THE CHICAGO DIVERSION.*

AUTHOR'S NOTE.—I must acknowledge my deep indebtedness to Dr. O. D. Skelton, Under-Secretary of State for Canada, who has been most kind in supplying me with documents, many of which are not easily available in England. This does not involve him in any responsibility for my opinions.

The grave international problem created by the diversion of the waters of Lake Michigan at Chicago is a by-product of a geographical situation which is probably unique in the world. In all places the head waters of great river systems approach one another closely at the watershed, but as a rule they begin with tiny streams of no practical importance or utility. Again, these watershed areas are usually in mountain country remote from great centres of population. For both these reasons there is normally no practical purpose to be served by any interference with the natural course of the streams, and therefore there is no conflict of interests calling for legal or political solution.

But at the point where the watershed between the St. Lawrence and Mississippi basins comes close to the south-western corner of Lake Michigan we have a situation which is peculiar in two respects. The country forms part of the great central plain of North America, and the actual watershed is formed by a very low range of hills called the Valparaiso moraine, which at its lowest point is only ten feet above the level of Lake Michigan. On the other side of the low ridge, within a few hours' walk of Chicago, we find the Desplaines River, which presently joins the sluggish stream of the Illinois and thus creates a navigable waterway to the Mississippi and the Gulf of Mexico. In no other part of the world do the navigable waters of two great river systems approach so close to the watershed and in no other place does the connexion between them present such a simple problem for the engineer.

The second peculiarity is that at this critical point there has grown up with mushroom rapidity one of the greatest cities of the world. We have all heard much of Chicago in recent years, but chiefly in connexion with its slaughter-houses, its murders, and its mayor, and these are what in our profession we call matters of domestic jurisdiction. At first we may be inclined to think that drains fall under the same head, yet for the international lawyer it is in the drains that his problem begins. The fundamental fact

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is that Chicago has grown too fast for its drains. Modern sanitary engineering undoubtedly finds it possible to deal even with the sewage of a vast city situated in a flat plain, but the solution of the problem by highly technical methods is neither easy nor cheap. It is much simpler just to pour the sewage into a convenient lake or river, and so they began by pouring it into Lake Michigan. But the waters of the lake were also needed for drinking purposes, and this confusion of functions naturally produced undesirable results. As time went on it proved more and more difficult to push the intake of the water supply out so far as to be beyond the reach of contamination from the sewers, and the health of the population suffered grievously.

Two possible solutions remained. One was to erect a modern system of filtration and disposal works. The other was to divert the flow of sewage from east to west. The second idea had some history behind it. The early French missionary explorers, little interested in international law and less in drains, had foreseen the possibility of linking the two great river systems by piercing the low divide, and in 1848 a small canal had been actually constructed. It was fed by primitive methods from the neighbouring streams and caused no appreciable diversion of water.

The temptation proved irresistible. In 1889 the Illinois legislature created a corporation called the Sanitary District of Chicago and empowered it to build a drainage canal leading from Lake Michigan to the Desplaines River. The original works were completed in 1900 and frequently extended. Their effect was to reverse the flow of the small streams debouching into Lake Michigan and also to divert a large and increasing body of water from the lake itself into the Mississippi basin. In their original conception these canals were for sanitary purposes only, but in 1907 the system was further developed to provide hydro-electric power, and the ambitions of Chicago began to play with the idea of a great navigable waterway which would make the city a port in direct communication with the Gulf of Mexico. In 1925 and 1926 an active campaign was carried on to obtain Congressional approval for a nine-foot waterway, and a bill was actually passed in January, 1927, but with the important proviso "that nothing in this Act shall be construed as authorising any diversion of water from Lake Michigan"—a proviso which nullified the value of the concession.

