

was "temporarily" turned aside for a short distance and then resumed its normal course.

#### Navigation on Lake Michigan

Consider the next illustration: The Boundary Waters' Treaty defines boundary waters as "the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the International Boundary between the United States and the Dominion of Canada passes, including all bays, arms and inlets thereof, etc." And the treaty also states: "It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters and now existing or which may hereafter be constructed on either side of the line."

Now, the treaty, subject to certain restrictions, stipulates "that the navigation of all navigable boundary waters shall forever continue free and open for the purpose of commerce to the inhabitants and to the ships, vessels and boats of both countries equally," and one not acquainted with possible interpretations suggested for portions of the treaty, is naturally surprised to learn that it has been contended that Lake Michigan is not a boundary water—although a geographically corresponding body of water in Canada, the Georgian Bay, is such,—and the treaty suggests, inferentially, that Lake Michigan is only conditionally open to navigation, while Georgian Bay—the Bay is not specifically mentioned—is open, but not conditionally open as in the case of Lake Michigan. Besides, assuming that the uninviting project of the Georgian Bay ship canal ever materialized, this canal, under the treaty, would be as equally free and open to the United States as to Canada. Of course, I am not arguing one way or another upon the points cited in my illustrations, and I am passing over any reference to rights still existent under earlier treaties. I am simply suggestively pointing out certain facts which have been disclosed, and indicating certain contentions which have been offered, when subjects involving treaty terms, have, variously, been considered.

#### Water Diversion from Niagara River

Take another illustration: The Boundary Waters' Treaty, in Article V., deals specifically with the diversion of water for power purposes from the Niagara River, and provides that, "so long as this treaty shall remain in force, no diversion of the waters of Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided."

When, during the last few years, certain interests desired to utilize a portion of the waters now flowing in the lower Niagara River, that is to say, below the Falls, the claim was urged that such waters could be used without coming before the International Joint Commission for permission, because it was contended that the treaty only dealt with diversion of water above the Falls and did not specify where the water should be returned. In other words, some interests hold that, under Article V., the International Joint Commission has no jurisdiction to deal with any diversion in the Niagara River other than with diversion made from "above the Falls." The water, it was argued, could be taken out *above* the Falls and turned, if users so desired, directly into Lake Ontario without coursing the lower Niagara River.

#### Application of St. Lawrence River Power Company

While illustrations might be multiplied, we shall here consider only one other instance. This arose during the past summer in connection with the application of the St. Lawrence River Power Company respecting the construction of

works in the vicinity of, and the diversion of waters from, the Long Sault Rapids. The St. Lawrence River Power Company is a subsidiary company of the Aluminum Company of America, which, amongst other activities, operates a large aluminum-producing plant at Messena, N.Y. The St. Lawrence River Power Company desired to construct works in the St. Lawrence which would, so far as possible, remove ice difficulties which affected their winter output. To this end they excavated, largely in rock, a long channel, 25 feet deep by 150 feet wide, in the bed of the St. Lawrence River. Complementary to this excavation there was to be a large boom held by rock-filled cribs, some 30 feet square, sunk in the St. Lawrence River. Below the dredged channel just referred to, there was also to be constructed in what is known as the South Sault Channel—that is, the passage nearest the United States' shore—a "submerged weir," which, actually, is a large submerged dam. The work of channel excavation was undertaken, and practically completed under permit from the United States War Department, without the matter in any way being brought to the official attention of the Canadian authorities.

#### A War Measure

The Boundary Waters' Treaty provides that there shall not be "any interference with or diversion from their natural channel of such waters on either side of the boundary" as will result in any injury on the other side of the boundary. If the enlarged channel remained, then the proposed submerged weir had to be constructed in order to compensate for alterations in level already resulting from the excavation. Incident to the construction of this weir the company deemed it desirable to obtain the approval of the International Joint Commission. Consequently, an application was made for hearing before the Commission. The company and the United States Government authorities stated that as a "war measure" it was necessary that the company be supplied with more power in order to produce more aluminum. The Commission was urged to deal with the application of the company without delay and to waive rules of procedure which constitute the usual safeguards so far as the public is concerned. This course was urged although the company knew at least about a year before it made the application that the proposed dam would be necessary. Upon the war necessities Canada, of course, guaranteed every possible assistance and despatch.

In passing, I would like to remark that at times when certain issues have been under consideration before the International Joint Commission, and it appeared advantageous to interested parties to show how what might be done in boundary waters on one side of the boundary would affect the level of waters on the other side, it has sometimes been instanced that even a pile driven in a stream on one side would affect the level of water on the other. In the case of the large channel to which reference has just been made, which substantially affected levels in the river and adversely affected Canadian navigation, counsel for the applicant company argued that interests would really not be disadvantageously affected because when the large cribs and the dam was in place disturbed levels would then be restored.

#### "Free and Open"

Under the Webster-Ashburton Treaty it is specifically provided that the channels in the St. Lawrence River on both sides of the Long Sault, Barnhart and Croil islands were to be kept "free and open to the ships, vessels and boats of both parties." So that, in any event, if the South Sault Channel were blocked by a dam, a navigable channel which was to be kept open by treaty right would be closed, and a public liberty and right which could not be justified under the spirit and intent of the treaty would be enjoyed by private interested parties.