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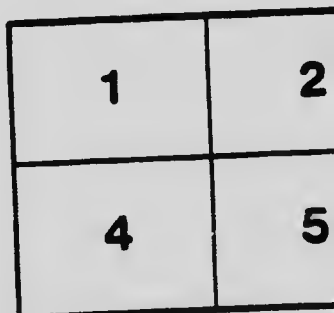
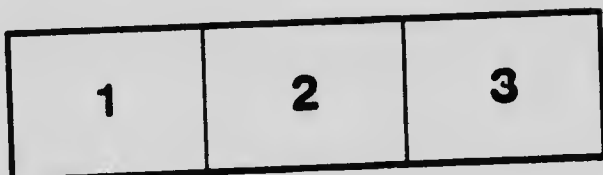
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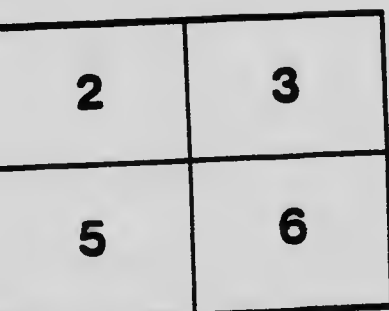
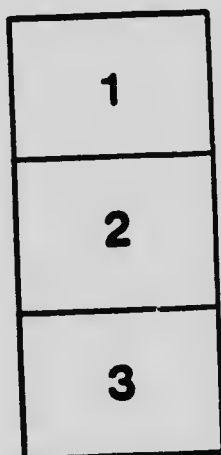
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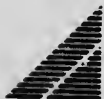
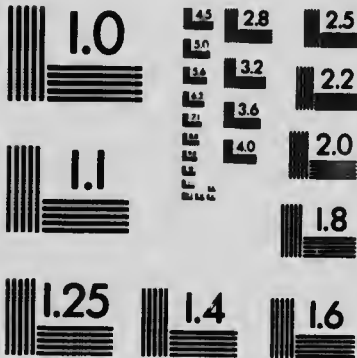
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How States could evade
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How States Could Evade Reciprocity

"POLICE" POWER PLACES INDIVIDUAL STATES ABOVE FEDERAL AUTHORITY

Constitutional Aspect of the Proposed Agreement—If Ingenious Enough States Could Direct Authority to Block Imports from Canada

(Reprint from Toronto Saturday Night.)

IN dealing with the pulpwood and paper schedules of the reciprocity agreement now before Parliament, the negotiators encountered an obstacle in the existence, in some of the provinces, of laws standing in the way of the freedom of the trade sought to be established. The difficulties connected with the export of pulpwood were, of course, of a peculiar nature, depending upon the circumstance that the bulk of the pulpwood in Canada happens to be upon the Crown lands under the control of the Provincial Governments. But the incident suggests the possibility of other difficulties through the exercise of the powers of individual provinces of Canada. It also suggests the possibility that corresponding action to the prejudice of Canadian trade might be taken by individual states of the Union.

States Versus Provinces

Both the United States and Canada are under a Federal form of government where the legislative sovereignty is divided between a central or federal government and local, provincial or state governments. In both countries the central government is paramount in certain matters but helpless in others. In the discussion of the reciprocity agreement very little attention has been given to this feature, which is a constant source of complication in the international relationships of countries under a federal form of government, and has proved particularly so in the case of the United States. The history of the United States gives ample ground for the apprehension of such difficulties in connection with the projected arrangement, not so much because of laws at present existing, but because of the powers of the states to enact such laws as

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the expediency of local politics may from time to time dictate. And owing to differences in the constitutions of the two countries the probability of such action on the part of the States is greater than that of action by the provincial governments.

Apportionment of Powers on Different Basis

Under the constitution of the United States the apportionment of legislative powers between the federal government and the states is on a different basis from that of the Canadian constitution under the British North America Act. The latter instrument enumerates in detail the powers of the provincial governments as well as those of the central or federal governments; and such powers as are not specifically assigned are by a general clause committed to the central government. This feature of the Canadian constitution is usually expressed by saying that the "residuum of power" is in the Dominion Government. The constitution of the United States, on the other hand, merely selects from amongst the powers which the states would have as independent nations, a certain number of specific powers, which are collected and committed to the federal government. The enumeration of these powers in the constitution is reinforced by prohibition upon the exercise of certain powers. But apart from the items of power specifically delegated to the central government and those prohibited to the States, the balance or residuum of powers remains in the individual states.