Although it is obvious that the federal system of the United States cannot be pleaded in abatement of its international liabilities, perhaps it may be convenient to say a word here about the

direct participation of Washington in the activities of Chicago. In 1901 a permit from the Secretary of War authorized the Sanitary District to divert 4,167 cubic feet per second from Lake Michigan, and in 1907 an application to increase the amount was refused by Mr. Taft on the ground that it might lead to international complications. Another application for a permit to withdraw 10,000 c.s.f. was refused by Mr. Stimson, the present Secretary of State, in 1913. Chicago failed to observe the limits imposed, and in 1913 the Federal Government moved for an injunction. After taking the case under advisement for six years, Judge Landis in 1920 granted an injunction in the Federal District Court of Chicago, and in January, 1925, his decision was affirmed by the Supreme Court in a judgment which drew attention, among other things, to the treaty obligations of the United States.[1] Nevertheless, in March the Secretary of War abandoned the fruits of his victory and granted a new permit for the withdrawal of 8,500 c.s.f., subject to certain conditions, of which the most important were that there should be "no unreasonable interference with navigation" and that the city should undertake the construction of proper sewage disposal works. This permit was exclusive of the amount required for ordinary domestic purposes, and the State Department explained to the Canadian Government that in March, 1925, the average withdrawal amounted to 9,700 c.s.f. So long ago as 1909 the actual amount taken was admitted by the Secretary of State to be 10,000 c.s.f., and it is certainly not less than that to-day.

These figures by themselves will convey little to most of us, but the practical consequences are serious. Technical calculations show that the authorized reduction of 8,500 c.s.f. reduces the water-level in the port of Montreal by 4.44 inches,[2] and the actual reduction is probably nearly six. In the case of a big ship every inch is equivalent to about seventy tons of cargo, and the large liners that go to Montreal have only a few inches of water under their keels. It should be remembered that the deep waterway from the ocean to Montreal has been developed entirely by Canadian energy and money, although the use of it has by treaty been made common to the traffic of both nations. The cost of restoring the depths by dredging is estimated at $4,608,000.[3]

The loss can also be expressed in terms of the hydro-electric

[1] *Sanitary District of Chicago* v. *United States*, 266 U.S. 405. The delay in the court below was sharply censured.

[2] *U.S. Senate Document* No. 183 of 1927, p. 51. On the Great Lakes and in the river above Montreal the reduction is even more serious.

[3] *Ibid.*, pp. 52, 57.

power which is capable of development on the St. Lawrence between Prescott and Montreal. According to the calculations of the Joint Board of Engineers which has investigated the technical aspects of the St. Lawrence waterway scheme, the loss would amount to 70,125 horse-power in the international section of the river, and 90,950 in the Canadian section.[4] These figures are based on its "authorized" withdrawal of 8,500 c.s.f., and the actual loss is proportionately greater.

We may sum up this statement of the facts by saying that the existing diversion has already worked grave injury to Canadian interests, and that the possibilities of future injury are greater still if Congress should ever give its consent to the proposed ship canal from Chicago to the Mississippi. That brings us to the issues of law involved. Is it a case of *damnum sine injuria,* or is it an example of an international wrong engaging the liability of the delinquent State? In order to answer this question we must consider both treaty stipulations and general rules of law.

The long controversy between Great Britain and the United States over the navigation of the St. Lawrence was closed by the Treaty of Washington in 1871, when Great Britain conceded the American claim to equality of treatment on the St. Lawrence in return for similar privileges upon the Porcupine, Yukon, and Stikine Rivers, as well as upon Lake Michigan. This treaty does not deal specifically with the problem of diversion, but it has some bearing on the broader aspects of the question. Since the early years of her independence the United States had strenuously contended for the principle of equal rights upon international rivers, claiming that an upper riparian State had a natural right of passage through the national waters of the lower. In the treaty each side reserved its own point of view in principle, but the American claim was conceded in the particular instance. Perhaps we cannot always demand consistency in international argument, but it may be pointed out that a State which claims equal rights of navigation in the lower waterway can scarcely claim at the same time the right to injure or to destroy it by unilateral action.

