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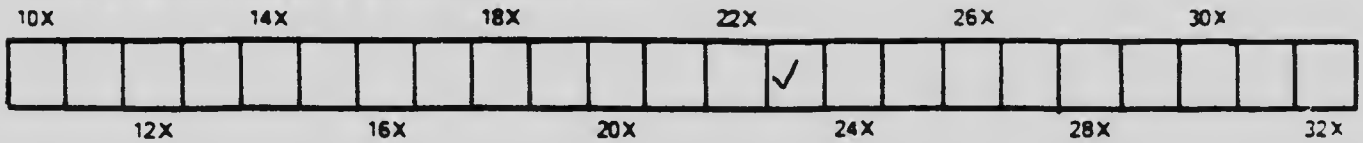

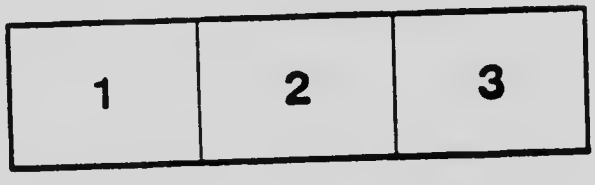


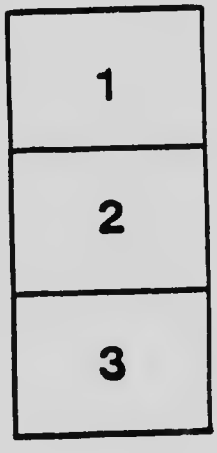


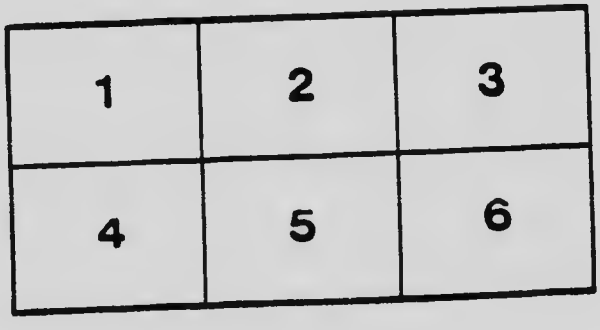

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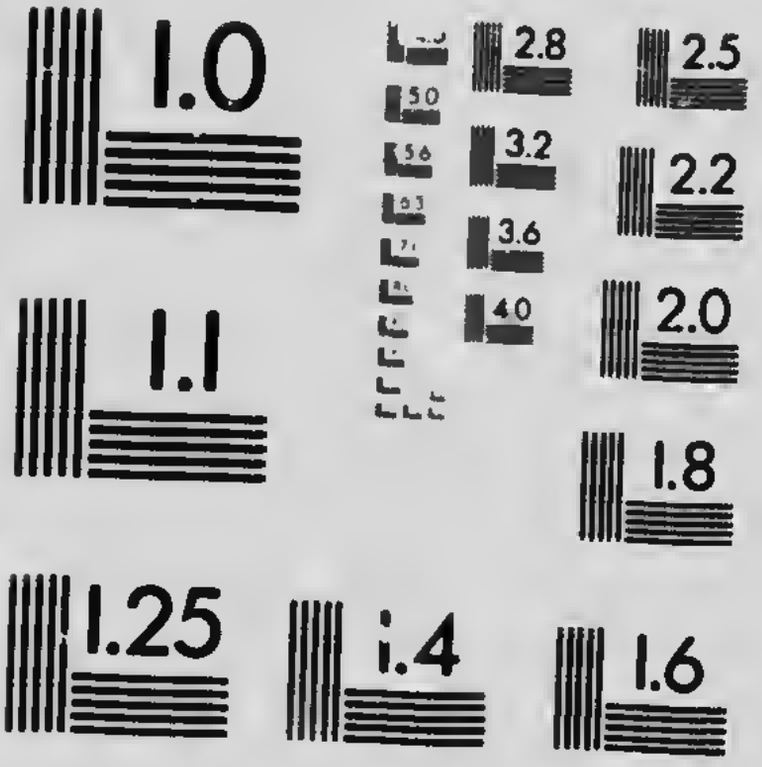


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# THE PANAMA CANAL AND ITS TREATY OBLIGATIONS

SPEECH DELIVERED BY THE HON. WALLACE NESBITT, K.C. BEFORE THE CANADIAN CLUB, HAMILTON, DECEMBER 6, 1912 AND BEFORE THE WOMEN'S CANADIAN CLUB, MONTREAL, DECEMBER 12, 1912

# THE PANAMA CANAL AND ITS TREATY OBLIGATIONS

I propose to deal, shortly, first with the history of the Canal, and second, with a description of the completed project and its expected results upon the commerce of the world, and then to discuss what I conceive to be the proper interpretation of the present treaty.

It will be impossible to compress into the limits of a speech all the arguments pro and con on the construction of the Hay-Pauncefote treaty. I deprecate, however, the attitude taken by so many publicists and journalists that the present position of the United States is absolutely unwarranted and, in fact, sordidly dishonest. No one can read with care the debates in the Senate upon the Panama Canal Bill, or the message of President Taft recommending the Bill, without realizing that, if the treaty and the Bill are considered alone, and apart from their previous history and the surrounding circumstances, the question is debatable. At the same time, I fear that the question has not been discussed with that dispassionate accuracy which it deserves, but that opinions and decisions have been determined by unexamined prejudice, or by the probability of national advantage. The attitude of many in the United States, both politicians and others, was succinctly stated by those Senators who said, in effect, that, if there were any doubt, it ought to be resolved in favor of their own country, and that, if they had to choose between a patriotic and an unpatriotic interpretation, they were going to take the patriotic interpretation. On the other hand, it is easily understood that, without a full knowledge of the facts and of all that led up to the making of the Hay-Pauncefote treaty, the ordinary person in the United States cannot realize how it can be that the United States, having spent some four hundred millions to construct the Canal, should not have a right to deal with it as it pleases, and to make the other nations whose ships use the canal pay tolls, while its own ships go free.

I believe that, when the question is fully understood, American public opinion as a whole will agree with the attitude taken by so many of the leading journals and public men, and best voiced by Senators Root, Burton and McCumber, and will dissent from the views most ably represented by Senators Lodge and O'Gorman. The sober second thought of the nation which made such splendid sacrifices for the

sake of Cuban independence; which has kept its pledged word so faithfully in Cuba, and [illegible] took the attitude it did in reference to the Boxer indemnity, [illegible] be trusted to do what is right. It must be remembered that it was absolutely necessary for President Taft to obtain immediate legislative action to provide for the administration of the Canal, and the controversial provisions added to that necessary legislation were tacked on by the House and the Senate just previous to a Presidential election; and we all know enough about politics to understand the expectation that an apparently patriotic attitude would be immensely popular, no matter how little it harmonized with previous utterances.

Where I think history will censure President Taft is in this. The British Government filed a protest against the legislation, alleging that it was clearly in contravention of the Hay-Pauncefote treaty. That this protest was not without foundation is best evidenced by the fact that many of the ablest lawyers and leading journalists of the United States took the same view as that which it presented. And yet, notwithstanding that the United States has been the leader in the peace movement; that it has been the practical propounder of the theory of arbitration; that it is largely responsible for the creation of the Hague Tribunal; that the passage of the Bill would create a most difficult situation both practically and diplomatically, and notwithstanding this protest from a friendly power, with which the United States had solemnly agreed to refer just such matters to arbitration, President Taft recommended the passage of the Bill, instead of advising that it should be referred to the Hague Tribunal to decide whether the Bill, if passed, would be a breach of the provisions of the Hay-Pauncefote treaty, and that the opinion of jurists of world-wide reputation should be taken upon the matter.

I think that what Canadians, who are more vitally interested than anybody else in this question, must do is to see to it that the American public shall be thoroughly informed of the facts, and I have every hope that, once it formed, their sense of fair play, their desire to show a scrupulous regard for the observance of treaty relations, will cause them to repudiate the selfish and narrow policy at present crystallized in the Panama Canal Act, or, at the least, to refer the matter for arbitrament to the Hague Tribunal. I cannot believe that the opinion that has been expressed—that they would not get fair play before that Tribunal—will be seriously entertained. Such a view gives little credit to the jurists composing that body. I should expect every member of that Tribunal to decide impartially according to his conscience, and to do what he thought the equity of the case before him demanded. It is to be noted that, in the last

reference be ween ourselves and the United States, the extreme United States' view was adopted by one of the foreign representatives, whereas the United States' representative concurred with ours in his view. I think that one of the greatest tributes that could be paid to him is to say that I would not yield to the temptation of agreeing with a view in favour of his own country which another member of the Tribunal propounded, but dissented from that and concurred with the view of the Canadian representative.

