Duplicate 37

INTERNATIONAL JOINT COMMISSION

FACTUM

Filed on behalf of the Canadian Pacific Railway Company, upon the hearing for the consideration of Article VI. of the Treaty relating to Boundary Waters and Questions along the Boundary between Canada and the United States, signed January 11th, 1909.

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It is submitted by the Canadian Pacific Railway Company that upon the proper construction of Article VI the waters to be divided between Canada and the United States are the waters of the entire watersheds of the St. Mary and the Milk Rivers and their tributaries in Alberta, Saskatchewan and Montana.

Two contentions were advanced in argument before the International Joint Commission by Counsel for the United States and by the representative of certain private interests in Montana.

These contentions may be shortly stated as follows:

1. That the waters to be measured and apportioned pursuant to Article VI are only those waters of the St. Mary and Milk Rivers and their tributaries which naturally flow across the International Boundary.

2. That a construction of Article VI which would apportion between the High Contracting Parties all of the waters of the two rivers and of all their tribu-

taries is unwarranted, because a treaty dealing with waters which do not naturally flow across the International Boundary, is not within the treaty-making power of the President and Senate of the United States.

These contentions, it is confidently submitted, find no support in the language of the Treaty itself and the following considerations show the true meaning of the Article to be that suggested in the opening paragraph:

I.

Article VI of the treaty reads in part as follows:

> "The High Contracting Parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power, and the water thereof shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each."

In the language used there is no exception of any part of either of said rivers, nor of any tributary of either of said rivers. The language is general and includes the whole of both rivers and all tributaries. It would seem that to avoid any difference of opinion as to the waters within the agreement, the words, "in the State of Montana and the Provinces of Alberta and Saskatchewan" were parenthetically inserted. Both streams and all their tributaries are in Montana, Alberta and Saskatchewan, and unless it was intended to include in the agreement all of the waters of both streams and their tributaries, no reason can be assigned for making the reference to all of the terri-

tory in which such streams and their tributaries are located. Again, it was so easy for the High Contracting Parties to have said that the agreement should apply only to the waters flowing across the boundary, if such was the intention, that the assumption that the language used was intended to be so limited is too violent an assumption to be accepted, especially in view of the learned and distinguished representatives of both countries who had to do with formulating the treaty.

Applying the rules for the construction of treaties, recognized and adopted by the Supreme Court of the United States, it is not permissible to make any exception not contained in the Article.

In the case entitled The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven, et al, 8 Wheat. 464, the Supreme Court of the United States, in discussing the construction of a treaty involved, said:

> "The terms in which this article is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction."

In the case of The Amiable Isabella, Munos. Claimant, 6 Wheat. 1, the Supreme Court of the United States, in an opinion by Mr. Justice Story, said:

> "In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend, or add

to any treaty, by inserting any ~~claim~~ clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind."

In the case of De Geofroy v. Riggs, 133 U.S. 258, the same court said:

> "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."

* * * *

The article declares that the St. Mary and Milk rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan) are to be treated as one stream for the purposes of irrigation and power. This clearly shows that the High Contracting Parties had in mind the entire water sheds of the two streams and their tributaries, and intended to place the territory in each country within said water sheds on an equality, so far as the use of

water for irrigation and the creation of power from said streams and their tributaries is concerned. Unless such was the intention there was no occasion for regarding the two streams and their tributaries as one stream.

In 1906 the case of Kansas v. Colorado, 206 U.S. 46, was decided by the Supreme Court of the United States. That case involved the respective rights of Kansas and Colorado to the water of the Arkansas river, which river flows from Colorado into Kansas. Colorado asserted the right to divert and use all of the water of the stream in that state and claimed that the right of Kansas was limited to the water of the stream which had its origin from springs and other sources in that state. In the opinion the court said:

> "Equally untenable is the contention of Colorado that there are really two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and, from springs and branches, starting a new stream to flow onward through Kansas and Oklahoma towards the Gulf of Mexico."

