Docket 57

INTERNATIONAL JOINT COMMISSION

In the Matter of the Measurement and Apportionment of the Water of the St. Mary and Milk Rivers and their Tributaries, as required by Article VI. of the Treaty between Great Britain and the United States, relating to such water and other subjects.

REPLY BRIEF AND ARGUMENT FILED ON BEHALF OF THE CANADIAN PACIFIC RAILWAY COMPANY IN SUPPORT OF PROPOSITION THAT ARTICLE VI. RELATES TO ALL OF THE WATERS OF THE TWO RIVERS AND THEIR TRIBUTARIES.

International Joint Commission

In the Matter of the Measurement and Apportionment of the Water of the St. Mary and Milk Rivers and their Tributaries, as required by Article VI. of the Treaty between Great Britain and the United States, relating to Boundary Waters and questions arising along the boundary between Canada and the United States.

REPLY BRIEF AND ARGUMENT FILED ON BEHALF OF THE CANADIAN PACIFIC RAILWAY COMPANY IN SUPPORT OF PROPOSITION THAT ARTICLE VI. RELATES TO ALL OF THE WATERS OF THE TWO RIVERS AND THEIR TRIBUTARIES.

Contentions with Reference to Article VI.

It is contended in behalf of the United States that the language of Article VI. is ambiguous in that it does not clearly appear therefrom whether the parties to the treaty intended to make an agreement embracing all of the water of the two rivers and their tributaries, or only the water flowing across the boundary and that because the language is thus ambiguous it is appropriate and necessary to consider the controversy and negotiations resulting in the making of the treaty from which it is argued that the

intention of the parties was to make an agreement relating only to the water flowing from one country to the other. On the other hand, it is contended in behalf of Canada that there is no ambiguity, by reason of which it is improper to look for the intention of the parties beyond the language of the article, but that if the controversy and prior negotiations, which resulted in the making of the treaty, are considered they will disclose that the parties intended to embrace within the agreement made all of the water of the two streams and their tributaries.

Law Applicable

It is a principle of law, firmly established, that the intention of the parties to a treaty or other contract must be ascertained from the language employed, unless the language is ambiguous, in which event prior negotiations, or other matters, extrinsic of the writing, may be considered.

> Board of Lake County Commissioners v. Rollins, 130 U.S. 662.
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> "We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

> To get at the thought or meaning expressed in a statute, a contract or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, whcih involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it (Citing Cases). So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

While the principle was applied in the case just cited to a constitution, it is also applicable to a treaty, as appears from the opinion of the same court 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, in which it is 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."

It follows, from the rule thus announced, that there is no room for construction, unless there is an ambiguity and that the ambiguity must exist by virtue of the language used and cannot be created by reference to matters extrinsic of the writing.

Hamilton v. Rathbone, 175 U.S. 414.

In the opinion in the case just cited the court said:

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve,* but not to *create,* an ambiguity."

Matters Extrinsic Treaty Used to Create Ambiguity

As the "province of construction lies wholly within the domain of ambiguity," as said by the Supreme Court of the United States, it becomes necessary for the learned counsel for the United States, to find an ambiguity. In view of this necessity they proceed to create an ambiguity by considering the controversy and negotiations resulting in the treaty. This is evident from the statement of Senator Walsh in his argument in Detroit as follows:

> "It (Article VI.) refers only to those tributaries, to my mind, that are both in the State of Montana and in one of the provinces mentioned; and that, as I shall argue later, by reason of the whole course of the negotiations which obtained between the parties."

Judge King in his argument speaks of a "latent ambiguity." He says: "It is, then, incumbent upon us to establish, as I take it, that there is in this treaty such a *latent ambiguity* or such ambiguity as entitles the treaty to construction at the hands of the Commission."

Now, it is recognized by all authorities that a latent ambiguity, as distinguished from a patent ambiguity, is one which exists by reason of matters extrinsic of the instrument or writing being considered. A latent ambiguity, as defined by Lord Bacon, "is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." (Bac. Law Tracts, Reg. 23, p. 99).