I now enter upon the history of the matter. I do this because I do not think the present question can be fairly understood, unless one appreciates certain salient points of that history, namely, that from the earliest days, the importance of inter-oceanic communication was recognized by all nations; that, in the beginning of its history, the United States, while recognizing the special importance to itself, was not in a financial position to undertake the task alone; that, while that was the situation, it was the leader in the thought that, no matter by whom the Canal was built, whether by private capital or by a nation or nations, it must be open to all peoples upon the same terms; that, when Great Britain and the United States became jointly interested in the neutralization, this view still obtained and was in fact emphasized; and that, in the negotiations which led up to the United States obtaining complete control, the view that it should be a trust for mankind was put in the very forefront, and concessions were obtained from Great Britain based upon that as the settled policy. It is in the light of all these circumstances that the present treaty itself must be read.

The opening of the Panama Canal in 1915 seems to be the answer of Commerce to the capture in 1453 of Constantinople by the Turks and the closing of the Mediterranean. The highway of commercial activity was perforce changed to the Atlantic. The discovery of the new world by Columbus was the result of his endeavour to find a western passage from Europe to Cathay. As Mr. Lowell said, Columbus started out to find the entrance to the back door of the old house and found the front door to the new! It was reserved, however, for Balboa in 1513 to locate "the waist of the world," when he sighted from a peak of the Culebra mountains the Pacific. This point of observation is practically in the direct line of the present Panama Canal. In the endeavor to find a western passage, Magellan in 1519-1521 discoved the sea route from the Atlantic to the Pacific by the Strait of Magellan, but it was not until 1530 that the shipping world recognized that this was the only sea route, and the result was fraught with great political consequences. The long journey to the western coast of Central and North America caused the

rival powers for the supremacy of the Atlantic to take little interest in and to make scarcely any attempt to settle this coast. England's claim to California was certainly as good as that of the United States, but, owing to the distance and the inaccessibility, she was indifferent enough to accept without much demur the loss of California, Washington Territory and Oregon, and to take the 49th parallel as the southern boundary of her dominions.

The attention of the world, however, was in 1550 drawn by the Portuguese navigator, Antonio Galvao, in a publication, to the importance of inter-oceanic communication, and he pointed out there were four practicable routes—Tehuantepec, Nicaragua, Panama and Darien. In 1551, the Spanish historian, El de Gomara, submitted a memorial to Philip II. of Spain, urging the immediate construction of some one of these waterways. This did not meet with any response, as Spain was at that time fully occupied with the exploitation of the riches of Mexico, Peru, etc., and interest in the matter died out for about 140 years, when, in 1695, William Paterson launched his Darien scheme. Paterson was a poor Scotch farm lad who had drifted to London, and had become in 1694 the founder of the Bank of England. He fell into more or less disgrace, however, and from Edinburgh in 1695 launched his scheme for a company of Scotland trading to Africa and the Indies, which was to have its headquarters at Darien. Even at that early date he laid down as an essential doctrine that the inter-oceanic communication which he intended to establish there under Scotch auspices should have, for its cardinal principle, absolute equality of treatment, so far as all nations were concerned. When the expedition sailed on the 26th July, 1698, with Paterson merely as an adviser instead of having supreme control, the scheme apparently was doomed to disaster. If Paterson had had supreme control, the history of the world would probably have been changed, because there is no reason to suppose, looking at his views as expressed at the time and as subsequently pressed upon William III., that England would not have acquired through this settlement a commanding influence in Central and South America.

After the failure of the Paterson scheme, another period of practically one hundred years elapsed before the matter was taken up seriously. This time it was Spain which, in 1778, ordered surveys to be made of the Tehuantepec route, and in 1779 of the Nicaraguan route. But political conditions in Europe put an end to the aspirations of Spain. In 1808 the great Humboldt visited Cuba, Columbia and Panama, and in his work, published at that time, put forward a practical scheme for cutting through the Isthmus of Panama, and also

mentioned other points, where, by utilizing some of the rivers flowing into the Gulf of Mexico, the end, perhaps, could be more advantageously attained than at Panama. The German poet, Goethe, whose inspired breadth of view and prophetic insight corresponds with that of our English Shakespeare, became greatly interested in Humboldt's views, and said, speaking of the project:

> "All this is reserved for the future, and for a great spirit of enterprise; but so much is certain: if a project of the kind succeeded in making it possible for ships of whatever lading or size to go through such a Canal from the Gulf of Mexico to the Pacific Ocean, quite incalculable results would ensue for the whole of civilized and uncivilized humanity. I should be surprised, however, if the United States were to let the opportunity escape them of bringing such an achievement into their own hands. We may expect this youthful power, with its decided tendency westwards, in thirty or forty years to have also occupied and peopled the extensive tracts of land beyond the Rocky Mountains. We may further expect that along the whole Pacific Coast, where Nature has already formed the largest and safest harbours, commercial cities of the utmost importance will gradually arise, to be the medium of trade between China, together with the East Indies and the United States. . . . It is absolutely indispensable for the United States to effect a way through from the Gulf of Mexico to the Pacific Ocean, and I am certain they will compass it. This I should like to live to see, but I shall not."

This view was expressed in 1827. In 1830 a Dutch Company obtained a concession for a canal through Nicaragua. In 1826 Henry Clay issued instructions to Messrs. Anderson and Sargeant in reference to a canal at Panama. In 1846 the United States made a treaty with New Granada to secure a right of transit over the Isthmus by any modes "of communication which now exist or may hereafter be constructed," and guaranteed the sovereignty of Granada over the Isthmus. I shall refer to this later in discussing the treaties. The United States was now beginning to busy itself thoroughly in the subject. In 1849-50, the President directed a survey by American engineers for railways both at Panama and Nicaragua, and from this time forward the attention of the United States was largely concentrated upon this region, mainly in consequence of the discovery of gold in California, and the interest in the West which that created. In 1850 the United States negotiated with England the Clayton-Bulwer treaty, to which I shall refer again. In 1853-4 Dr. Cullen formed a company with a proposed capital of fifteen million pounds sterling to dig a canal across the Isthmus of Darien, and the project interested both Queen Victoria and Napoleon III. to such an extent that a British and a French man-of-war were

sent on a mission of investigation to the Isthmus. The natives, however, shewed such hostility that the project fell through. I daresay the war in the Crimea had much to do with the failure of interest in the scheme.

From 1870-75 the United States, through its army engineers, was engaged in making surveys which narrowed the choice of routes down to those by Panama and Nicaragua, and in 1876 a Commission appointed by the United States reported in favour of Nicaragua. In the meantime, the opening of the Suez Canal in 1869 had caused a loss of interest in the matter in England. In 1881 de Lesseps formed his company for a tide-water canal. This company bought out an existing railway and paid for it twenty-five and a-half millions of dollars, but its history is one of unparalleled inefficiency and corruption. It succeeded in spending three hundred and fifty million dollars, about three times the total cost of the Suez Canal, and out of the fever-soaked soil it took some thirty million cubic yards. The United States has, up to date, taken out some one hundred and seventy-five millions of yards. In 1889 the company went into liquidation, and the new Panama Canal Company was formed, which did little more, however, than keep alive its corporate existence. In that year a Commission was appointed by President McKinley to determine on the best route for the Canal under the control, management and ownership of the United States, and in 1891 this Commission reported in favour of Nicaragua, but estimated the French company's rights in Panama at forty million dollars. This company had been holding out for a very large sum, and when it offered to sell at forty millions the Commission issued a supplementary report in favour of the Panama route. Matters dragged along until the spectacular voyage of thirteen thousand miles of the battleship Oregon round the Horn to Key West focussed the attention of the whole of the United States upon the situation.

It was, as I shall point out later, now the doctrine of the United States that the Canal, when built, would be a mere continuation of the coast line of the United States, and, therefore, that it must be one over which the United States should have supreme control. Accordingly, it was necessary to approach Great Britain to get rid of the terms of the Clayton-Bulwer treaty, and in 1900 this was attempted by what is known as the first Hay-Pauncefote treaty, which, however, was so amended by the Senate that the British Foreign Office refused to agree to it. But in 1901 the second Hay-Pauncefote treaty, which might better be called the Choate-Lansdowne treaty, was negotiated and agreed to between Great Britain and the United States.