The court also said:

> "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri v. Illinois, supra, the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a

matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas river was a stream running through the territory which now composes these two states. Arid lands abound in Colorado. Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purposes of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which might and ought to be tried and determined. If the two states were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court."

The court considered the drainage area of the Arkansas river in Colorado which was found to be 26,000 square miles and the drainage area of said river in Kansas which was found to be 20,000 square miles. The court further considered the population, acreage of land cultivated, crop production in the drainage area in each of the states, also the quantity of water flowing in the stream, the amount of the appropriations therefrom, the storage capacity of reservoirs which had been constructed, and other matters, all for the purpose of determining whether that equality of right to the water of the stream which was regarded as the cardinal rule to be followed in determining the rights of said states to the water was being recognized and observed. In concluding the opinion the court said:

> "Summing up our conclusions, we are of the opinion that the contention of Colorado of two streams cannot be sustained; that the appropriation of the waters 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, its corporations and citizens, in appropriating the waters of the Arkansas for irrigation purposes.
>
> The decree which, therefore, will be entered, will be one dismissing the petition of the intervener, without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas river. The decree will also 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."

It is fair to presume that the High Contracting Parties, or at least the representatives of the United States, had in mind, when the treaty was made, the case of Kansas v. Colorado, and sought to incorporate in the treaty an agreement with reference to the waters of St. Mary and Milk rivers and their tributaries, consistent with the principles of law controlling the rights of two states to the water of a stream flowing through both, recognized by the Supreme Court of the United tates. In securing the equality of right of each state, which is the basis of that opinion, the Supreme Court of the United States

found it necessary to deny the claim of Colorado that the stream should be treated as two rivers and that each state was entitled to the water which had its source and origin in that state, and to take into consideration all of the water which had its source and origin in both states and thereby treat the stream and its tributaries throughout as one stream.

The one stream provision, contained in the treaty under consideration, undoubtedly was suggested by the opinion in the case of Kansas v. Colorado and was incorporated in the treaty with a view to making the treaty apply to all of the waters of St. Mary and Milk rivers and all of their tributaries for the same reason that the Supreme Court of the United States took into consideration all of the water of the Arkansas river and its tributaries in determining the equality of right of each of the states of Kansas and Colorado to such water.

* * * *

The treaty declares that "in making such equal apportionment more than half may be taken from one river and less than half from the other by either country so as to afford a more beneficial use to each." This provision is wholly inconsistent with the idea that only the water flowing across the boundary should be considered. In determining the amount of water which should be awarded to each country from each stream, in order to afford "a more beneficial use to each" country, it is absolutely necessary to take into consideration the amount of land within the drainage area of both streams and their tributaries in each country and also all of the water within the water sheds of the two streams, whether flowing in the main streams or their tributaries, available for the reclamation and irrigation of such lands. In other words, it is necessary to consider all of the matters considered by the Supreme Court of the United

States in the Kansas-Colorado case. Unless this is done the agents of the High Contracting Parties, upon whom the duty of making the measurement and apportionment rests, cannot make an apportionment "so as to afford a more beneficial use to each" country. Let us assume, that there is a large acreage of land in Montana which can be successfully irrigated from the water of Milk river and its tributaries which has its source and origin wholly within Montana, and which can also be irrigated by water flowing across the boundary, and that there is a large area of land in Canada which can only be irrigated by the water of Milk river which naturally flows into the United States. Under such circumstances, in making the apportionment so as to afford a more beneficial use to each country, the quantity of water in Milk river, which should be apportioned to the United States, can only be determined by considering and taking into account the land in Montana which can be irrigated by the water which has its origin in Montana, and which, by reason of natural conditions, must be apportioned to the United States. So that, the more beneficial use clause argues conclusively that all of the water of the two streams and their tributaries was in contemplation of the High Contracting Parties in making the agreement.