There is also a further important difference. Except in a small number of comparatively unimportant matters the powers of the Dominion and the provinces are mutually exclusive, and the absence of the legislation on the part of one will not justify legislation by the other. In other words, there is no overlapping of jurisdiction. In the United States a different rule prevails, and many powers exist concurrently in the states and in the federal governments. Where there are both state and federal enactments upon such a subject of concurrent power that of the federal government, of course, prevails; but in the absence of federal legislation the state laws are in full force.

Federal Powers Circumscribed

One feature of the reciprocity arrangement which demands careful consideration is the fact that the legislation of the federal government is of a negative character. The duties upon certain articles of commerce are removed, but nothing is done by way of stamping commerce in these articles with the approval of the federal government in such a way as to shut out state regulation. The federal government not having legislated, the states remain competent to enact a variety of laws by which restriction or virtual prohibition might still be possible if sufficient ingenuity were exercised in framing them.

Although under the constitution the federal government is invested with jurisdiction "to regulate commerce with foreign nations," and although this is reinforced by prohibition upon the state that "no state shall, without the consent of Congress, lay any imposts or duties upon imports or exports except what may be absolutely necessary for executing its inspection laws . . . and all such laws shall be subject to the

revision and control of the Congress," and that "no state shall, without the consent of Congress, lay any duties or tonnage"; yet the states have, under what is called the "police" power, a large field of jurisdiction, within which it is quite competent for them to legislate in such a way as to prejudice traffic in commodities which, for any reason, it is found expedient to discourage.

Wide Scope for "Police" Authority

Of the different forms in which such legislation might be brought in, the one that most readily suggests itself is that of regulations ostensibly directed to the preservation of health. Such legislation is, of course, entirely within the competence of the state legislatures unless it comes in conflict with positive federal legislation. In one of the series of "oleomargarine cases" before the Supreme Court of the United States it was held that the question whether it was possible to regulate the sale of that product, or whether it was preferable to forbid it entirely, was a question of fact and of public policy which was essentially within the province of the state legislatures to determine. But the powers of the states are by no means confined to laws relating to health, such as pure food and quarantine laws. They include a wide range of supervision over what may be regarded as the general convenience and welfare of the citizens. There are, of course, numerous cases where state legislation which interfered with trade and commerce has been held invalid as trenching upon federal jurisdiction, but many of these enactments have been so crudely framed as to invite the disapproval of the courts. On the other hand, there are numerous cases where state legislation seriously affecting commerce has been held valid. Most of these cases have turned upon the scope of the "police" power.

"Police" Regu. Powers Supreme in the States

What is this police power of the states? It is spoken of by Chief Justice Shaw in one case as "the power vested in the legislature by constitution to make, retain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they judge to be for the good and welfare of the Commonwealth and of the subjects of the same." This is a very wide definition, and as a matter of fact there are very few subjects of governmental activity which would not in some aspect fall under the head of police power; but under the United States constitution the term appears to denote nothing more nor less than the residuary powers of the states after the powers of the federal government have been subtracted from them. Of this "police power" an eminent writer upon the Constitution of the United States says: "In the American constitutional system the power to establish the ordinary regulations of police has been left with the individual states, and it cannot be taken away from them, either wholly or in part, and exercised under legislation of Congress. Neither can the official government, nor any of its departments or offices, assume any supervision of the police regulations of the states. All that the federal authority can do is to see that the states do not, under cover of this power, invade the field of national sovereignty, nor impede the

exercise of any authority which the constitution has conveyed to the nation, or deprive any citizen of the rights guaranteed by the Constitution."

Washington, Unlike Ottawa, Cannot Intervene

It is important to note that there is no provision in the Constitution of the United States for the disallowance of state enactments by the federal government. Under the Canadian Constitution if provincial legislation is considered inimical to federal interests it may be disallowed, though it may be quite within the competence of the Provincial Legislature. No such power exists in the United States. The state and the federal governments are independent of each other and the federal government has no control whatever over any legislation which is within the constitutional power of the states. Where a state legislature passes a statute which is beyond its powers the only remedy is in the courts, and it may require many years and much litigation to determine that such a statute is *ultra vires* of the state.

Only a Treaty Can Bind the States

Some of the difficulties to be apprehended from state legislation might, of course, have been obviated if the agreement had been cast in the form of a treaty instead of the informal understanding that concurrent legislation would be obtained. The individual states are not only prohibited from entering into treaties or agreements with foreign countries or with each other, but the treaties entered into by the federal government become part of the supreme law of the land. But in its present form the reciprocity arrangement will leave a large measure of freedom in the states to interpose obstacles in the way of importations from Canada which the federal government will be powerless to remove.