This left the way open for a negotiation with Colombia for territorial rights, and in 1903 a treaty was arranged with Colombia, which, however, the Colombia Senate refused to ratify. Three days after its refusal a revolution took place, and the new Republic of Panama was recognized by the United States. The United States agreed with the new Republic for the *use, occupation and control,* for the purposes of a canal, of a ten-mile strip of territory, on payment of ten million dollars down and two hundred and fifty thousand dollars yearly, to begin in nine years.

I shall not weary you with a technical description of the great work. Mr. Bryce says of it:

> "Thus the voyager of the future, in the ten or twelve hours of his passage from ocean to ocean, will have much variety. The level light of the fiery tropic dawn will fall on the houses of Colon as he approaches it in the morning, when vessels usually arrive. When his ship has mounted the majestic staircase of the three Gatun locks from the Atlantic level, he will glide slowly and softly along the waters of a broad lake which gradually narrows toward its head, a lake enclosed by rich forests of that velvety softness one sees in the tropics, with vistas of forest-girt islets stretching far off to right and left among the hills, a welcome change from the restless Caribbean Sea which he has left. Then the mountains will close in upon him, steep slopes of grass or brushwood rising two hundred feet above him as he passes through the great Cut. From the level of the Miguel lock he will look southward down the broad vale that opens on the ocean flooded with the light of the declining sun, and see the rocky islets rising, between which in the twilight his course will lie out into the vast Pacific. At Suez the passage from sea to sea is through a dreary and monotonous waste of shifting sand and barren clay. Here one is for a few hours in the centre of a verdant continent, floating on smooth waters, shut off from sight of the ocean behind and the ocean before, a short, sweet present of tranquillity between a stormy past and a stormy future."

When the Canal is finished there will be thirty thousand trained West Indian labourers in search of employment, which ought to be of interest to our railway contractors. Seventy-five per cent. of the labour employed upon the Canal has been British West Indian.

Let me say a word about the meaning to commerce of the Canal, when completed, and particularly about its meaning to Canada. I do not believe that the human mind is capable of realizing all that it is likely to mean in the future to the commercial world. With the mere figures showing the distances which will be saved, and the shifting of shipping bases which may follow, you are already familiar, and they convey, at best, but a feeble impression.

The Canal itself, it must be remembered, is only a part of the waterway scheme contemplated by the United States. An American writer thus sums up the situation:

> "The perfecting of the Panama Canal and the Lake Michigan Canal, the canalization of the Illinois River, the perfecting of the channel of the Mississippi itself, and the deepening and otherwise perfecting of the channels of its larger tributaries, will furnish the backbone of the improving of the waterways scheme. So that, so far as transportation is concerned, steamers for Honolulu and Yokohama can load their freight at Duluth and Fort William, Toronto, Hamilton, or Buffalo, and freight can be carried direct from the wharves of Minneapolis or Chicago, Pittsburg, Omaha, to Bombay, Liverpool or Hong-Kong."

To Canadians, although engaged at the moment to the last ounce of their energy in developing their own country, it seems to me that the Canal is fraught with the greatest possibilities. I am assuming, I believe rightly, that the suggestion that has been made that wheat cannot be shipped from Vancouver to Liverpool, via the Panama, because of its necessary passage through a tropical climate, is not correct, but that the shipment of wheat is quite feasible. The Canal will mean, from Moosejaw west, practically a saving of from 12c. to 15c. a bushel on wheat. We have only about one-tenth of the land capable of wheat-raising now under cultivation. There are less than twenty million acres under cultivation, and there are said to be over two hundred and fifty million acres suitable for it. Is it extreme to think that we may be, in ten years, exporting instead of one hundred millions of bushels, four hundred millions? Suppose the advantage from the Canal is 10c. a bushel, and that there is an average of 15 bushels to the acre. It means $1.50 per acre per annum for every acre put under cultivation. It means such an impetus given to the Canadian wheatfields that the railways will be far more than recompensed for any loss they may sustain in the carriage of grain by the small package freight and by the increase of earnings from density of population.

Then, as regards Eastern Canada, there must necessarily be great coal depots established at the coaling stations in the vicinity of the entrance to the Canal, and in this New Brunswick and Nova Scotia are greatly interested. The steel mills both of Eastern Canada and of the United States will enjoy an enormous advantage in shipment to the western coast of Canada, as against those of England and Germany. The West Indies, however, it appears to me, will come into their own, more than any other peoples. If any of you are speculators, buy West India real estate! It seems to me that the ultimate result will be such a readjustment and develop-

ment over the whole field of international industry as it is almost impossible to contemplate.

Having stated, shortly, the history of the building of the Canal and its possibilities, I now come to the most important question, namely: what are the conditions under which the use of the Canal is to be permitted? By the Act of Congress, as it stands at present, the shipping of all nations is to be allowed through the Canal on payment of the same tolls, except that the coastwise shipping of the United States is to be free from tolls. The British Government has filed a protest against this Act, asserting that it is an infringement both of the letter and of the spirit of the Hay-Pauncefote treaty. The objection to it is that it discriminates in favour of American shipping.

Canada is more affected than any other country by the discrimination, as our ships plying, say, from Vancouver or Prince Rupert, have to compete with ships from Seattle, etc., and the toll of so much per ton would be very serious. Liverpool or Bremen shipping to San Francisco or Seattle would be affected as against New York or Boston shipping, as its rivals, a similar cargo to the west. One would suppose the United States consumer would see to it that his burdens were not so increased.

I now turn to the treaties themselves and to what has occurred in connection with them. I have mentioned that, as early as 1808, Humboldt had examined the various waterways, and the commercial importance of the project had been pointed out. Accordingly, in 1824 the United States concluded a treaty of general friendship with Colombia, which, while containing no specific reference to the waterway, guarded the position of the United States so as to render unlikely the possibility of any other power undertaking the task of building a canal then beyond the resources of the United States. In 1846 a definite treaty was concluded with New Granada. The Republic of Colombia had been divided in 1831, and New Granada now included the future canal zone. By this treaty the United States secured that the right of way or transit across the Isthmus of Panama, by any modes of communication which then existed or might thereafter be constructed, should be open and free to the Government and citizens of the United States. No other tolls or charges were to be imposed on the citizens and merchandise of the United States than were levied on New Granada, and, in return, the United States guaranteed to the other party the perfect neutrality of the Isthmus and the sovereign rights of New Granada over that territory. Apparently in response to this, Great Britain took possession, in 1848, of what is now Greytown, the only practicable

Atlantic terminal for a canal along the Nicaraguan route, and the United States retaliated by arranging a treaty, which, however, was not ratified, with Nicaragua, whereby the United States obtained the exclusive right to construct a canal by this route. Great Britain promptly took possession of Tigra Island, one of the possible Pacific terminals of Nicaraguan canal, and to compose these differences the Clayton-Bulwer treaty was negotiated in 1850.

Before I discuss that treaty, let us see what policy as to inter-oceanic communication had been settled upon and announced by the United States.

In 1826 Henry Clay, as Secretary of State, issued instructions to Messrs. Anderson and Sargeant, in which he wrote:

> "If a canal across the Isthmus be opened so as to admit of the passage of sea vessels from ocean to ocean, the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe, upon the payment a just compensation or reasonable tolls."

To quote Senator Burton:

> "This was the first declaration by a Secretary of State, other official, or Congress, in regard to the proposed Panama Canal. Since that time this first declaration has been confirmed by American statesmen of all political parties—Whig, Democrat, and Republican—with substantial unanimity. The principle has been enunciated by presidential messages, by instructions from Secretaries of State, and by resolutions of the House and Senate and of Congress. The message of President Roosevelt, in submitting the treaty with Panama, expressly states this policy."

Let me justify the Senator's statement.

On the 3rd March, 1835, the Senate of the United States unanimously resolved—

> "That the President of the United States be respectfully requested to consider the expediency of opening negotiations with the governments of other nations and particularly with the governments of Central America and New Granada, for the purpose of effectually protecting, by suitable treaty stipulations with them, such individuals or companies as may undertake to open a communication between the Atlantic and Pacific Oceans by the construction of a ship canal across the isthmus which connects North and South America, and of securing forever, by such stipulations, *the free and equal right of navigating such canal to all such nations*, on the payment of such reasonable tolls as may be established to compensate the capitalists who may engage in such undertaking and complete the work."