* * * *

If the law of Montana relating to the right to the use of water, is considered, a good reason for making the agreement apply to all of the water of the two streams and all of the water in all of the tributaries of the streams is apparent.

According to that law the right to the use of water is acquired by what is termed an appropriation, and section 4845 of the Revised Codes of Montana of 1907, declares that "As between appropriators the one first in time is first in right."

In the opinion in the case of City of Helena v. Rogan, 26 Mont. 452-469, which involved the right to take by the exercise of the power of eminent domain certain rights to the use of water acquired by appropriation from a stream which flowed through two counties, the court in the opinion said:

> "Each person owning a valid water right in Lewis and Clarke county is the owner of a certain incorporeal hereditament, to wit, the right to have the water flow in Prickly Pear creek from the head thereof, and from the head of each tributary thereof above his place of diversion, in sufficient quantity to the head of his ditch or place of diversion, and to have it of such quality as will meet his needs as protected by his water right: that is, he owns an easement in the stream and its tributaries above his point of diversion. He also has the right to require appropriators subordinate to him and his water right, who have appropriated and who take water from the stream or its tributaries below his point of diversion, to forbear using such water when such use will deprive appropriators prior to him, downstream, of the use of water to which they are entitled; otherwise he might be required to forbear the use of water to which he is entitled in order to supply the appropriator first in order of priority. This interest in the stream and its tributaries is an easement, and is part of and incident to the water right, to wit, the property sought to be condemned. Therefore we see that the property sought to be condemned extends over part of the two counties mentioned.

In the case of Beaverhead Canal Co. v. Dillon etc. Co., et al, 34 Mont. 135, the court said:

> "The prior appropriator of a particular quantity of water from a stream is entitled to

> the use of that water, or so much thereof as naturally flows in the stream, unimpaired and unaffected by any subsequent changes which, in the course of nature, may have been wrought. To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snowfall, or by springs or seepage which directly contribute."

Section 4852 of the Revised Codes of Montana of 1907 provides:

> "In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such action, and the court may in one judgment settle the relative priorities and rights of all the parties to such action. When damages are claimed for the wrongful diversion of water in any such action, the same may be assessed and apportioned by the jury in their verdicts, and judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves."

It follows that in Montana and in all of the states in the arid region of the west where the doctrine of the right to the use of water by appropriation is recognized, an appropriator acquires a right and interest in all of the water of the stream flowing to his point of diversion. His right is measured and controlled, not only by the amount of other prior appropriations but by the quantity of water in the main

stream and the tributaries thereof, above his point of diversion, and also by the quantity of water in the main stream and tributaries below his point of diversion and above the point of diversion of any other appropriator below him on the main stream. This is necessarily true in view of the principle by which the first in time is the first in right.

In view of these considerations, in making an agreement for the division and apportionment of the waters of Milk and St. Mary rivers and their tributaries, it was just as essential that the agreement should apply to all of the water as that a decree or judgment in a case prosecuted in accordance with the provision of section 4852 of the Revised Codes of Montana should adjudicate the rights to all of the water of a stream and its tributaries.

In the Kansas-Colorado case the fact that the laws of those states recognized the right to the use of water by appropriation was adverted to and was one of the factors which induced the court to deny the claim of Colorado that the Arkansas River should be treated as two streams and to hold that each state had an interest in all of the water of the stream.

* * * *

Article II of the treaty provides:

> "Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions 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 inter-

> ference 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 hereto."

If a person in Montana should divert the water of Milk river which flows into Canada so as to interfere with the appropriations on the stream in Canada the appropriators in Canada could maintain an action in the courts of Montana and would have the same rights as they would have had if their appropriations had been made on the Montana side of the line. In other words the rights between parties in Canada and in the United States to the waters flowing into Canada are the same as the rights between parties in the United States. The same is true between parties in Canada and parties in the United States as to waters which flow from Canada into the United States.