More directly bearing upon the controversy is the Boundary Waters Treaty of 1909. The main purpose of this agreement was the establishment of an "International Joint Commission" charged with the duty of advising and reporting upon all questions arising out of the use of boundary waters. These reports have no arbitral value, and each Government retains its liberty of action. Much

[4] *U.S. Senate Document,* No. 183 of 1927, p. 57.

useful work has been done by the Commission in the last twenty years, but neither Government has as yet asked for a report upon the problem created by the Chicago diversion.

Some of the provisions of the treaty may be summarized. The preliminary article defines boundary waters as those "along which the international boundary . . . passes . . . but not including tributary waters," so that Lake Michigan does not fall within the definition. Article 1 provides for freedom of navigation in the usual form, and Article 2 reserves to each party the exclusive jurisdiction over tributary waters in its own territory, but with the important proviso 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 diversions 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." None of the other articles bear directly upon the present question, since they all deal with the construction of works in "boundary waters," as previously defined, except for a provision (Article 4) that "waters flowing across the boundary shall not be polluted."

So far as the Chicago diversion is concerned, the effect of the treaty is clearly to preserve the existing rights of the parties under the general rules of international law. On the American side it seems to have been thought that this constituted an implied sanction of the diversion. In explaining the treaty to the Foreign Relations Committee of the Senate, Mr. Root said:

> I have very carefully guarded the terms of this treaty in order not to include Lake Michigan and in order not to involve Senator Cullom's constituents in the drainage canal in the treaty in any way.

Again, after referring to the provision in Article 5 which conceded to Canada the larger share of power at Niagara, he went on to say:

> Then there is this further fact why we could not object to this 36,000 provision on the Canadian side (i.e. at Niagara). We are now taking 10,000 cubic feet a second out of Lake Michigan at Chicago, and I refused to permit them to say anything in the treaty about it. . . . They consented to leave out of the treaty any reference to the drainage canal, and we are now taking 10,000 cubic feet per second for the drainage canal which really comes out of the lake system.[5]

This suggestion necessitates a passing reference to Article 5, which permits Canada to use 36,000 c.s.f. and the United States

[5] These passages were cited by Mr. Hughes in his report to the Supreme Court in 1927.

20,000 c.s.f. for power generation at Niagara. The purpose of this limitation is stated to be "so that the level of Lake Erie and the flow of the stream (i.e. the beauty of the Falls) shall not be appreciably affected." By far the greater volume of water flows on the Canadian side, and the article goes on to say that the parties desire to protect the existing investments in power plants. Since all the water taken at Niagara is returned to the river, the diversion does not affect navigation lower down, and there is not a word in the treaty to indicate that the apportionment was to be regarded in any way as a compensation for the water taken out at Chicago.[6]

We may now pass to consider the question under the general rules of international law. The standard authors, all of whom discuss at length the question of navigation rights on international rivers, scarcely seem to have realized the importance of the problem of economic exploitation, but a short paragraph in Oppenheim (or rather Dr. McNair)[7] indicates that the writer would have supported the Canadian contention in the present controversy. Fauchille contents himself with recording a number of treaty stipulations from 1843 to 1923, but does not give us his own views upon the general problem.[8] Taken as a whole, these treaties proceed upon the principle that works executed in the territory of A require the consent of B if they injuriously affect his interests. In general they indicate a tendency to incorporate this principle in the conventional law of nations, particularly as one of them is a general international agreement.[9]

Of judicial decisions the one most directly in point is a judgment rendered by the German Staatsgerichtshof on June 18, 1927, in a controversy between Württemberg and Baden concerning the use of the upper waters of the Danube.[10] Between the towns of Hüfingen in Baden and Fridengen in Württemberg the bed of the river is porous, with the result that a large quantity of water percolates away underground and ultimately emerges to form the source of the little river Aach, which flows into Lake Constance. By reason of this phenomenon, known as the *Donauversinkung*, the

[6] The contention that the treaty authorized the diversion was denied by counsel for the Federal Government in argument before the Supreme Court; 266 U.S. 420.