President Jackson, on the 9th January, 1837, in a message to the Senate, concurred in the view expressed in their resolution of 1835.

Two years later, in 1839, the House of Representatives, by a unanimous vote, adopted a resolution similar to that of the Senate, wherein they requested the President to ascertain

> "the practicability of effecting a communication between the Atlantic and Pacific oceans by the construction of a ship canal across the Isthmus, and of securing forever, by suitable treaty stipulations, *the free and equal right of navigating such canal by all nations.*"

It is to be observed that the idea of the Senate of the United States, even at that early period, was that the free and equal right of navigating the Canal forever should be the basis of any rights.

On the 10th February, 1847, President Polk, in asking the Senate for their advice with regard to the ratification of the Treaty with New Granada, and having particularly in view the clause of the Treaty which guaranteed the neutrality of the territory and the sovereignty of New Granada over it, set out the resolution of 1835, and said that, while he was deeply sensible of the dangers of alliances, which this treaty with New Granada virtually was, this treaty was justifiable on the ground of the great commercial interests of the United States in the project. He proceeded:

> "3. It will constitute no alliance for any political object, but for purely commercial purposes *in which all the navigating nations of the world have a common interest.*"
>
> "4. The ultimate object as presented by the Senate of the United States in their Resolution to which I have already referred, *is to secure to all nations the free and equal right of passage over the Isthmus.*"

President Taylor, on December 4th, 1849, in his first annual message to the Senate and House of Representatives, said:

> "Should such a work be constructed under the common protection of all nations *for equal benefits to all*, it would be neither just nor expedient that any great maritime state should command the communication The territory through which the Canal may be opened ou[t] [t]o be freed from the claims of any foreign power. No suc[h] [p]ower should occupy a position that would enable it hereafte[r] to exercise so controlling an influence over the commerce of the world or to obstruct the highway *which ought to be dedicated to the common uses of mankind.*"

And on April 22nd, 1850, in another message to the Senate of the United States, when transmitting the Clayton-Bulwer treaty, he uses this language:

"At the time negotiations were opened with Nicaragua for the construction of a canal through her territory, I found Great Britain in possession of nearly half of Central America, as the Ally and protector of the Mosquito King. It has been my object in negotiating this treaty not only to secure the passage across the Isthmus to the Government and citizens of the United States by the construction of a great highway *dedicated to the use of all nations on equal terms*, but to maintain the independence and sovereignty of all the Central American Republics."

And he again reiterates the Resolution of the Senate of the 3rd March, 1835, that the object of the Canal was to secure forever the free and equal right of navigating such canal to all such nations, on payment of such reasonable tolls as might be established.

To quote Senator Burton again:

"It may be said that these expressions were used at a time when it was contemplated that the Canal would be constructed by private capital, and that in view of the fact that the Government has undertaken this work a different status is created, but the very language of the Hay-Pauncefote treaty of 1901 and the later treaty with Panama negatives this contention. It was clearly the intent of both treaties to continue the policy which had been enunciated in former years."

Now, in the light of these declarations, look at the language of the Clayton-Bulwer treaty. The preamble is as follows:

"Her Britannic Majesty and the United States of America, being desirous of consolidating the relations of amity which so happily subsist between them, by setting forth and fixing in a Convention their views and intentions, with reference to any means of communication by ship canal which may be constructed between the Atlantic and Pacific Oceans, by the way of the River St. Juan de Nicaragua, and either or both of the Lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean."

Then the terms of the treaty are set out, and it contains these four essential points:

1. It bound both parties not to "obtain or maintain" any exclusive control of the proposed canal, or unequal advantage in its use.

2. It guaranteed the neutralization of the Canal.

3. It declared that the intention of the signatories was not only the accomplishment of a "particular object," *i.e.*, that the particular Canal, which was then supposedly near realization, should be neutral and open on equal terms to the two contracting powers and to all other nations, "*but also to establish a general principle*," and that they therefore agreed

"*to extend their protection* 'reaty stipulation to any other *practicable communications, whether by canal or railway, across the Isthmus.*"

4. It stipulated that neither signatory would ever "occupy or fortify or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America," nor make use of any protectorate or alliance, present or future, to such ends.

Let me now demonstrate from the United States Records that there was no change of policy after the treaty.

On the 5th April, 1860, President Buchanan, in a message to the Senate, transmitted a treaty between the United States and the Republic of Honduras, and said:

> "This treaty is in accordance with the policy inaugurated by the Government of the United States and in a special manner by the Senate in the year 1846, and several treaties have been concluded to carry it into effect."

He stated that the object was to obtain a grant of free and uninterrupted transit for the Government and people of the United States over the transit routes across the isthmus, and a guarantee of their neutrality. He then set out the various treaties, beginning with that of New Granada of the 12th December, 1846; and concluded:

> "The Government of the United States can never permit these routes to be permanently interrupted, nor can it allow them to pass under the control of other rival nations. *While it seeks no exclusive privileges upon them for itself*, it can never consent to be made tributary in their use to any European power."

Secretary Fish, during the administration of President Grant, expressed in a Message the hope that there would be an early decision as to a canal route, based up its "dedication to the commerce of all nations," without advant to one over another of those who guaranteed its assured neutrality.

Secretary Blaine, communicating with Mr. Lowell, says:

> "Nor does the United States seek any exclusive or narrow commercial advantage. It frankly agrees and will by public proclamation declare at the proper time in conjunction with the Republic on whose soil the Canal may be located, *that the same rights and privileges, the same tolls and obligations of the use of the Canal shall apply with absolute impartiality to the merchant marine of every nation on the globe;* and equally in time of peace the harmless use of the Canal shall be freely granted to the war vessels of *other nations.*"

And on the 8th March, 1880, President Hayes, in a Message to the Senate, says:

> "The policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European power or to any combination of European powers. . . . An inter-oceanic canal across the American isthmus will essentially change the geographical relations between the Atlantic and Pacific coasts of the United States and between the United States and the rest of the world. It would be the great ocean thoroughfare between our Atlantic and our Pacific shores and virtually a part of the coast line of the United States."

Observe the first appearance of the coast-line idea.

President Cleveland, in a Message to the Senate on December 8th, 1885, said:

> "Whatever highway may be constructed across the barrier dividing the two greatest maritime areas of the world, *must be for the world's benefit; a trust for mankind.*"

And again:

> "The lapse of years has abundantly confirmed the wisdom and foresight of those earlier administrations which, long before the conditions of maritime intercourse were changed and enlarged by the progress of the age, proclaimed the vital need of inter-oceanic transit across the American isthmus and *consecrated it in advance to the common use of mankind* by their positive declarations and through the formal obligations of treaties. Toward such realization the efforts of my administration will be applied."

May we not hope that the great Democratic party under its new President will make good these words of President Cleveland?

Again, in 1896, Secretary Olney said:

> "that the inter-oceanic routes there specified should, under the sovereignty of the States traversed by them, be *neutral and free to all nations alike.*".

And, in speaking of the Clayton-Bulwer treaty, he said:

> "Upon every principle which governs the relations to each other, either of nations or of individuals, the United States is completely estopped from denying that the treaty is in full force and vigour."

Mr. Blaine, therefore, endeavored to free his country from the obligations of the Clayton-Bulwer treaty, but without success.

Senator Davis, in March of 1900, submitted, as an Executive document to the Senate, a report in which he used the following language:

"The leading powers of Europe recognized the importance of this subject in respect of the Suez Canal and ordained a public international act for its neutralization that is an honour to the civilization of the age.

"The European powers gave to this subject the greatest consideration and reached conclusions that are not open to criticism as being unjust to any nation in the world. Turkey and Egypt, the Imperial and the local Sovereigns of the Canal, and Great Britain, had special interest in the rules for regulating the use of the Canal, and they united in the convention which deprived them of exceptional privileges in its navigation for the sake of justice to all maritime nations and the peace and prosperity of the world. No nation disapproves of this great act. . . . No American will ever be found to complain of it. It is right in its moral features, in its impartiality. . . . The United States cannot take an attitude of opposition to the principles of the great Act of October 22nd, 1888 (Suez Canal Act), without discrediting the official declarations of our Government for fifty years on the neutrality of an isthmian canal and its equal use by all nations without discrimination. To set up the selfish motive of gain by establishing a monopoly of a highway that must derive its income from the patronage of all maritime countries, would be unworthy of the United States if we owned the country through which the Canal is to be built. . . . It is not reasonable to suppose that Nicaragua and Costa Rica would grant to the United States the exclusive control of a canal through those states on terms less generous to the other maritime nations than those prescribed by the great Act of October 22nd, 1888, or, if we could compel them to give us such advantages over other nations, it would not be creditable to our country to accept them."