It thus appears that there is to be no boundary division of the streams but that the entire streams were the subject of the agreement. In other words, the view of the Supreme Court of the United States in the Kansas-Colorado case, that the rights of the people of those states should be determined, irrespective of the state boundary and as though the stream was wholly within one state, was accepted and applied.

In the case of Bean v. Morris, 221 U.S. 485, decided May 29, 1911, and which involved a stream of water flowing from Montana into Wyoming and the

right of an appropriator in Montana as against appropriators from the stream in Wyoming, the court in the opinion said:

> "It was admitted at the argument that, but for the fact that the prior appropriation was in one state, Wyoming, and the interference in another, Montana, the decree would be right, so far as the main and important question is concerned. * * * So we pass at once to the question of private water rights as between users in different states.
>
> We know no reason to doubt, and we assume, that, subject to such rights as the lower state might be decided by this court to have, and to vested private rights, if any; protected by the Constitution, the state of Montana has full legislative power over Sage Creek while it flows within that state. Kansas v. Colorado, 206 U.S. 46, 93-95, 51 L. ed. 956, 973, 974, 27 Sup. Ct. Rep. 655. Therefore, subject to the same qualifications, we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to creat easements, or such private rights and obligations as are in dispute, across their common boundary line. Missouri v. Illinois, 200 U.S. 496, 521, 50 L. ed. 572, 579, 26 Sup. Ct. Rep. 268; Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258, 260, 54 L. ed. 1032, 1037, 31 Sup. Ct. Rep. 11. But with regard to such rights as came into question in the older states, we believe that it always was assumed, in the absence of legislation to the contrary, that the states were willing to ignore boundaries, and allowed the same rights to be acquired from outside the state that could be acquired from within. Mannville Co. v. Worcester, 138 Mass. 89, 52 Am. Rep. 261; Thayer v. Brooks, 17 Ohio 489, 49 Am.

Dec. 474; Slack v. Walcott, 3 Mason, 508, 516. Fed. Cas. No. 12,932; Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 538, Fed. Cas. No. 13,-446; Rundle v. Delaware & R. Canal Co., 1 Wall. Jr. 275, Fed. Cas. No. 12,139, 14 How. 80, 14 L. ed. 335; Foot v. Edwards, 3 Blatchf. 310, Fed. Cas. No. 4,908. See Wooster v. Great Falls Mfg. Co., 39 Me. 246, 253; Armendiaz v. Stillman, 54 Tex. 623; State v. Lord, 16 N.H. 357; Howard v. Ingersoll, 17 Ala. 780, 793. There is even stronger reason for the same assumption here. Montana cannot be presumed to be intent on suicide, and there are as many if not more cases in which it would lose as there are in which it would gain, if it invoked a trial of strength with its neighbors. In this very instance, as has been said, the Big Horn, after it has received the waters of Sage Creek, flows back into that state. But this is the least consideration. The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory (Rev. Stat. ss. 2339, 2340 U.S. Comp. Stat. 1901 p. 1437; act of March 3, 1877, chap. 107, 19 Stat. at L. 377. U.S. Comp. Stat. 1901, p. 1548), and is recognized by both states now. Before the state lines were drawn, of course, the principle prevailed between the lands that were destined to be thus artificially divided. Indeed, Morris had made his appropriation before either state was admitted to the Union. The only reasonable presumption is that the states, upon their incorporation, continued the system that had prevailed theretofore, and made no changes other than those necessarily implied or expressed. See

Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Smith v. Denniff, 24 Mont. 20, 50 L.R.A. 741, 81 Am. St. Rep. 408, 60 Pac. 398.

It follows from what we have said that it is unnecessary to consider what limits there may be to the powers of an upper state, if it should seek to do all that it could, The grounds upon which such limits would stand are referred to in Rickey Land & Cattle Co. v. Miller & Lux, 218 U.S. 258, 261, 54 L. ed. 1032, 1038, 31 Sup. Ct. Rep. 11. So it is unnecessary to consider whether Morris is not protected by the Constitution; for it seems superfluous to fall back upon the citadel until some attack drives him to that retreat."