We believe the conclusion is fairly deducible, from the arguments of both Judge King and Senator Walsh, that they would not have discovered any ambiguity in Article VI., except for their pre-conceived notion, based upon the consideration by them of the controversy and negotiations that the parties intended to contract with reference to only that part of the water in the two streams and their tributaries flowing across the boundary, and their desire to have the treaty so construed. In other words, their understanding of the controversy and previous negotiations, and their wish to have the treaty interpreted to conform to this understanding, created in their minds the ambiguity which they claim exists.

Claim that Word "Tributaries" Ambiguous

In searching for an ambiguity they discovered that the parenthetical clause in the article is of doubtful meaning. It is argued by Senator Walsh that this clause is ambiguous in that it does not clearly express what was intended to be included by the use of the word "tributaries." He argues that by reason of the word "and" following the word "Montana" in the parenthetical clause the meaning of the word "tributaries" is limited by such clause to those tributaries only which cross the boundary and are situated in Montana and Alberta and in Montana and Saskatchewan. The position of the Senator is stated by him in his argument as follows:

> "I think that qualifying clause must be deemed to read, 'those rivers and their tributaries in the State of Montana and the Province of Alberta and in the State of Montana and the Province of Saskatchewan.'
>
> "If it is to be regarded as a phrase of identification rather than limitation, it would seem as though the proper language would be 'the St. Mary and Milk Rivers and their tributaries in the State of Montana, the Province of Alberta and the Province of Saskatchewan.' "

It is difficult to understand from Judge King's argument just what reason he assigns for regarding the parenthetical clause as a limitation of the meaning of the word "tributaries." It is, however, apparent that the doubt in his mind, as to the thought expressed by the parenthetical clause, is based upon his assumption that the treaty involves only the water flowing across the boundary.

Discussion of Alleged Ambiguity

In the first place, if the parties had meant to limit the article to the water flowing across the boundary, this could have been done by merely inserting the words "flowing across the boundary" after the word "thereof," thereby making the article read 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 purpose of irrigation and power, and the waters thereof ***flowing across the boundary*** shall be apportioned equally between the two countries," etc.

It was so easy to have so written the treaty that it is impossible to believe that the exception, contend-

ed for by the learned counsel of the United States, was within the intention of the parties.

Senator Walsh says that if the clause is to be regarded as one of identification rather than one of limitation, "it would seem as though the proper language would be "the St. Mary and Milk rivers and their tributaries in the State of Montana and the Province of Alberta and the Province of Saskatchewan." It follows, of course, that the Senator would regard the clause as one of identification if, as a matter of fact, all of the tributaries were in Montana and Alberta, and the clause had read, "the St. Mary and Milk rivers and their tributaries in the State of Montana and Province of Alberta." Judge King says that while the article "referred to those different provinces in Canada, it referred to them and clearly intended to refer to them as a whole,—as one territory." He, therefore, treats this clause the same as though it had read "in the State of Montana and Canada," and, consequently, takes issue with the Senator as to the language which should have been used to make the parenthetical clause a clause of identification instead of one of limitation. We respectfully submit that Judge King's understanding that the two provinces were regarded as one territory, in writing the parenthetical clause, is clearly correct, and that the parties formulating the treaty, having so regarded them and having used the word "Provinces," could not have expressed the thought that all of the tributaries should be included without the use of the conjunction "and" after the word "Montana," or in any different language from that found in the article. If all three of the sections of country referred to had been provinces, the clause would have been written "in the Provinces of Montana, Alberta and Saskatchewan," or if the three had been states it would have been written "in the States of Montana, Alberta and Saskatchewan." In such event there apparently would be no question in the mind of Senator Walsh, but that

the clause should be regarded as one of identification and considered as explaining the word "tributaries" to mean all tributaries.