As a fact, as I shall show you in a moment, the eventual treaty between the Republic of Panama and the United States reiterated the principle of non-discrimination.

Senator Davis continued:

"That our Government or our people will furnish the money to build the Canal presents the single question whether it is profitable to do so. If we are compelled by national necessities to build the Canal, we have no right to call on other nations to make up the loss to us."

Following upon this, Mr. McKinley, in his second Message to Congress, said:

"That the construction of such a maritime highway is now more than ever indispensable to that intimate and ready intercommunication between our eastern and western seaboards demanded by the annexation of the Hawaiian Islands and the prospective expansion of our influence and commerce in the Pacific, and that our national policy now more imperatively than ever call for its control by this Government, are propo-

sitions which I doubt not the Congress will duly appreciate and wisely act upon."

Accordingly, negotiations were at once opened with Lord Pauncefote, the British Ambassador, and the result of these negotiations was a treaty prepared in February, 1900, which, however, proved unacceptable to the Senate. But finally, in November, 1901, the Convention known as the Hay-Pauncefote treaty was concluded. It is upon the construction of this treaty that the present controversy has arisen. It is short, and, in view of its importance to this discussion, I shall trouble you for a moment with its exact terms, omitting some of the merely formal parts:

> His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King and Emperor of India, and the United States of America, being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal, under the auspices of the Government of the United States, without impairing "the general principle" of neutralization established in Article VIII. of that Convention, have for that purpose appointed as their Plenipotentiaries: etc.
>
> ARTICLE I.—The High Contracting Parties agree that the present Treaty shall supersede the afore-mentioned Convention of the 19th April, 1850.
>
> II.—It is agreed that the Canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the Canal.
>
> III.—The United States adopts, as the basis of the neutralization of such ship-canal, the following rules, substantially as embodied in the Convention of Constantinople, signed the 29th October, 1888, for the free navigation of the Suez Canal, that is to say:
>
> 1. The Canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.
> 2. The Canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed

within it. The United States, however, shall be at liberty to maintain such military police along the Canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the Canal except so far as may be strictly necessary; and the transit of such vessels through the Canal shall be effected with the least possible delay in accordance with the Regulations in force, and with only such intermission as may result from the necessities of the service.

   Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the Canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible despatch.

5. The provisions of this Article shall apply to waters adjacent to the Canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance, and operation of the Canal shall be deemed to be part thereof, for the purposes of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the Canal.

IV.—It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned Canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present Treaty."

Secretary Hay, in a memorandum to the Senate Committee on Foreign Relations, in reference to the treaty, characterized it as a contract between Great Britain and the United States, in which the former surrendered her rights of joint construction and control under the Clayton-Bulwer treaty, which he described as a material interest, in consideration of the rules and principles embodied in the treaty.

President Roosevelt said:

> "It specifically provides that the United States alone shall do the work of building and assume the responsibility of safeguarding the Canal, and shall regulate its neutral use by all nations on terms of equality without the guarantee or interference of any outside nation from any quarter."

And again, on January 4th, 1904, he said:

> "Under the Hay-Pauncefote treaty it was explicitly provided that the United States should control, police and protect the Canal which was to be built, *keeping it open for the vessels of all nations on equal terms.* The United States thus assumes the position of guarantor of the Canal and of its peaceful use by all the world."

And Secretary Hay, on January 15th, 1904, said:

> "The Clayton-Bulwer treaty was conceived to form an obstacle, and the British Government therefore agreed to abrogate it, the United States only promising in return to protect the Canal and *keep it open on equal terms to all nations in accordance with our traditional policy.*"

In 1903, as I have mentioned, the United States obtained the required territorial concessions from the Republic of Panama. The treaty by which they did so is also of importance in this discussion. But I shall not trouble you at this point by reading it, as I shall have occasion later to refer to the material parts of it.

Now, it is in this state of facts that the United States have passed the Panama Canal Act, providing that no tolls for the use of the Canal shall be charged upon their own coastwise shipping—that is, upon American vessels trading from one American port to another. I want now to discuss how far they are justified under the treaties in passing this Act.

I propose to keep separate, as far as I can, the various arguments in support of the American position and the answers which I conceive can be made to them. I do this for the sake of clearness, but, at the same time, I think that much of the cumulative force of the case of Great Britain is lost by this method of treatment, since, in many instances, the answers to one argument are applicable also to others.

Several of the arguments advanced on behalf of the United States may, I think, fairly be described as untenable, for reasons which I shall try to give you, but many of them can by no means be so described, and undoubtedly require serious consideration.

The first argument which they suggest is that in Rule 1 of Article 3 of the Hay-Pauncefote Treaty, which says, you will remember, that:

> "the Canal shall be free and open to the vessels of commerce and war of *all nations* observing these rules upon terms of entire equality, so that there shall be no discrimination against any such nation in respect of the conditions or charges of traffic or otherwise,"

the words "all nations" do not include the United States, and that that nation is, therefore, at liberty to discriminate in favour of

it's own shipping, so long as the shipping of all *other* nations is admitted upon terms equal as between them.

I think that this is one of the arguments which may be classed as untenable. There are very many answers to it.

In the first place, if the words "all nations" do not include the United States, then I do not know what the English language means.

It is to be noted also that an amendment was proposed to the first Hay-Pauncefote treaty expressly permitting the United States to discriminate in favour of their own shipping, but it was voted down in the Senate, and it can hardly now be contended that the substance of that rejected amendment is nevertheless still contained in the treaty.

But, apart from this, it is expressly stated in the Hay-Pauncefote treaty that it is not intended

> "to impair the general principle of neutralization established by Article 8"

of the Clayton-Bulwer treaty, and Article 8 of that treaty is therefore to that extent continued in force. That Article provides that the Canal,

> "which shall be open to the subjects and citizens of Great Britain and the United States on equal terms, shall also be open on like terms to the subjects and citizens of every other State which is willing to grant thereto such protection as Great Britain and the United States engage to afford."

It seems clear that, under this article, the United States was included, and was precluded from discriminating in favour of its own shipping.

Again, Article 2 of the Hay-Pauncefote treaty, after agreeing that the Canal may be constructed under the auspices of the Government of the United States, provides that

> "*subject to the provisions of the present treaty* the said Government shall have and enjoy all the rights incident to such construction."

This, to my mind, makes it perfectly plain that the United States were to be in no higher position by reason of their being themselves the builders and owners of the Canal than any other nation, but that any rights which they might have as such builders and owners should be *subject to the provisions of the treaty*, which would, of course, include the provision against discrimination.

But it is said that Article 1 of the Hay-Pauncefote treaty covers the vessels of war of all nations as well as their vessels of commerce, and it is impossible that the United States should charge tolls to their own vessels of war, because that would simply be taking the

money out of one pocket and putting it into another. Therefore, it is argued, it is clear that the words "all nations" do not include the United States when applied to vessels of war, and, as the two classes of vessels are put on precisely the same basis, those words cannot apply either to their vessels of commerce.

But I deny the premise on which this argument is founded. I can see no impossibility or absurdity in charging tolls to American ships of war. On the contrary, I think that the United States is bound to charge such tolls. It is not taking the money from one pocket and putting it into another, because, if the tolls are charged and paid, they become part of the revenue of the Canal, and serve to that extent to lighten the tolls which must be charged to other nations, whereas, if the tolls are not paid at all, the money never leaves the pocket of the United States, and other nations get no benefit from it.

But it is said again that, if this treaty includes the United States, they will be bound, in case of war, to allow free passage through the Canal to the warships of the nation with whom they were engaged, even though such passage were required for the purpose of bombarding New York or San Francisco. How, it is asked, can it be argued that the United States have bound themselves to anything so preposterous?