The provisions of article VI to the effect that the two rivers and their tributaries should be regarded as one stream; that an equal apportionment of the water should be made; and that in making the apportionment more than one half the water might be taken from one river and less than half from the other by each country, so as to afford a more beneficial use to each, when considered in connection with article II, plainly discloses that the High Contracting Parties intended to make an agreement in accord with the principles controlling the rights to water of a river flowing from one state into another, as recognized and declared in the Kansas-Colorado case and the case of Bean v. Morris, supra.

II.

Construing the treaty as providing for an equal apportionment of all of the water of both streams and all the tributaries does not make the treaty operate as a cession of any water which does not flow across the boundary. No authority is granted to either country to construct canals or other means of

diversion in the other country, and consequently no part of the water which has its origin and source in one country and does not flow across the boundary, can be awarded to or taken by the other country. The water in Milk river and its tributaries which does not flow across the boundary must, in making the apportionment, be awarded to the United States, and the water of St. Mary river and its tributaries, which does not flow across the boundary, must, in making the aportionment, be awarded to Canada. This, however, does not prevent an equal apportionment of all of the water of the two streams and all their tributaries. To illustrate, let it be assumed that there are 5,000 cubic feet per second of water in Milk river and its tributaries which does not flow across the boundary, and that there are 6,000 cubic feet per second of water in St. Mary river and its tributaries which does not flow across the boundary, and that there are 5,000 cubic feet per second in the two streams and their tributaries flowing across the boundary. In making the equal apportionment provided for, the United States should be awarded 3,000 cubic feet per second and Canada 2,000 cubic feet per second of the water crossing the boundary. All of the waters of the two streams and their tributaries are taken into consideration in determining the amount of water to which each country is entitled, but in making the apportionment only the water which flows across the boundary can be divided. In other words, while all of the waters of the two streams and their tributaries are referred to as the basis for the apportionment, a division of only the waters which flow across the boundary can be made. It is, of course, wholly immaterial whether the water in the United States, which does not flow across the boundary, is apportioned to the United States, or is considered as belonging to the United States and is merely taken into consideration in making the apportionment of the waters which flow

across the boundary. In either event, the amount of water flowing across the boundary, which would be apportioned to each country, would be the same.

The case may be likened to an island or a tract of land of unknown area belonging to two countries where the boundary is in dispute. The fixing of the boundary is, of course, within the treaty-making power. Let us assume, that the dispute with reference to such boundary covers an area only a mile or two in width, while the entire width of the island or tract of land is twenty-five miles. No one would question but that in fixing the boundary the two countries might agree that it should be so fixed that each country would obtain an equal amount of the island or tract of land. Such an agreement would require a survey to be made of the entire tract of land involved and a locating of the boundary so that one half of the land would be on each side. Under such circumstances, it could not be reasonably contended that there was any cession of territory by either country, notwithstanding the entire island or tract of land was taken into consideration in fixing the boundary.

It follows that the inquiry whether the cession by the United States to Canada of water in Milk river or the tributaries thereof, which does not flow across the boundary, is within the treaty-making power of the United States, is not involved and is wholly immaterial.

* * * *

Where the language of a treaty is ambiguous and there is a doubt regarding the meaning and a fair opportunity for a difference of opinion, it may be permissible, in construing the treaty, to consider the extent of the treaty-making power provided one construction contended for would make the treaty invalid as in excess of the limit of that power. But as

the language of this treaty is plain and as there is no room for construction, a consideration of the treaty-making power by the International Joint Commission would, it is respectfully submitted, be improper and presumptuous. It is the duty of the International Joint Commission to accept the treaty as written and it has no jurisdiction or authority to review the action of the President and Senate of the United States in making the treaty, which action necessarily involved a decision that the treaty is within the treaty-making power. The International Joint Commission is a creature of this treaty, with only the power of performing the ministerial function of directing the measurement and apportionment of the water.

