canada, in relation to each other and to their respective inhabitants, and as such may, according to article 10, be referred for decision to the International Joint Commission by the consent of both parties, the United States having previously obtained the consent of the Senate; and Canada the consent of the Governor-General in Council." The same article further provides, as previously indicated, that if the Commission is divided and is unable to render a decision, the matter under discussion shall be referred for final decision to an Umpire, chosen in accordance with the fourth, fifth and sixth paragraphs of article 45 of the Hague Convention of October 18, 1907.

Whether such procedure would meet with the necessary approval of those possessed of the treaty-making power of the United States is a question open to debate, but if adopted would certainly be evidence of our complete faith in the past work of the International Joint Commission, and of our willingness to at least listen to the Canadian claim that no permanent diversion should be permitted to another watershed naturally tributary to the waters forming the boundary between Canada and the United States. Mr. Hughes, in "Our Relations to the Nations of the Western Hemisphere," says in speaking of the International Joint Commission:

> Without a final commitment, it affords an opportunity for investigation of delicate questions lying within the domestic sphere, yet having an international bearing. An impartial examination of the facts by a permanent joint commission would frequently enlighten the legislature of both countries and lead to the formation of a sound public opinion permitting an amicable adjustment. We have used too rarely this sort of instrumentality in relation to international controversies![39]

The diversion of waters at Chicago is an example *par excellence* of a delicate question lying within the domestic sphere yet having a decided international bearing, and it might be a good policy to allow the Joint Commission an opinion as to the solution of the problem, inasmuch as it was set up to handle exactly such a case.

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[39] "Our Relations to the Nations of the Western Hemisphere," Hughes, p. 31.