But those who advance this argument lose sight of the principle of international law that treaties are abrogated by the mere fact of war. *Inter arma silent leges*—in the midst of arms laws are silent; and this principle affords a complete answer to the argument with which I am dealing. That this is the true answer appears further from the language of Rule 6 of the treaty, which, when providing for the immunity of the Canal and its works from attack, expressly states that such immunity shall exist in time of war as in time of peace. It is the maxim which I have mentioned that made these words necessary, and their omission from Clause 1 makes it plain that the application of the maxim to that Clause is not to be excluded, but that its provisions would be abrogated by a war in which the United States were engaged, so far as the other belligerent nation was concerned.

Moreover, it is a noticeable fact that the words "in time of war as in time of peace," did actually appear in Clause 1 of the first Hay-Pauncefote treaty, which was not ratified. But they were omitted in the second treaty, which now governs, precisely because of the existence of the maxim which I have mentioned. This is given as the reason in a report of the Department of State of the Committee on Foreign Relations, entitled "History of Amendments Proposed to the Clayton-Bulwer Treaty," as follows:—

"THIRD.—The next important change from the former treaty consists in the omission of the words 'in time of war as in time of peace' from clause 1 of Article 3.

"No longer insisting upon the language of the Davis amendment—which had in terms reserved to the United States express permission to disregard the rules of neutrality prescribed, when necessary to secure its own defence, which the Senate had apparently deemed necessary because of the provision in Rule 1 that the Canal should be free and open 'in time of war as in time of peace,' to the vessels of all nations—it was considered that the omission of the words 'in time of war as in time of peace' would dispense with the necessity of the amendment referred to, and that war between the contracting parties, or between the United States and any other power, would have the ordinary effect of war upon treaties when not specially otherwise provided, and would remit both parties to their original and natural right of self-defence and give to the United States the clear right to close the Canal against the other belligerent, and to protect it and defend itself by whatever means might be necessary."

The next argument advanced appears to me to be equally devoid of foundation.

It is said that the United States are not bound by the Hay-Pauncefote treaty because they received no consideration for making it.

This argument is based upon the assertion that the Clayton-Bulwer treaty covered only a canal by the Nicaragua route, and contained nothing to prevent the United States from building the present Canal by the Panama Route. Therefore, it is contended, Great Britain in reality gave up nothing in agreeing that that treaty should be so far abrogated as to allow the United States to build this Canal.

It is true that the preamble of the Clayton-Bulwer treaty speaks of a ship canal by the Nicaragua route, and the first seven articles continue to speak of the "said canal," but, when you come to Article 8, you find this language:

"The Governments of Great Britain and the United States having not only desired in entering into this convention to accomplish a particular object but also to establish a general principle, they hereby agree to extend their protection by treaty stipulation to *any other practicable communications, whether by canal or railway, across the Isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama,*"

and then it provides that such canals or railways shall be open to all nations on equal terms.

So that, in truth, the Clayton-Bulwer treaty does specifically prevent the construction of this very canal by the United States.

Moreover, the preamble to the Hay-Pauncefote treaty says that the contracting parties are desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans *by whatever route may be considered expedient.*

Then it is said that the Clayton-Bulwer treaty had been broken by Great Britain, and had been treated by both powers as abrogated, so that it was really non-existent, and therefore that Great Britain gave no consideration by agreeing to its modification.

I should have thought that this was a point which should have occurred to the United States at the time when they entered into the Hay-Pauncefote treaty, and is hardly open to them now. But, in any case, both this and the previous argument are, it seems to me, completely foreclosed by the preamble of the Hay-Pauncefote treaty, to which I have already referred, which states that its object is

> "to remove any objection which may arise out of the convention of the 19th April, 1850, commonly called the Clayton-Bulwer treaty, to the construction of the Canal under the auspices of the Government of the United States."

That this was the situation, and that the Clayton-Bulwer treaty was still binding and constituted a barrier to the construction of the Panama Canal by the United States, is expressly recognized by the report of the Committee on Foreign Relations, when they adopted the Hay-Pauncefote treaty. This report was drawn by a great international lawyer, Senator C. K. Davis, of Minnesota. If there had been any substance in the arguments now advanced, surely they would have occurred either to him or to some member of the Committee. Yet his report says:

> "In the convention of February 5th, 1900, Great Britain agrees that the restriction as to the exclusive control of the Canal imposed by the Clayton-Bulwer treaty shall continue to bind her, while the United States is relieved from it."

And again:

> "This sweeping modification of Article 1 of the Clayton-Bulwer treaty as to all its restriction of the right of the United States under its auspices to construct the Canal and to have and enjoy all the rights, such as ownership, incident to its construction, as well as the exclusive right of providing for its management and regulation, leaves no ground, substantial or conjectural, on which Great Britain could hereafter contend for any of the restrictions contained in that Article (not expressly excepted), as remaining in force against the United States. She consents to remain under the prohibition of that article and consents that the United States shall be relieved from them

in her negotiations with Costa Rica or Nicaragua for such exclusive rights in or relating to the Canal as they may concede to the United States. . . If this convention is ratified, Great Britain could not negotiate with Costa Rica or Nicaragua or any other American state for any right to build, own, control, manage, regulate or protect a canal to connect the oceans, while the United States is left free to enter upon and conclude such negotiations. . . If we should abrogate the parts of the Clayton-Bulwer treaty which forbid the exclusive control of the Canal by either Government, thereby removing that restriction from Great Britain, we would deliberately open the door to her natural desire to obtain the right of the exclusive control of the canal under the treaty with Nicaragua, concluded in 1860. Great Britain has a claim to the exclusive control of the Canal that is very important to her in that the British possessions and the Dominion of Canada have coast and great seaports on both oceans. . . No other nation except the United States could have so great an interest in the exclusive right to own and control an isthmian canal; but in this matter, come what may, we are compelled to assert the superiority of our right now for the first time conceded by Great Britain. *It is wise and just, therefore, that the value of this concession to us should be established as a great consideration for anything we may yield if we indeed yield anything in acquiring the exclusive right to control the Canal by a modification of the Clayton-Bulwer treaty.*"

But, indeed, the real answer to the argument that the United States gained nothing and that Great Britain gave up nothing by the abrogation of the Clayton-Bulwer treaty is to read that treaty. It is full of troublesome conditions and restrictions.

And, apart from all this, I know of no rule of international law which requires consideration to make a treaty binding. Even in the domain of private contracts that doctrine is, I believe, peculiar to the law of England, and, in the case of a treaty between nations, I can see no reason why either could claim to be released from the obligation of the treaty, even if it were shown, as I think the United States cannot show in this case, that it received no consideration for any rights which it may have abandoned.

The next argument, which also I think untenable, is put in this way. At the time of the Hay-Pauncefote treaty, it was contemplated that the United States would be compelled, for the purpose of building the Canal, to obtain some territorial concession in the nature of an easement or right-of-way from the Central American state owning the land upon which the Canal was to be built. But, it is said, the situation in fact now is that the ten-mile zone, through which the Canal is constructed, is owned, lock, stock and barrel, by the United States, having been bought from the Republic of Panama for a large sum, and is as much the territory of the United

States, as, for instance, Alaska. That being so, it is said that the provisions of the Hay-Pauncefote treaty are no longer binding, since a state of affairs has arisen which that treaty never intended to cover, and it cannot have been the intention of the framers of that treaty to restrict the United States in dealing as she might please with her own territory.

The first answer to this argument is that it is based upon an incorrect premise. The United States does not own the canal zone. The language of the treaty by which she acquired her rights in that zone from the Republic of Panama is as follows:

> "ARTICLE 2.—The Republic of Panama grants to the United States in perpetuity *the use, occupation and control*"

of the canal zone,

> "*for the construction, maintenance, operation, sanitation and protection of the Canal.*"
>
> "ARTICLE 3.—The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article 2 of this agreement . . . which the United States will possess and exercise *as if it were the sovereign of the territory* within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

It will be observed that this is not an out and out grant. If it were, all the additional words, which I have read to you, would be quite unnecessary. The United States is not granted the sovereignty of the territory, but only *such rights as it would have if it were sovereign.* The distinction was pointed out by President Taft himself when he was Secretary of War. He said of the treaty:

> "It is peculiar in not conferring sovereignty directly upon the United States, but in giving to the United States the powers which it would have if it were sovereign."