In the case of Clark v. Braden, 16 How. (U.S.) 635, Mr. Chief Justice Taney, in delivering the opinion of the Supreme Court of the United States, said:

> "The treaty is therefore a law made by the proper authority and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered."

In the case of Kinkead v. United States, 150 U.S. 483, the question of the power and jurisdiction of the commission provided for the treaty of March 30, 1867,

by which Alaska was ceded to the United States, was involved. It appeared that the commissioners appointed by the United States were authorized to receive a formal transfer of the ceded property. Whether or not a certain building was within the terms of the cession became a matter of controversy. In considering the powers of the commissioners to determine this controversy the court said:

> "The truth is, the powers of the commissioners were simply ministerial, and the making of inventories simply a matter of convenience, and a method of determining prima facie what property the government should appropriate to itself for the time being, and what should be left to the individual proprietors. To treat this inventory as binding either upon the government or individuals would be to acknowledge that the commissioners were invested with judicial powers to determine the title to property. Clearly they had no power to depart from the plain language of the treaty, and no power to bind the government by an assumption that government property was private property, and thus settle questions of title or ownership. The weight that has been given to contemporaneous construction has never gone to the extent of holding that the title or ownership of property may be changed by the action of executive officers appointed to carry a statute or treaty into effect."

* * * *

If, however, the treaty had ceded to Canada the water in Milk river and its tributaries which does not flow across the boundary, such treaty would be clearly within the treaty-making power of the United States.

In section 2 of article II of the Constitution of the United States it is declared that "He (the president) shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur."

In article VI it is declared "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Mr. Charles Henry Butler, the leading authority in the United States on the treaty-making power, in his two volume work on the subject, says on page 4 et seq:

> "The author fully appreciates that any attempt to extend Federal jurisdiction to matters which are not clearly expressed in the Constitution carries with it the ***onus probandi*** to its fullest extent. He is, however, so firmly convinced that the government of the United States is completely endowed with all the essential attributes of nationality and sovereignty in regard to National affairs that he feels fully justified in expressing the following opinion:
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> First: That the treaty-making power of the United States, as vested in the Central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that Government as an attribute of sovereignty, and that it extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the

several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner whatever and vested that power exclusively in, and expressly delegated it to, the Federal Government.

Second: That this power exists in, and can be exercised by, the National Government, whenever foreign relations of any kind are established with any other sovereign power, in regulating by treaty the use of property belonging to States or the citizens thereof, such as canals, railroads, fisheries, public lands, mining claims, etc.; in regulating the descent or possession of property within the otherwise exclusive jurisdiction of States; in surrendering citizens and inhabitants of States to foreign powers for punishment of crimes committed outside of the jurisdiction of the United States or of any State or territory thereof; in fact, that the power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiation between sovereign states, is practically unlimited, and that in no case is the sanction, aid or consent of any State necessary to validate the treaty or to enforce its provisions.

Third: That the power to legislate in regard to all matters affected by treaty stipulations and relations is co-extensive with the treaty-making power, and that acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with State laws or provisions of State constitutions.

Fourth: That all provisions in State statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto, must give way to the provisions of the treaty, or act of Congress based on and enforcing the same, even if such provisions relate to matters wholly within State jurisdiction."

In the opinion in the case of the People v. Gerke, et al., 5 Cal. 381, it is said:

"The language, which grants the power to make treaties, contains no words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the Federal Government would be subverted. This principle of construction as applied, not only in reference to the constitution of the United States, but particularly in the relation of all the rest of it to the treaty-making grant, was recognized both by Mr. Jefferson and John Adams,—two leaders of opposite schools of construction. See Jefferson's Works, vol. 3, p. 135; and vol. 6, p. 560.