If the parenthetical clause limits the word "tributaries" to those situated both in Montana and one or the other of the Provinces, in order to conform the clause to the Senator's view, it is necessary to change the word "and" between Alberta and Saskatchewan, to the word"or." Such a change would undoubtedly give some support to the Senator's argument. If, however, we regard the reference to the Provinces of Alberta and Saskatchewan as descriptive of a single section of country or territory, the use of the word "and" between Alberta and Saskatchewan is appropriate and necessary to make the clause grammatical, and, at the same time, explain the word "tributaries" to mean the tributaries in both Provinces and in Montana.

If we accept the Senator's contention, that the parenthetical clause limits the word "tributaries" to those in Montana and Alberta and in Montana and Saskatchewan, then all tributaries located wholly on one side of the boundary or the other are excluded. That this was not the intention is conceded by the Senator. He says that the tributaries on one side or the other of the boundary, the waters of which cross the boundary through the main streams, are included, and that the tributaries wholly in one country or the other, the waters from which do not flow over the boundary, are excluded, because the article embraces all the water and only the water flowing from one country to the other.

It is, therefore, necessary, in order to make the parenthetical clause express the intention of the parties with reference to the water of the tributaries, as the learned Senator conceives it to have been, that the same should be deemed to read *"in the State of Montana and Province of Alberta, and in the State of*

Montana and Province of Saskatchewan, and in said state or either of said provinces, the waters of which flow over the boundary through the main streams." In other words, it is necessary to interpolate into the article such language as will make the article embrace, in addition to those tributaries crossing the boundary, those other tributaries which do not cross the boundary, but the water from which flows over the boundary. This is not permissible under any rule governing the construction or interpretation of treaties or other contracts.

The argument of the Senator amounts to this: The article relates only to the water flowing over the boundary, because the word "tributaries," when construed in connection with the parenthetical clause, is confined to tributaries crossing the boundary, and because the article only embraces water flowing over the boundary the word "tributaries" cannot include those tributaries, the water from which does not flow over the boundary. This is what might be termed reasoning in a circle.

According to the argument of the Senator, there are three classes of tributaries, viz.: (1), those crossing the boundary; (2), those wholly in one country or the other, the water from which flows over the boundary through the main streams; and (3), those wholly in one country or the other, the water from which does not flow over the boundary. The parenthetical clause, as understood by the Senator, limits the word "tributaries" to those crossing the boundary. This, however, the Senator says was not the intention, but it was the intention to include tributaries which does not cross the boundary, the waters from which flow over the boundary. As the parenthetical clause as so construed does not evidence such intention, but on the contrary evidences the intention that the word "tributaries" should apply only to those

crossing the boundary, it is necessary to find the intention that tributaries wholly in one country or the other, the water from which flows over the boundary, should be included, and that the third class of tributaries,—those wholly in one country or the other, the water from which does not flow across the boundary, —should be excluded, from matters extrinsic of the treaty. So that, in the final analysis the ambiguity, which it is claimed exists, is created by the assumption that the article relates to all of the water and only the water flowing from one country to the other, which assumption is not supported by the parenthetical clause and is not authorized by the language of the article but is based upon the controversy and negotiations resulting in the treaty.

Immediate Prior Negotiations Show Intention to Include all Water.

If, however, reference is had to the immediate prior negotiations, it will be found that they conclusively demonstrate that it was the intention of the parties that the word "tributaries" should embrace all tributaries and that the parenthetical clause was inserted for the very purpose of avoiding any misunderstanding or any claim of ambiguity.

On January 9, 1909, two days before the treaty was signed, Mr. Gibbons, who was then in Ottawa, telegraphed Mr. Anderson, who was in New York City, as follows:

> "Home Authorities suggest the following changes, all of which I think you can concur in to bring treaty within constitution: * * *
>
> "Article 6: Say 'Provinces of Alberta and Saskatchewan'; change name of commission, leaving out the words 'of the United States and Canada'; instead of 'other rivers' say 'the St. Marys River.'" (Rec. p. 97).

On the following day Mr. Anderson telegraphed Mr. Gibbons "have accepted all amendments," etc. (Rec. p. 99).