Moreover, the grant is expressly made for the purposes of the construction of a canal, and the annual payment of $250,000 by the United States appears to me to emphasize this idea of the absence of absolute ownership. But, however this may be, the argument appears to me to be completely answered by Article 18 of the treaty with the Republic of Panama, which is as follows:

> "The Canal when constructed and the entrances thereto shall be neutral in perpetuity and shall be open upon the terms provided for by section 1 of Article 3 of, and in conformity with all the stipulations of the treaty entered into by the Governments of the United States and Great Britain on November 18th, 1901,"

that is, the Hay-Pauncefote treaty? So that, whatever is the precise nature of the rights acquired by the United States from the Republic of Panama, they take them expressly under a trust to observe

in respect thereto all the provisions of the Hay-Pauncefote treaty, and that this is so has been expressly admitted in the Senate by Senator Lodge, of Massachusetts, the chief supporter of the Panama Canal Act.

In the debate on the Act in the Senate, at p. 11093 of the Congressional Record, I find this:

> "MR. LODGE—It all goes back to the Hay-Pauncefote treaty. I was aware, of course, of the treaty with Panama. I do not think it adds anything to the force of the Hay-Pauncefote treaty.
>
> "MR. ROOT—I referred to it as showing that whatever the Hay-Pauncefote treaty binds us to we are still bound by. We cannot escape from the provisions of that treaty.
>
> "MR. LODGE—That is not to be disputed.
>
> "MR. ROOT—It has been disputed.
>
> "MR. LODGE—I certainly did not mean to dispute it. I was not aware that I had disputed it."

The point is further expressly covered by Article 4 of the Hay-Pauncefote treaty itself, which provides that

> "no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned Canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present treaty."

As to this last clause, I should perhaps mention that it is again argued that this does not include United [illegible]rt refers simply to the perennial changes of Government which [illegible]ke place in the Central American states.

Really this argument, and the argument that "all nations" do not include the United States, remind one irresistably of the conversation in "Alice through the Looking-Glass," between Alice and Humpty-Dumpty.

> "'When *I* use a word,' said Humpty Dumpty, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'
>
> "'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
>
> "'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'"

There is another argument which I think I need do no more than mention.

It is said that the life of a nation is more important even than its honour, and that no nation can be bound by a treaty which endangers its very existence; that the power to admit its own shipping to the canal free of tolls and to exclude the ships of war of other nations in time of war is vital to the very existence of the United States, and that, therefore, if the Hay-Pauncefote treaty

interferes in any way with this right, the United States is not bound by it, but it is a mere nullity.

I think I can leave that argument with you without comment.

Now I come to the arguments which, to my mind, require more serious consideration than any with which I have yet dealt.

It is said that, where the tolls are imposed by the nation owning the Canal, a remission of these tolls in the case of that nation's own ships is simply equivalent to the payment of a subsidy to those ships to the extent to which they use the Canal.

There is nothing in the Hay-Pauncefote treaty to prevent other nations from subsidizing their own ships to an amount based upon the tolls which they pay for the use of the Canal, and this is, in effect, simply a repayment to them of the tolls which they had paid. But, in the case of the nation owning and operating the Canal, to charge the tolls, and then to repay them in the shape of a subsidy, would be simply taking money out of one pocket and putting it into another. For this reason, the United States is at liberty to remit the tolls altogether in the case of its own ships, and to admit them through the Canal free of any tolls whatever.

But I answer that, in principle at any rate, a remission of tolls is by no means the same thing as a subsidy of an amount equivalent to the tolls, whatever it may be in practice, a question with which I shall deal in a moment.

And, therefore, the Act, as drawn, providing, as it does, that no tolls shall be charged upon American coastwise shipping using the Canal, is a plain violation of the terms of the Hay-Pauncefote treaty.

But I go further, and I say that, in practice as well as in principle, there is a wide difference between a remission of tolls and a subsidy. It is not true that for the United States to charge tolls on its own ships, and then to repay them by way of subsidy, is simply taking money out of one pocket and putting it into another. This is the fallacy which lies at the very root of the argument from subsidy to remission. If the tolls are charged and paid, they become, as I have already pointed out, part of the revenue of the Canal and applicable to its upkeep, and, therefore, lower to that extent the rates which it is necessary to charge in order to maintain the Canal, and to pay the interest on the money borrowed for its construction. If, on the other hand, the tolls are remitted altogether, that money never goes into the revenue of the Canal, and the rates which have to be charged upon other ships using it are proportionately higher. If the coastwise shipping of the United States were, owing to the Canal, to become a great industry, the practical difference between the two situations would be very marked.

But further, even though a subsidy equal to the amount of the tolls were equivalent, both in principle and in practice, to a complete remission of the tolls, there is, to my mind, a very noticeable difference for the purpose of the Hay-Pauncefote treaty between a *general* subsidy, of whatever amount, to the shipping of a country, and a *particular* subsidy to vessels using a particular route to the extent to which they use that route. It may well be that it is open to all nations, including the United States, to grant such general shipping subsidies as they may choose, and that they are not prevented from doing so by the fact that some of their ships use the Canal. But it seems to me very doubtful whether it is open to any nation to grant to its ships using the Panama Canal a subsidy equivalent to the amount of the tolls paid by those ships for such use. There is much to be said for the argument that that would be a violation of the first Rule in Article 3 of the treaty, that the Canal shall be free and open to the vessels of all nations *on terms of entire equality*, and that the United States could exclude from the Canal the ships of any nation granting such a subsidy, on the ground that the right of navigating the Canal is confined to nations observing the rules prescribed by the treaty. But it follows from what I have said before that, if other nations could not grant such a subsidy, neither could the United States. And, while it may seem that, theoretically, this would be a very purposeless position for the other nations interested to take up, there is a practical reason, which I shall mention later, why they might want to adopt it.

But where I do think the United States are right is in this, that, if it be open to other nations to pay such a particular subsidy as I have mentioned, there is nothing in the treaty to prevent the United States from doing so too. It is true that there were some Senators opposing the Act who did go so far as to argue that, while it was open to other nations to grant such a subsidy, it was not open to the United States, but I confess that I can see nothing in the treaty to justify any difference in treatment in this respect between the United States and other nations.

But, though this be so, it cannot be made an argument in favour of the Act, which I am now discussing, since, as I have said, that Act does not purport to grant a subsidy, either general or particular, but simply provides that no tolls shall be charged at all, and I have already pointed out the practical difference between the two.

That there is such a difference has already been conceded, indeed, strenuously contended, by the United States themselves.

When the Welland Canal was built by Canada, Great Britain promised that she would use her efforts to secure that that Canal

should be open to American as well as to Canadian commerce on terms of equality. The Canadian Government passed an Act providing for a rebate to Canadian vessels of a part of the tolls paid by them for the use of the Canal, but President Cleveland objected so strongly to this, as a violation of the promise of equality, that the Act was withdrawn by Order-in-Council. And that contention of the United States was put forward in respect of a mere promise by England to use her best efforts to secure certain terms, whereas we are here dealing with the definite words of a binding treaty. Moreover, Great Britain then spoke merely of securing "*equality*," while the words used in the Hay-Pauncefote treaty are "*entire equality*."

Perhaps it is not unfair to observe on this point that there is this further practical difference between a subsidy and a remission of tolls—namely, that no subsidy bill could possibly be passed through the Congress or Senate of the United States, while there has been no difficulty in passing the present Act, providing, as it does, for a remission of tolls.

Then the final argument in support of this Act is this,—The coastwise shipping of the United States is confined, by the very terms of the Act which we are discussing, to American vessels, and no foreign ships are permitted to engage in it. That being so, there can be no competition between the coastwise shipping of the United States and the shipping of any other country. The thing forbidden by the treaty is discrimination, but, where there is no competition, there can be no discrimination. Therefore, it is concluded, it is open to the United States to exempt its own coastwise shipping from the payment of tolls, so long as such exemption is confined to coastwise shipping.

An objection to this argument is what I have already pointed out as to any exemption, namely, that it diminishes the revenue of the Canal, and, therefore, raises the rates which must be charged. For this purpose it obviously makes no difference whether the exempted shipping competes with the other ships using the Canal or not.

But, apart from that, I ask you to observe that all the other arguments used in support of the Act are quite wide enough to cover the foreign shipping of the United States, as well as its coastwise shipping. Indeed, Senator Lodge stated over and over again that, in his opinion, there was absolutely no difference between the two.

In the report of the Senate Debate, at p. 9678 of the Congressional Record, I find this:

> "Mr. Chamberlain—Is the Senator addressing himself now to the treatment of our vessels engaged in foreign commerce,

or do his remarks apply, and are they intended to apply, to the coastwise trade?