It may, therefore, be assumed that, aside from the limitations and prohibitions of the Constitution upon the powers of the Federal Government, 'the power of treaty was given, without restraining it to particular objects, in as plenipotentiary a form as held by any sovereign in any other society.' This principle, as broadly as I have deemed proper to lay it down, results from the form and necessities of our Government, as elicited by a general view of the Federal compact. Before the compact, the States had the power of

treaty making as potentially as any power on earth—it extended to every subject whatever. By the compact, they expressly granted it to the Federal Government in general terms, and prohibited it to themselves.

The General Government must, therefore, hold it as fully as the States held who granted it, with the exceptions which necessarily flow from a proper construction of the other powers granted, and those prohibited by the Constitution. The only questions, then, which can arise in the consideration of the validity of a treaty, are: First, Is it a proper subject of treaty according to international law or the usage and practice of civilized nations? Second, Is it prohibited by any of the limitations in the Constitution?

Taking for illustration the present subject of treaty, no one will deny that, to the commercial States of the Union, and indeed to the citizens of any State who are engaged in foreign commerce, a stipulation to remove the disability of aliens to hold property, is of paramount importance, or, at any rate, it may be so considered by the States, and demanded as a part of their commercial polity.

Now, as by the compact the States are absolutely prohibited from making treaties, if the General Government has not the power, then we must admit a lameness and incompleteness in our whole system, which renders us inferior to any other enlightened nation, in the power and ability to anvance the prosperity of the people we govern.

Mr. Calhoun, in his discourse on the Constitution and Government of the United States, has given to this power a full consideration, and I

cannot doubt that the view which I have taken, is sustained by his reasoning. According to his opinion, the following may be classed as the limitations on the treaty-making power: First, It is limited strictly to questions inter alios—'all such clearly appertain to it.' Second, 'By all the provisions of the Constitution which inhibit certain acts from being done by the Government or any of its departments.' Third, 'By such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary.' Fourth, 'It can enter into no stipulation calculated to change the character of the Government, or to do that which can only be done by the Constitution making power; or which is inconsistent with the nature and structure of the Government or the objects for which it was formed.'

Having stated these as the only limitations, the author adds, 'Within these limits all questions which may arise between us and other powers, be the subject matter what it may, fall within the limits of the treaty-making power, and may be adjusted by it.'

One of the arguments at the bar against the extent of this power of treaty, is, that it permits the Federal Government to control the internal policy of the States, and in the present case, to alter materially the statutes of distribution."

The case is cited approvingly by the Supreme Court of the United States in Hauenstein v. Lynham, 100 U.S. 483, and by the same court in the case of DeGeofroy v. Riggs, 133 U.S. 258, in which it was decided that a treaty securing to the citizens of another country the right to purchase, inherit and hold property in this country, controls as against the laws or constitution of a state.

In the opinion in the case of Hauenstein v. Lynham, the court said:

> "It must always be borne in mind that the constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity."

In the opinion in the case of DeGeofroy v. Riggs, Mr. Justice Field said:

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525, 541 (29: 264, 270). But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. Ware v. Hylton, 3 U.S. 3 Dall. 199 (1: 568); Chirac v. Chirac, 15 U.S. 2 Wheat. 259 (4: 234); Hauenstein v. Lynham, 100 U.S. 483 (25: 628); Droit d'Aubaine, 8 Ops. Atty-Gen. 417; People v. Gerke, 5 Cal. 381."

It will be noted that in thequotation just made Justice Field expresses the opinion that the treaty-making power does not authorize the cession of any portion of the territory of a state without its consent.