[7] *International Law*, 4th ed. (McNair), Vol. I, p. 381.

[8] *Traité de Droit International Public*, sec. 525[22]. In discussing national rivers (sec. 435) Fauchille maintains that the right of industrial exploitation should be subordinated to the common right of navigation where it exists. Presumably this theory would apply *a fortiori* to international rivers.

[9] The Geneva Hydro-Electric Convention of 1923; *League of Nations Treaty Series*, Vol. XXXVI, p. 76.

[10] *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. CXVI, App.

water of the Aach is rich in mineral solutions and is of special value for industrial purposes. Of this Baden gets the benefit. On the other hand, Württemberg suffers by the loss of water, the river being frequently dried up altogether for considerable periods. The disputes arose out of the fact that each State had constructed works designed to protect its own interests, Baden seeking to increase and Württemberg to diminish the percolation of the river. Each party now sought an injunction to restrain the activities of the other.

Since the constitutional and municipal law of Germany afforded no solution, the Court was compelled to rest its judgment upon international law. It was pointed out that modern international law restricts the application of the doctrine of territorial sovereignty by the principle *sic utere tuo ut alienum non laedas*. Broadly speaking, neither State is entitled to make artificial alterations in the flow of the river which cause injury to the other. The application of this principle must be governed by the circumstances of each particular case, and the conflicting interest must be weighed equitably against each other. One must consider, not only the absolute injury caused by the neighbouring State, but also the relation of the advantage gained by one to the injury caused to the other.

In the result Baden was ordered to refrain from causing such increase in the percolation as was due (i) to certain works at Immendingen, and (ii) to the accumulation of sand and flint in the bed of the river along the shore near Möhringen, but it was held that she was not bound to undertake responsibility for the permanent improvement of the river bed. Württemberg was similarly ordered to refrain from obstructing the percolation by certain works which she had constructed.

The English lawyer will notice a certain resemblance between this judgment and the decision of the Privy Council in *Stollmeyer* v. *Trinidad Lake Petroleum Co.*[11] In each case the dominant principle is the right of each riparian owner to enjoy the stream in its natural form, but this principle is qualified by applying the doctrine of practical convenience and the equitable apportionment of benefits.

To the same effect is the opinion of the United States Supreme Court in the case *Kansas* v. *Colorado*,[12] where Kansas complained that Colorado was using up the waters of the Arkansas River for irrigation purposes. Kansas put her claim upon the basis of strict riparian rights under the English common law, an argument which, if conceded in full, would in effect have given her the right to say

[11] [1918] A.C. 485.
[12] (1902) 185 U.S. 125, and (1907) 205 U.S. 46.

that a large part of Colorado should be a permanent desert. Colorado claimed that the principle of territorial sovereignty gave her the right to do as she pleased with all water on her own territory, and this claim, had it succeeded, would have similarly given her the right to dry up the whole valley of the river in the lower State.

In the result, after an elaborate review of a great mass of evidence, the bill was dismissed upon the broad ground that the facts did not point to an unreasonable or inequitable division of the general benefits of the river. The reasons are summarized in a few sentences at the end of a lengthy judgment.[13]

> We are of the opinion that the appropriation of the water of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the State of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their occupation and cultivation, when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits, and may rightfully call for relief against the action of Colorado. . . . The decree will dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river. Each party will pay its own costs.