"MR. LODGE—I mean all American vessels. For the purposes of this treaty, it does not make any difference what trade they are engaged in."

Then at p. 9681:

"MR. HITCHCOCK—I did not quite clearly understand the Senator. When he speaks of our vessels, does he refer only to the vessels engaged in the coastwise trade?

"MR. LODGE—I refer to all American vessels, no matter what they are engaged in. They are all alike.

"MR. HITCHCOCK—Does he refer to vessels engaged in the international trade in competition with others?

"MR. LODGE—All American bottoms. The American coastwise trade is well taken care of now.

"MR. HITCHCOCK—Does the Senator think that the United States has any greater right to grant free passage to vessels in our coastwise trade than it has to American vessels in international trade?

"MR. LODGE—Before the Senator came in I stated that I did not see any distinction that could be drawn."

And at p. 11094:

"As a matter of principle under that treaty, I do not see that the coastwise trade differentiates it from a vessel in the foreign trade."

Then Senator Chamberlain says, at p. 11297:

"I am not so sure but that under the terms of that treaty we not only have the power to grant discrimination or even free tolls to our coastwise traffic, but we have the right to treat American vessels engaged in foreign commerce on a different basis from foreign vessels engaged in foreign commerce, and, although it is probably not the time to do it now, the time will come when this Government will insist on its right to grant discriminatory tolls to American vessels engaged in foreign commerce."

And, further, I deny flatly, even as an abstract proposition, the statement that, where there is no competition there can be no discrimination. I say there is no necessary connection whatever between the two. Suppose that all the trade through the Canal to the West coast of South America were done by German ships, and all the trade to the West coast of North America by British ships. Could it be said that, because there is no competition between them, the British ships were not discriminated against if tolls were charged upon them, while the German ships were admitted free? It seems to me that there can be no question that, in principle at any rate—and I shall deal with the practical aspect in a moment—the present bill *does* discriminate in favour of American coastwise shipping, and that that proposition is sufficiently proved simply by

stating that it provides for the free admission of that shipping, while all other shipping is charged tolls.

But it is said that, even though that be so, and though theoretically the Act be a discrimination in favour of American coastwise shipping, yet, as that shipping does not compete with the shipping of other nations, practically they will not be hurt by any exemption. To that I should have thought it a sufficient answer to say that an agreement is an agreement, and that it does not lie in the mouth of one of the parties to say, "It is true that what I propose to do is a violation of our agreement, but it is a violation by which you will not be hurt." Whether other nations will be hurt or not, it is so nominated in the bond, and that is enough for the other party to the agreement.

But, whatever may be the position as to the *abstract* relation between discrimination and competition, to which the American argument is very largely confined, the abstract argument is really useless here, because the result of the Act is actual discrimination in fact. If the effect of the exemption is, as Americans hope it will be, to revive and strengthen their coastwise shipping, and to make it into a great and flourishing industry, it seems to me that this will result in a serious discrimination against the shipping of other nations, not only in the *charges* but in the *conditions* of the traffic through the Canal, by reason of its overcrowding with American vessels. And, for that purpose, it can make no possible difference where those vessels may be bound, or in what trade they may be engaged.

The problem of crowding frequently becomes serious in the Suez Canal, which is a water level canal, and it may well become even more so in a canal of this kind, where the transit will occupy from 12 to 24 hours, and vessels will have to pass through several locks.

And, further, there *is* actual competition between the coastwise trade of the United States and the trade of other nations to the same ports. It is true that only American vessels can carry goods from New York to San Francisco, but that is not to say that no other vessel carries goods to San Francisco at all, and the goods from New York to San Francisco do compete with goods from Liverpool, or Hamburg, or whatever it may be, to the same port. The customs duties are already a considerable handicap to these competing goods of foreign nations, and discrimination against them in the Canal would make their position hopeless.

In this aspect of the question we in Canada are particularly interested, because we are the only people not already seriously handicapped by the additional length of the voyage in competing with American ships for the trade to American ports. Surely it is

idle to say that, when the Canal is completed, there will be no competition between ships from New York to San Francisco and ships from Montreal to the same port! The result of discrimination against Canadian ships in the matter of tolls for the use of the Canal may be to make it cheaper to ship the goods by rail to New York, and thence in an American exempted vessel to San Francisco, than to ship them from Montreal to the same port in a Canadian vessel.

And it may even prove a serious handicap to Canadian vessels trading between Canadian ports. For, if the tolls are heavy, it would probably pay, instead of shipping in a Canadian vessel from Montreal to Vancouver direct, to ship by rail in bond to Boston or New York, thence by an American exempted vessel to Seattle, and then by rail again from there to Vancouver.

Indeed, both the present and the future competition between the American coastwise vessels and Canadian ships is expressly admitted by Senator Lodge himself.

I find that, at p. 11095 of the Congressional Record, Senator Reid asks:

> "We have agreed according to one construction not to discriminate against the commerce or shipping of Great Britain, but, if Great Britain has no rights in our coastwise trade, then how is it discriminated against when we permit that trade, in which it has no rights, which it cannot engage in at all, to go through the Canal without charge?"

And Mr. Lodge replies:

> "Assuming of course, as you must, that the interpretation is correct—that is, for the Senator's proposition—we will assume that the view is correct that we have the right to discriminate in tolls. I think giving it to the coastwise trade of America is discrimination in favour of the whole coastwise trade of America as against a portion of the trade of the British Dominion. I do not think the fact that it is given to an entire trade, an entire merchant marine or coastwise traffic, alters the discrimination."
>
> Mr. Reid—"Let me state it in the concrete. No vessel can engage in the coastwise trade of the United States except a vessel registered as an American vessel. When we let that vessel go through without paying any tolls, we do not discriminate between any British vessel engaged in the coastwise trade, for there can be no such vessel."
>
> Mr. Lodge—"No, but we discriminate against a vessel engaged in another trade."
>
> Mr. Reid—"We simply permit a vessel to go through when Great Britain cannot have such a vessel and cannot engage in such a trade. The Senator speaks of the Canadian trade; that is to say, a vessel could leave a port of Canada on the Atlantic coast, go through the Canal, and land its goods at a Pacific Canadian point; but our coastwise vessels could not do that.

They could not compete with Canada for that trade, and if they did carry that trade they would not be permitted, under the bill as it is now proposed, to go through the Canal at all unless they paid the tolls. The minute they go into competition with the Canadian trade and haul Canadian goods, they are not engaged in our coastwise trade, but they are engaged in a general shipping business. Is not that correct?"

MR. LODGE—"They may take Canadian goods at any of our ports where Canadian goods are put in bond and be in the coastwise trade. They can compete with Canadian vessels, of course."

MR. REED—"Do I understand the Senator to say that our vessels engaged in our coastwise trade would be permitted, under the Bill, as it is now proposed, to go to Canada and load?"

MR. LODGE—"No, they can take Canadian goods at American ports."

MR. REED—"Goods that had already been shipped into our country?"

MR. LODGE—"Coming in under bond. Just the same, the competition is there. There is no mistake about it. It is just as direct competition as could possibly be devised."

MR. REED—"It seems to me that when the goods get into an American port and are then taken by an American vessel engaged in the coastwise trade, it becomes American coastwise trade. We come back to the technical point again. You are not taking away from England any right, or making a discrimination against an English vessel, because you are not taking away from that vessel any right which it can enjoy under the law."

MR. LODGE—"The discrimination in competition seemed very clear to me and very direct. I think they feel it very much in Canada."

In short, the present Act would seem to come well within the language of President Cleveland when protesting, in reference to the Welland Canal, against the Canadian practice of rebating, in his Message to Congress in 1881:

"To promise equality and then in practice make it conditional upon our vessels doing Canadian business instead of their own, is to fulfil a promise with the shadow of performance."

When the facts are known to the thinking people of the United States, will they not almost universally echo the sentiment of Senator Burton?

"Mr. President, in the face of this can we honourably claim that there was a secret understanding or a secret purpose in our minds to claim a construction directly opposed to what we had declared in our vote should not be our policy? If so, we were neither honest with ourselves nor with the world."

In any event, treaty obligations and national honour both require that the construction of the treaty should be left to arbitration. To quote Senator Root:

"I say to you, if we refuse to arbitrate it, we shall be in the position of the merchant who is known to all the world to be false to his promises."