This statement is commented upon by Mr. Butler in his treatise on the treaty-making power, vol. 2, p. 239, as follows:

> "It may be presumptuous on the part of the author of this volume to criticize such an eminent jurist as Stephen J. Field, but as his suggestion in regard to the limitation affecting the cession of any portion of the territory of a State is in direct contradiction with the opinion expressed by no less an authority than Chancellor Kent, the author feels that he is at liberty to choose between the two, and that he can exercise the choice without being disrespectful to either. In expressing his own opinion, therefore, that the treaty-making power extends even beyond the limits assigned by Mr. Justice Field it is not for the purpose of criticizing a practically obiter remark in the opinion of that Justice (for no such cession was under consideration) but to express his affirmative approval of the position taken by Chancellor Kent, that, undoubtedly, the United States has power to make a treaty ceding territory of a State, even without the consent of that State, although it might be an exercise of wise political discretion to obtain the consent of the State before doing so."

Whatever may be said regarding the power of the United States to cede to another country territory within a state without its consent, the power of the United States to make treaties respecting the waters within a state has been too long exercised and recognized to be now questioned.

In the opinion in the case of McCready v. Commonwealth of Virginia, 94 U.S. 391, Mr. Chief Justice Waite said:

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. Pollard v. Hagan, 3 How. 212; Smith v. Md. 18 How. 74 (59 U.S. XV, 270); Mumford v. Wardwell, 6 Wall., 436 (73 U.S. XVIII, 761); Weber v. Comrs., 18 Wall. 66 (85 U.S. XXI, 802). In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty. Martin v. Waddell, 16 Pet., 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters, and their beds to be used by its People as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the People of their common property. The right which the People of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

Notwithstanding the ownership by a state of the beds of all tide-waters within its jurisdiction and of the tide-waters themselves and the fish therein, the right to regulate fisheries therein by treaty has been exercised on many occasions. (A discussion of the treaty-making power with reference to this matter,

can be found in Butler on Treaty-making Power of the United States, vol. 2, p. 445, et seq., and in an address by him to the Anglo-American Joint High Commission in October, 1898, published on pages 445 et seq. of said work.)

Furthermore, if a state is the owner of water in a stream flowing into another country and can divert and use all of the water without violating any principle of international law, as decided by Mr. Harmon, when attorney-general of the United States (vol. 21 of the Ops. of Atty.-General of the United States, p. 281), it, of course, follows that this treaty is invalid as a whole so far as it applies to the water of St. Mary and Milk rivers and their tributaries. The Supreme Court of the United States, however, in the case of Kansas v. Colorado recognized the right of the United States to make a treaty with reference to the use of waters flowing into another country. In the opinion it is said, in speaking of the controversy relating to the waters of the Arkansas river flowing from Colorado into Kansas:

> "If the two states were absolutely independent nations it would be settled by treaty or by force."

It is well known that the United States made the treaty with Mexico with reference to the waters of the Rio Grande river by which Mexico was awarded a certain amount of the water which has its source and origin in the United States.

In the case of Winter v. the United States, 207 U.S. 564, it was decided that in the treaty with the Fort Belknap Indians, made in 1888, there was reserved for the Indians a certain amount of the water of Milk river and that this treaty or agreement was not destroyed by the Act of Congress admitting Montana into the Union as a state.

It is submitted, therefore, that upon principle, as well as upon precedent long established, the United States could by treaty cede to Canada the right to take and use water from a tributary of Milk river wholly within the State of Montana, which has not been appropriated.

* * * *

As the treaty, when regarded as applying to all of the waters in the two rivers and their tributaries, does not conflict with or violate any provision of the constitution of the United States, whether or not it was within the treaty-making power, is a political question, that has been decided by the president and the senate of the United States in making the treaty, and there is no power or authority in the International Joint Commission to review that decision.

U.S. v. Reynes, 9 How. (U.S.) 127;
Clark v. Braden, 16 How. (U.S.) 635.

It is the duty of the International Joint Commission to direct the measurement and apportionment of the water. The performance of this ministerial duty necessarily involves a consideration and determination of the water to be measured and apportioned. As said by the Supreme Court of the United States in the case of Kinkead v. United States, 150 U. S. 463, the commission has no power "to depart from the plain language of the treaty."

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