The Chicago drainage canal had itself come before the Supreme Court a year earlier in the case of *Missouri* v. *Illinois*,[14] in which Missouri claimed that the Mississippi River was being seriously polluted by the discharge of sewage from Chicago. Here, again, the bill was dismissed upon the facts, the evidence showing that the pollution was more than counterbalanced by the introduction of a large volume of pure water from Lake Michigan. But the Court stated clearly that it would have been prepared to grant an injunction if the evidence had disclosed a case of nuisance, and

[13] 206 U.S. 117.
[14] (1906) 202 U.S. 598.

overruled a demurrer by which the defendant State alleged that the case presented no justiciable controversy.[15]

Diplomatic history throws but little light upon the problem. Its emergence into the field of practical politics is comparatively modern, and most of the possible cases of conflict appear to have been foreseen and provided for by treaty. But a passing reference should be made to the prolonged controversy between the United States and Mexico concerning the use of the Rio Grande for irrigation purposes,[16] which was settled in 1906 by a treaty providing for apportionment of the water according to a detailed scheme, with a proviso that no principle of law was deemed to be thereby admitted. The case is of interest chiefly by reason of the official opinion of the United States Attorney-General, Mr. Harmon, that the doctrine of sovereignty involved the absolute right of a State to do as it pleased with the waters in its own territory. This opinion was given in 1895, and the dispute appears to be the first one in which the issue was clearly raised as a question of international law. Such an extreme assertion of sovereign rights would certainly not command the support of competent authority at the present day.

The correspondence between Canada and the United States from 1912 to 1927 has now been published as a Canadian Blue Book, No. 227 of 1928. It contains no discussion of the legal question, except for the repeated assertions of the Canadian Government that the diversion is contrary to international law. In a note dated July 26, 1926, Mr. Kellogg says that he is "not prepared to admit" the legal contention put forward by Canada, but no further indication is given of the American attitude towards this problem. In the last note of the series (Oct. 17, 1927) he again refuses to discuss the legal issue. Perhaps the most interesting item in this correspondence is the reasoned opinion of the Secretary of War, Mr. Stimson, in refusing the Chicago application for an enlarged permit in 1913 (pp. 7-13). The final paragraph is short enough to be quoted:

> In short, after a careful consideration of all the facts presented, I have reached the following conclusions:
>
> First, that the diversion of 10,000 cubic feet per second from Lake Michigan, as applied for in this petition, would substantially interfere with the navigable capacity of the navigable waters in the Great Lakes and their connecting rivers.
>
> Second, that that being so, it would not be appropriate for me without

[15] 200 U.S. 496.

[16] Moore's *Digest*, Vol. I, p. 653; Hyde, *International Law*, Vol. I, p. 313. The injunction granted by the Supreme Court in 1899 was based wholly on reasons of municipal law; *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U.S. 690.

express congressional sanction to permit such a diversion, however clearly demanded by the local interests of the sanitation of Chicago.

Third, that on the facts here presented no such case of local permanent necessity is made evident.

Fourth, that the provisions of the Canadian treaty for a settlement by joint commission of "Questions or matters of difference" between the United States and Canada offer a further reason why no administrative officer should authorize a further diversion of water, manifestly so injurious to Canada, against Canadian protest.

It is not easy to understand why any of these reasons were any less valid in 1925, when Mr. Stimson's successor, Mr. Weeks, granted his permit for an increased diversion immediately after obtaining an injunction from the Supreme Court to prevent it.

Perhaps it is necessary to add at this point that the conflict of interests presented by this controversy does not entirely follow international lines. The interests of New York and several other eastern States are identical with those of Canada, and these States have consistently opposed the policy of Chicago. At the present moment we are awaiting the judgment of the Supreme Court in a complicated case in which six States appear as plaintiffs and seven as defendants. In October, 1927, the Court referred the issues of fact and law involved for report by Mr. Hughes as "special master," and he has since reported to the effect that the action of the Secretary of War in granting the permit is within his constitutional powers. No question of international law is involved in this opinion, and no action has as yet been taken upon it by the Supreme Court.[17]

Upon the whole problem authority is not very plentiful, but its tendency is unmistakable. Substantially it consists of the treaty provisions, now fairly numerous, and the German and American decisions cited above. The analogy of private law, in so far as it is relevant, points in the same direction. Practical convenience and common sense unite with authority to condemn the doctrine laid down by Mr. Harmon in 1895, that territorial sovereignty permits a State to do as it likes with waters in its own territory irrespective of any injury it may cause to its neighbours. On the other hand, it is clear that international practice will not support the extreme assertion of riparian rights that is possible under the strict rules of private law. The Roman and English rules upon the subject were developed long before the scientific exploitation of water systems could be foreseen, and even within the limits of municipal law their

