CAN WE MAKE A ST. LAWRENCE TREATY?

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THE constitution and practice of the United States in regard to treaties are, as is well known to students of constitutional law, radically different from the constitution and practice of most, if not all, of the other countries of the world. With other countries, if the matters provided for by the treaty are such as require to be expressed in legislation, the treaty itself is no more than a promise that such legislation shall be enacted. There is no effect, until the Government which signed the treaty has enacted the requisite legislation. In the case of the United States, the treaty itself is, under Article VI of the Constitution, equivalent to legislation. A treaty made "under the authority of the United States", is "the supreme law of the land"; and all courts in all States are bound thereby, just as they are by the Constitution and the laws enacted by the United States in pursuance thereof, "anything in the Constitution or laws of any State to the contrary notwithstanding".

This would appear to be a fairly complete assurance to those who enter into compacts with the United States that anything which that country contracts by treaty to do will automatically be done, or rather is automatically done by the mere fact of the treaty having been signed by the President and ratified by two-thirds of the Senate as the Constitution requires. Unfortunately, the matter does not appear to be quite so simple in practice. Article VI of the Constitution cannot be treated as standing alone, and must be read in conjunction with other portions of that document, notably the Tenth Amendment, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." There is no general pronouncement by the Supreme Court from which one can deduce any general principles as to the effect of these two clauses upon each other in any given case. Even the phrase "made under the authority of the United States" is capable of more than one interpretation, and may be explained as meaning "within the limits of the authority conferred upon the United States by the Constitution". Nations which have entered into treaties with the United States, and under these

treaties have accepted reciprocal obligations about whose validity there is no doubt whatever, would naturally prefer to interpret it as meaning "made in accordance with the procedure laid down in this Constitution". They would like to believe that any treaty signed by the President and ratified by the Senate, as directed in Section 2 of Article II, should be considered as being necessarily and in all cases valid and binding.

The Supreme Court has discussed this question, as recently as 1920, and in connection with a treaty to which Canada was a party. The State of Missouri appealed to prevent a game warden of the United States from enforcing in Missouri a treaty for the protection of migrating birds. It was alleged on behalf of the State that "what an Act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do". It is true that the State of Missouri lost its case; but two judges dissented from the majority opinion, and that opinion itself clearly rested much more on the question of the magnitude of the national interest involved than upon any deep-seated conviction that treaties ought to be upheld so far as possible.

Mr. Justice Holmes referred to the question of the meaning of the crucial phrase "made under the authority of the United States". It could not, he said, be taken as proved that that phrase required nothing more for the validity of a treaty than "the formal acts prescribed to make the convention". This point was still "open to question". This, however, was not the test that he proposed to apply for determining the validity of the treaty in question. "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way". He proceeded to suggest as a test the requirements of the national well-being; and speaking of this test he went on to say, in language that was doubtless full of inspiration for the people of Missouri and of the United States, but which held little comfort either for the migratory birds or for the people of Canada (neither of whom, naturally, were before the Court): "With regard to that, we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism; it has taken a century, and has cost their successors much sweat and blood, to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not mere-

ly in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved".

It is pleasant to know from this decision that the United States has become, among other things, a country in which a national covenant solemnly entered into with a neighboring country to prohibit the killing of migratory birds is entitled to respect. But that is all that we do know from this particular decision. And it is a little embarrassing to those who would like, and are even more or less compelled, to enter into treaty agreements with the United States, to have to pause before they do so in order to "consider what this country has become". It would be easier if there were some clear and unmistakable phrase in the Constitution, or in the interpretation of it by the Supreme Court, to which diplomats could direct their attention rather than to a question so very abstract and so very vague.

The Constitution of the Dominion of Canada possesses such a phrase. It is there set forth, in Section 132, that "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries". And this very complete grant of authority does not need to be interpreted in the light of any "reserved powers" possessed by the Provinces, for the Provinces have no powers except such as are expressly assigned to them by the Constitution, while in case of conflict the Federal authority is supreme.