It thus appears that Mr. Anderson and Mr. Gibbons had formulated a draft of a treaty for the consideration of the parties for whom they had been negotiating. Mr. Gibbons submitted the draft to those he termed "Home Authorities," and the amendments to Article VI., referred to in his telegram, were apparently suggested by the Home Authorities. These amendments were accepted on behalf of the United States and the treaty was signed. If, then, we eliminate the amendments which were proposed and incorporated we will have the draft of the treaty as agreed upon by Mr. Anderson and Mr. Gibbons, which reads as follows:

> "The High Contracting Parties agree that the St. Mary and Milk Rivers and their tributaries (in the State of Montana and Province of Alberta) are to be treated as one stream for the purposes of irrigation and power, and the waters thereof shall be apportioned equally between the two countries," etc.

If the purpose of the parenthetical clause was to limit the word "tributaries" to those crossing the boundary, reference would have been made to the tributaries in Montana and Saskatchewan, as well as the tributaries in Montana and Alberta. It cannot be assumed that the parties had overlooked the tributaries situated both in Montana and Saskatchewan. In view of these considerations, the only purpose which can reasonably be assigned for the amendment of the parenthetical clause, by inserting the words "Provinces of Alberta and Saskatchewan," in lieu of the words "Province of Alberta," was to prevent any claim that the tributaries in Saskatchewan are not included and avoid any possibility of a construction

which would exclude any of the water of the two river systems.

Again, in what is designated as Mr. Gibbons' draft of article VI., found on page 96 of the record, the words "in the State of Montana and Province of Alberta" are included in parenthesis and appear after the word "rivers" and before the words "and their tributaries." By no possible construction can this parenthetical clause in any way limit or qualify the word "tributaries," and its only purpose could have been to identify the rivers named. As this was Mr. Gibbons' intention when he prepared the draft, which Mr. Wyvell states was submitted between January 1 and January 9, 1909, while the treaty was signed on January 11, 1909, it cannot be that he had changed his mind when he proposed the amendment on January 9 and intended thereby to limit the application of the article to the water flowing over the boundary.

Referring to the draft of article VI., prepared by Mr. Newell (Rec. p. 93), we find that it was proposed by him to limit the article to the water flowing across the boundary. When this draft is compared with Mr. Gibbons' draft, the dissimilarity between the two proposals is strikingly presented. The proposal of Mr. Gibbons included all the water of the two streams and their tributaries, while the proposal of Mr. Newell was confined to the water flowing from one country to the other. The draft by Mr. Anderson (Rec. p. 97), while referring to the two rivers and their tributaries, provided that the one-half to which each country should be entitled should be "determined at the points of storage and diversion and at the boundary by measurements made jointly by the properly constituted reclamation and irrigation officers on either side of the boundary." According to Senator Walsh's understanding of this draft, the diversion and storage referred to had reference to the

storage and diversion of water which would otherwise flow across the boundary. This may be correct, but, if so there can be no question but that Mr. Anderson abandoned his contention that the article should apply only to the water flowing from one country to the other, in view of the draft which he and Mr. Gibbons finally agreed upon and which was submitted by Mr. Gibbons to what he termed the "Home Authorities," and by Mr. Anderson to those for whom he was negotiating.

The language of the article, as finally adopted, is so materially different from the language of the draft prepared by Mr. Newell, and from the language of the draft prepared by Mr. Anderson, and in such harmony with the draft prepared by Mr. Gibbons that it cannot reasonably be supposed that the parties intended to accept the proposal of Mr. Newell and Mr. Anderson and reject the proposal of Mr. Gibbons in formulating the article as it now appears in the treaty.

We, therefore, submit that the negotiations immediately preceding the signing of the treaty explain fully the purpose of the parenthetical clause and show conclusively that it was not the intention by the insertion of same to place any limitation upon the general and accepted meaning of the word "tributaries."