[17] See Garner in *American Journal of International Law* (1928), Vol. XXII. p. 837.

strict application can work serious injustice.[18] In practice it has been necessary to override them by public rights of expropriation in order to provide for such communal necessities as water supply and drainage. The same principle of the paramount right of the larger community holds good also in international law, but international agreement must take the place of the superior common authority which is lacking in international relations. Any particular river system must be viewed as a whole and its benefits distributed in equitable proportions among the riparian States. This is the principle underlying the German and American decisions, and it is also the dominant note of the treaty provisions. It means in effect that no State is bound to submit to injury inflicted by the unilateral action of another, while on the other hand a State would be guilty of an unfriendly act in refusing its assent to a reasonable scheme of common exploitation. The circumstances of every individual case will vary greatly, and probably it is not possible for international law to lay down rules in any more precise detail.

How can we apply these principles to the Chicago case? Obviously Canada cannot claim the right to cause an epidemic in the city by the immediate closing down of the existing drainage system, nor has any such demand been made by the Canadian Government. On the other hand, it is clear that the United States cannot plead necessity in defence of the action taken by Chicago, a plea which the Federal Government itself overruled in 1913. If Chicago has preferred to use Lake Michigan as a flushing tank rather than install a modern system of sewage disposal, it has done so merely to save the pockets of its taxpayers, and this motive can certainly not justify the infliction of a permanent injury upon navigation and other interests in Canada. Still less can the plea of necessity excuse the diversion of the water of the St. Lawrence system to another river basin for the purposes of hydro-electric power and navigation.

Assuming the fact of material injury in the present or in the future it seems beyond question that Canada has suffered an undoubted wrong in that the diversion has been carried out at every stage without any adequate attempt to consult her or to consider her interests. So far as the Chicago authorities are concerned, they have entirely failed to observe the principle of the paramount interest of the whole community—what the Supreme Court Calls "the equitable apportionment of benefits." At page 16 of the published correspondence we find the following extract from a report by the President of the Sanitary District: "I am of the opinion that the

[18] See *Bradford Corporation* v. *Pickles*, [1895] A.C. 587.

presumption that our water supply is to be limited to 10,000 c.s.f. . . . is gratuitous and mischievous and should not be voiced by the officials of this District. I believe that we should have the volume requisite to our needs as they appear and are justified." The principle of equitable apportionment contains the essence of the international law upon the matter, and its application in particular cases can only be determined by voluntary agreement.

Even the Federal Government must share the responsibility for neglecting to obtain the consent of Canada by the usual methods. In 1912 the Canadian Government was informed of the intention of the Secretary of War to hear arguments upon the Chicago application and consented, though without waiving its right to diplomatic remonstrance, to be represented at the hearing. Although on this occasion the permit was refused, we must regard it as an error of judgment that the Canadian Government consented to appear in the rôle of suppliant before an administrative officer of the United States. When served with notice of the renewed application in 1925 the Canadian Government took the more correct course of ignoring the proceedings in the Secretary's office. At no stage did the United States Government attempt to obtain the diplomatic consent of Canada to the proposed diversion, and its responsibility is enhanced by the fact that the Secretary of War proceeded to sanction an increased diversion immediately after obtaining a decision that it was illegal under his own municipal law.

To show how the matter ought to have been handled we may refer to the Lake of the Woods Treaty of 1925. This treaty was based upon a report of the International Joint Commission, and it sets up an international board of engineers charged with the duty of regulating the levels of the lake in the common interests of both countries. By Article 11 it is provided that "No diversion shall henceforth be made of any waters from the Lake of the Woods watershed to any other watershed except by authority of the United States or of the Dominion of Canada within their respective territories and with the approval of the International Joint Commission." Had the Chicago problem been approached in this spirit at the outset the present trouble need never have arisen.