This whole question is of the highest importance in relation to the proposed joint action of Canada and the United States for the improvement of the St. Lawrence Waterway. The territory of the State of New York extends to a boundary which runs along a clearly defined line between the two banks of the St. Lawrence river from Lake Ontario to Lake St. Francis. Both the proposed navigation channel and the proposed power works have been planned without reference to the present location of this line; that is to say, they take the utmost advantage of the natural features of the river bed, without considering in whose territory the channel runs or the turbines are installed at any particular stage. In the case of the channel, this gives rise to no difficulty; for the State of New York appears to have no authority which would be effective

against the Federal control over navigation. In the case of the power developments, the situation is much more difficult, so much so indeed that the Joint Board of Engineers has gone so far as to recommend a diversion of the boundary line, throwing a piece of New York State territory into Canada, for the purpose of ensuring that the actual power development, that is to say, the turbines and their housing, shall be equally divided between the two countries, and neither of them shall develop more than its proper half of the total power. This transfer cannot, of course, be effected without the consent of New York State, for the Federal Government has no authority to cede State territory. But even if it is effected, it is far from solving all the difficulties. It is necessary, for the successful operation of both power and navigation systems, that the whole work should be designed and managed as a unit, with a single authority (obviously international) in control of all matters relating to regulation of flow, deepening of river bed, treatment of ice obstacles, and a score of similar matters. The United States possesses authority in these matters so far as they concern the regulation of navigation, and to that extent it can bind itself to participate in and conform to this international regulation. The State of New York possesses authority in them so far as they concern the regulation of power production (unless that authority can be taken from it by the exercise of the treaty power), and the State of New York cannot bind itself to anything of the kind, being expressly debarred by the Constitution from entering into any sort of agreement with a foreign nation. From the Canadian point of view, therefore, it is imperative that, before the work is entered upon as a joint enterprise, the Federal Government of the United States must by some means possess itself of an unquestionable authority to do everything which the Federal Government of Canada can unquestionably do in the same circumstances.

It appears strange that up to the present time nobody has suggested what is surely the simplest and perhaps the only device by which this end can be obtained. That device is the purchase from the State of New York, by voluntary agreement, under Section 8 of Article I of the Constitution, of all that part of the bed of the river and of the adjoining land which may be necessary for the effective control of the waterway and its accessory power production. Under that clause the United States Congress has the right "to exercise exclusive legislation" over the seat of government of the United States, "and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-

yards, and other needful buildings". Even under this clause it is conceivable that a Supreme Court with very strong pro-State inclinations might deny the Federal authority over the bed of the river, on the pretext that it was not a "place purchased for the erection of needful buildings". But the bias of the Court would have to be very strong to induce it to disregard so completely the economic facts of modern hydro-electric engineering, and to undertake to separate the building housing the turbines from the dams and channel control works which supply the turbines with water. Under any reasonable interpretation, such a purchase would remove the power sites and all their appurtenances from State jurisdiction. It would, presumably, even before the interpretation could be obtained, allay most of the apprehensions that are now felt by many Canadians as to the effectiveness of United States treaty obligations in such matters.

The State of New York can certainly not be relied upon to pursue a self-denying policy in regard to any rights which it may conceive itself to possess, and which may eventually be awarded to it by the Supreme Court, in the power development of the St. Lawrence river. Mr. Henry W. Hill, President of the New York State Waterways Association, speaking at last year's Convention of the Association, said: "New York's water property rights in the St. Lawrence river are as sacred to it as are the natural resources of the New England States to them. Do you suppose Pennsylvania, Ohio and West Virginia would permit their coal mines, or Michigan would permit its iron ore or copper deposits, to be taken by the United States upon the plea that they were needed for navigation?" At the previous convention of the same Association, an officer of the State Attorney-General's Department went so far as to declare that in his belief the property rights of New York State had already been invaded by some of the powers exercised by the International Joint Commission under the Boundary Waters Treaty of 1909, and that if the State chose to take the matter to the Supreme Court, parts of that treaty would be found invalid. It is pretty safe to assume that the State of New York will at some time or other contest the exercise in New York territorial waters of some at least of the necessary powers of any international body which may be set up by any new treaty for the joint control of navigation and power in the international St. Lawrence. Senator Walsh of Montana, in a recent speech intended to reassure Canadians on this very subject, did rather the reverse when he reminded us that the constitutionality of the Boundary Waters Treaty has actually been challenged in the Supreme Court of the United States by this very

State, which desisted from the case, not because it abandoned its legal contention, but because it reached the conclusion that no present aggression was threatened. There is nothing to prevent the State from reviving its contention at any time, and no reason to suppose that it will refrain from reviving it whenever it considers that it would be to its interest to do so. The contention may not succeed. On the other hand, it may not fail. By the time Canada knows whether it is destined to succeed or fail (assuming that we go into the treaty without eliminating the State of New York in the manner above suggested), the Dominion will have accepted, and irrevocably accepted, all her obligations under the treaty, the dams will have been built, the canals will have been dug, the United States will presumably have been granted new and more or less permanent rights to the navigation of canals in the purely Canadian part of the river, and to the question, "What will Canada do about it?" there will apparently be no answer.