Diplomatic Correspondence and Writings Relating to Controversy and Negotiations

If, moreover, resort is had to what is termed the diplomatic correspondence, consisting of the written evidence relating to the controversy and negotiations, we confidently assert that such evidence forces the conclusion that all of the water of the two streams and their tributaries was intended by those who conducted the negotiations to be embraced within the treaty made.

As early as 1903, Secretary of State John Hay, in a letter to the British Ambassador, in stating the position of the United States, said:

> "It is proposed to deal with this matter in strict conformity with the laws concerning the rights to the use of water as recognized by the courts of the arid region, both on this side of the international boundary and on the other. The principle may be stated in the language of section 8 of the Reclamation Act of June 17, 1902, (32 Stat. 388):
>
> " 'That the right to use of water shall be appurtenant to the lands irrigated and beneficial use shall be the basis, the measure, and limit of the right.' * * *
>
> Inasmuch as the position taken by the Reclamation Service in this matter in regard to the rights claimed in Canada appears to be precisely that which is taken in the case of similar rights within the United States, both being treated according to the recognized rules of law governing the diversion and appropriation of water in arid regions, Mr. Hitchcock regrets that he can see no reason for a change in the position taken by this Government in the matter."

This statement of Secretary Hay clearly evidences his intention that the controversy should be settled by eliminating the international boundary, treating the rights of the people of the two countries to the water as equal, and apportioning the water on the basis of beneficial use, which, of necessity, required that all of the water of the two streams and their tributaries should be taken into consideration in making such an apportionment.

In 1907 Secretary Root prepared and submitted what he termed "suggestions for a basis of a treaty for the equitable apportionment" of the waters of the

St. Mary and Milk Rivers flowing across the international boundary. These suggestions, when considered in the light of the decision of the Supreme Court of the United States in the Kansas-Colorado case, which had been decided on May 13, 1907, thirty-three days before the communication of Secretary Root containing the suggestions is dated, will, we believe, make clear the fact that Secretary Root concurred in the judgment of his predecessor, Secretary Hay, as to the basis for a settlement of the controversy, and intended, by the suggestions offered, to apply the principle announced in the Kansas-Colorado case.

The Kansas-Colorado case was commenced in the Supreme Court of the United States and was first considered on a demurrer to the bill challenging the jurisdiction of the court. The court in an opinion by Chief Justice Fuller said:

> "The state of Colorado contends that, as a sovereign and independent state, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that, as the sources of the Arkansas river are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the state of Kansas the same position that foreign states occupy toward each other, although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent states in their relations to each other; that by the law of

nations the primary and absolute right of a state is self-preservation; that the improvement of her revenues, arts, articulture, and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary lines; that the moral obligations of a state to observe the demands of comity cannot be made the subject of controversy between states; and that only those controversies are justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining state; and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld." (182 U.S. 142—on p. 845).

The court further said:

"The state of Kansas appeals to the rule of the common law that owners of the lands on the banks of a river are entitled to the continual flow of the stream; and while she concedes that this rule has been modified in the Western States so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that that modification has not gone so far as to justify the destruction of the rights of other states and their inhabitants altogether; and that the acts of Congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common-law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado cannot absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for

reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.

"Sitting, as it were, as an international, as well as a domestic, tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand; and we are unwilling in this case to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas river in Kansas; whether what is described in the bill as the 'underflow' is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms, and corporations in Colorado must be made parties hereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the watershed or the drainage area of the Arkansas river; the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof.

"The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence." (on page 846).

After answer had been filed and proof taken the case again came before the court for final hearing.

206 U.S. p. 80. The court first considered the question of jurisdiction. The court said:

> "Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas river, as that flow existed before any human interference therewith, or Colorado the right to appropriate the water of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States."