In the later notes of the published correspondence Mr. Kellogg holds out the hope that the diversion may be reduced to the original figure of 4,167 c.s.f. by 1935, if Chicago fully complies with the conditions imposed by the permit of 1925, and he expresses his confidence that the city authorities are sincere in their intention to install a modern system of sewage disposal. Those who have

studied the relations between the Sanitary District and the Federal Government may be pardoned if they are slow to share this optimism, but in any case it does not affect the law of the matter. Even if the injury ceases in 1935, compensation will still be due for the damage inflicted in the intervening years.

From the Canadian point of view the undisputed facts present a clear case of an international wrong involving the legal responsibility of the United States. If the present article appears one-sided I can only plead that I have not had the advantage of studying the opposing case. The Canadian Government has repeatedly and clearly expressed its views of the law, but Mr. Kellogg has twice declined to state the legal reasons which can be advanced to justify the action of the United States It is to be hoped that his successor may be less reticent.

Postscript (May 16, 1929).

Since this article was written I learn from an article by Mr. J. Q. Dealey in the *American Journal of International Law* (April 1929, p. 310) that the Supreme Court has now granted the injunction sought for in the inter-state suit to which I referred, but has given time for compliance with its decree. The report of the case is not yet available in England, but the decision appears to rest mainly upon grounds of municipal law. Mr. Dealey adds:

> The court also held, without devoting much argument to it, that a diversion of water in one State, which causes a lowering of water-levels in other States and therefore does substantial injury to their interests, is illegal unless it be for the purpose of maintaining or improving navigation. In so far as the legal principles governing the States of the American Union may be applied internationally, this does much to sustain the argument of Canada, as this will be described in the following pages of this article, that the Chicago diversion was begun and is being carried on in violation of Canadian rights under international law.

Mr. Dealey's article is mainly concerned with the history of the negotiations between the various parties concerned, but I gather that he endorses the legal doctrine laid down by Mr. Harmon in the Rio Grande case in 1895. He also maintains that the apportionment at Niagara should be regarded as a *quid pro quo* for the Chicago diversion. I cannot share his view on either point, but it is possible that his arguments may be adopted by the United States Government, should the occasion arise.

The recent Anglo-Egyptian agreement upon the control of the waters of the Nile affords yet another example of a treaty which

embodies the principle of international law for which I have contended.

Supplementary Note (20th February, 1930).

The Editor has done me the honour of suggesting that this article may be of interest to the readers of the CANADIAN BAR REVIEW. Since the diplomatic situation has not, so far as I know, developed further during the past year, it seems best to reprint the article in its original form, but I should like to add a few further notes.

The article was written under pressure, and I had overlooked a passage in Fauchille (vol. I, part II, p. 451), as well as the resolutions adopted on the report of von Bar by the Institut de Droit International at its Madrid meeting in 1911. These texts, as well as a great deal of other material which further research has revealed, strongly support the position taken by Canada in the Chicago controversy.

The case of *Wisconsin* v. *Illinois*, referred to in the postscript, is now reported in 278 U.S. 399. The decision of the United States Supreme Court in *Wyoming* v. *Colorado* (1922), 259 U.S. 419, is also of interest in that it again repudiates the doctrine that the territorial sovereign can deal with the water as he pleases. The same principle appears in a decision given in 1878 by the Swiss Bundesgerichts in a dispute between the cantons of Aargau and Zurich (*Entscheidungen des Schweizerischen Bundesgerichts*, iv. 34).

The earliest diplomatic controversy upon the problem appears to be the dispute between Belgium and Holland which arose out of the diversion of water from the Meuse to supply the Campine Canal in Belgium. Holland took the standpoint now adopted by Canada, and the dispute was settled in 1863 by a treaty which limited the volume of water that Belgium might take for the canal. More recently the digging of new canals in both countries has revived the controversy.

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