

SESSIONAL PAPER No. 230

THE WEBSTER-ASHBURTON TREATY.

The main contention of the Canadian Government and of the other interests 1842 is an absolute bar to the construction of the proposed weir in the South Sault channel. This Article is in the following terms:—

“VII. It is further agreed that the channels in the river St. Lawrence on both sides of the Long Sault islands (Croil island was then called “Upper Long Sault island”) and of Barnhart island, the channels in the river Detroit on both sides of the island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the river St. Clair, with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties.”

On the one hand it was contended that this provision absolutely prevents the construction of the proposed submerged weir, and on the other hand, while there was some discussion as to the exact meaning and effect of Article VII, the chief contention was that this Article has been superseded by the provisions concerning navigation of the Waterways Treaty, and is no longer a binding enactment.

It is needless to say that the legal problem thus submitted to the Commission is an extremely important one. Without any idea whatever of reflecting in any way on the arguments of counsel, it may be added that this question should be most exhaustively argued, and that before deciding it the Commission should have ample time for full consideration.

Neither of these requirements has been available to the Commission. The arguments of counsel—probably on account of the very magnitude of the interests involved and the many questions of fact arising out of the testimony, and also on account of the number of those who desired to be heard—did not deal exhaustively with this question. Giving the fullest possible effect to Article VII of the Webster-Ashburton Treaty, it still remains to determine whether the words “free and open” have the absolute and unqualified meaning contended for. These words are used in other provisions of the same treaty, especially in Article II where it is stated that “all water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon river, as now actually used, shall be *free and open* to the use of the citizens and subjects of both countries.” These words are also used in the Treaty of Washington of 1871, as to the navigation of the river St. Lawrence, from the forty-fifth parallel of north latitude to the sea, and this is a treaty right secured by the citizens of the United States. Would it be contended that the closing of the Rainy river at International falls for power development, which has been done, or of the St. Lawrence river at the Lachine rapids, where an alternative navigation route exists via the Lachine canal, would be a violation of treaty rights? And there is a further question whether the High Contracting Parties, in 1909, did or did not, by the navigation provisions of the Waterways Treaty, extending to all navigable boundary waters as defined by this treaty,—and the South Sault channel is a navigable boundary water—supersede or at least absorb the prior and incomplete navigation provisions of the Webster-Ashburton Treaty of 1842? It is sufficient to simply state these questions to show that they should not be hastily decided, but only after the most exhaustive argument and the fullest consideration.

Time was wanting for this full consideration. A sudden emergency had arisen. The Secretary of War of the United States, in a letter dated August 23, 1918, and addressed to the Commission urged that the permit he had granted to the applicant be approved. He stated that “the War Industries Board is apprehensive that the