The court then considers the question whether Congress has authority or power to regulate the matter by legislation and decides that it has no power over interstate streams which are not navigable except as it may legislate with reference to the reclamation of arid lands, which legislation must be subject to the laws of the state. Reference is made to section 8 of the Act of June 17, 1902, reading as follows:

> "Section 8. That nothing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state, or of the Federal Government, or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof; Provided, That the right to the use of the water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

The court further said:

"It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state. * * *

"Now the question arises between two states, one recognizing generally the common-law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither state can legislate for, or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two states, or because neither state can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two states. Indeed, the disagreement, coupled with its effect upon a stream passing through the two states, makes a matter for investigation and determination by this court. * * *

As Congress cannot make compacts between the states, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force, under our system of government, is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several

instances the justice of the dispute. Nor is our jusisdiction ousted, even if, because Kansas and Colorado are states sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International Law is no alien in this tribunal. In The Paquete Habana, 175 U.S. 677, 700, 4 L. ed. 320, 328, 20 Sup. Ct. Rep. 290, 299, Mr. Justice Gray declared:

"'International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.'

"And in delivering the opinion in the demurrer in this case Chief Justice Fuller said (p. 146 L. ed. p. 846, Sup. Ct. p. 560):

"'Sitting, as it were, as an international, as well as a domestic, tribunal, we apply Federal Law, state law, and international law, as the exigencies of the particular case may demand.'

"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 decisions of this court. * * * *

"We must consider the effect of what has been done upon the conditions in the respective states, and so adjust the dispute *upon the basis of equality of rights* as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream. * * * *

"As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered between herself and a sister state. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation. * * * *

"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."

We, therefore, find that in this case the foundation upon which the decision rests is equality of right to the waters by each of the two states. The claim of Colorado of absolute ownership and right to divert all of the water naturally flowing to the boundary was repudiated. On the other hand, the claim of Kansas to have the natural flow of the water subject only to the common law of riparian rights was denied. As a matter of fact, the boundary was obliterated, the stream, with its tributaries, were treated as one stream and the right of each state to the water on the basis of beneficial use was declared.

When the court declared equality of right of each state to the water as a controlling principle, this equality of right was to be determined on the basis of beneficial use, which required a comparison of the benefits and advantages of the use of the water by the people of one state with the detriment and disadvantage to the people of the other state of a deprivation of the water. The court recognized that there was no established rule or principle of international law or of interstate law applicable to the situation presented, and promulgated a rule which was intended to conform to equity and justice. No reason can be assigned why this rule, applicable to a stream flowing from one state to another, is not also an equitable and just rule when applied to streams flowing across the boundary between Canada and the United States.

Referring now to Secretary Root's suggestion, we find it clearly stated that his purpose was to settle the controversy "relating to the use of the waters of the St. Mary river and Milk river" flowing across the boundary. There is no question but that the controversy was confined to the water flowing from one country to the other, and neither is there any question but that these are the only waters to be divided, or which can be divided. Having these waters in mind Secretary Root proceeded to outline "a basis of a

treaty for the equitable apportionment" of such waters by proposing certain stipulations and agreements, the first and second of which read as follows:

> "1. That for the purposes of this agreement the St. Mary river and the Milk River and their tributaries, which are now separate and independent river systems, shall be treated as though they were the waterways of a single drainage system.
>
> "2. That the water available for irrigation from *these two river systems* throughout the period from March 1 to September 30 of each year, both dates included, shall be apportioned to each of the two countries from day to day in equal amounts." (Rec. p. 65).

Having provided that "the St. Mary and Milk rivers and their tributaries" should "be treated as though they were the waterways of a single drainage system," and that the water therefrom "available for irrigation" should "be apportioned to each of the two countries from day to day in equal amounts," he then, by stipulation 5 undertook to define the share of the water which, without interference, would flow over the boundary to which each country should be entitled in order to effect an equal apportionment of all of the water available for irrigation from the two river systems.

Taking stipulation 5 by itself there is ample basis for a contention that the suggestions made had reference only to the water flowing across the boundary. When, however, stipulation 5 is read and considered in connection with stipulations 9 and 10, which have to do with the water supplying "the canal systems taking water from the lower Milk river in Montana," and the water supplying "the canal taking water from St. Mary river in Canada," and in connection with stipulation 2, no one can, with any degree of reason,

assert that the proposed stipulations are confined to the water flowing over the boundary. This is especially true in view of the express requirement of stipulations 9 and 10 that the measurement of the water therein referred to should be made at the intakes of said canals, which water includes not only the water flowing from one country to the other, but all of the water of any tributaries entering the streams above the intakes of said canals, and all other water draining into the main streams from the entire drainage systems above said intakes.

By virtue of stipulation 9 the share of the United States to the water of Milk river and its tributaries flowing over the boundary was made dependent upon the amount of water required to satisfy the appropriations through what was termed "the canal systems taking water from the lower Milk river in Montana." In other words, if the water originating in Montana should not be sufficient, with one-half of the water of Milk river and its tributaries flowing across the boundary, to satisfy such appropriations, then the United States should be entitled to such amount of the water flowing into the United States in excess of one-half as should be required to meet such appropriations. By virtue of stipulation 10 the share of Canada to the water of St. Mary river and its tributaries flowing from the United States was dependent upon the amount of water required to satisfy the appropriation through the canal in Canada taking water from the St. Mary river. If one-half of the flow from the United States, together with the water originating in Canada above the intake of said canal, was not sufficient to satisfy such appropriation then Canada should be entitled to such amount in excess of one-half as should be required to meet such appropriation.

It thus clearly appears that while only the water flowing over the boundary was to be divided this

division was to be made on a basis that would insure to each country an equal apportionment of all of the waters of the two streams and their tributaries, as required by stipulation 2.

That all of the water of the two streams and their tributaries was in the mind of the secretary in preparing the suggestions, and that he intended an equal apportionment of all of such water, is also apparent from the fact that he first speaks of the water flowing across the boundary as the subject of the controversy and then in the proposed stipulations refers generally to the "Milk river and the St. Mary river and their tributaries," to "these two river systems," to "the entire Milk river system" and to "the entire St. Mary river system." These expressions, when considered in connection with stipulations 9 and 10, and the provisions of stipulation 2 that "the water available for irrigation from these two river systems * * * shall be apportioned to each of the two countries from day to day in equal amounts," lead irresistibly to the conclusion that the proposed treaty embraced all of the water.

When Secretary Root's proposal is viewed in the light of the decision in the Kansas-Colorado case, it will be seen that he endeavored to formulate the basis for a treaty which would conform to the principle of equality of right measured and limited by beneficial use adopted in that case, which principle necessitates a consideration and apportionment of all of the water of the two streams and their tributaries.

As the suggestions presented by Secretary Root were prepared by the officers of the reclamation or irrigation service of the United States, they evidence not only the intention of Secretary Root, but also the intention of such officers that the Treaty should provide for an equal apportionment of all of the water of the two river systems and make a division of the

water flowing across the boundary so as to effect such apportionment.

In concluding this branch of the discussion, we respectfully submit that Secretaries Hay and Root contemplated a treaty which should make an apportionment of all of the waters of the two streams and their tributaries and that it was their view, concurred in by Mr. Gibbons, which was finally accepted and embodied in the treaty made.

Argument That Construing the Treaty to Embrace All Water Would Operate Unjustly Against the United States.

Judge King in his argument contends that regarding the treaty as applying to all of the waters of the two streams and their tributaries, will make the same operate to the disadvantage of the United States. While we do not admit this contention, a sufficient answer to same is found in the opinion of the Supreme Court of the United States in the case of The Amiable Isabella, Munos. Claimant, 6 Wheat. 1, wherein it is 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, 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 brief and argument heretofore presented in behalf of the Canadian Pacific Railway Company, we have fully discussed the contention made at the original hearing in St. Paul, but which seems now to have been abandoned, that if Article VI. provides for the apportionment of all of the waters of the two streams and their tributaries, it is in excess of the treaty-making power. In that brief and argument we also considered other matters which we respectfully urge establish the proposition that the article relates to and provides for the measurement and apportionment of all of the water.

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